

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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CASES
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CEDAR GREENE, LLC, ET AL AND O'LEARY GROUP WASTE SYSTEMS, LLC,
PLAINTIFFS V. CITY OF CHARLOTTE, DEFENDANT

No. COA12-212
(Filed 7 August 2012)

**1. Jurisdiction—standing—anti-discrimination principle—
public enterprise services—reimbursement policy**

The trial court erred by failing to grant defendant City's motion to dismiss the claim with respect to plaintiff O'Leary for lack of standing. The anti-discrimination principle embodied in N.C.G.S. § 160A-314 protects only customers of public enterprise services, not service providers. However, the trial court did not err in failing to grant the City's motion to dismiss the statutory discrimination claim with respect to plaintiff Cedar Greene. Cedar Greene demonstrated the requisite standing based on its showing of a threatened financial injury by the City's alleged discriminatory reimbursement policy.

**2. Cities and Towns—statutory discrimination claim—solid
waste disposal services—multi-family complexes**

The trial court erred by granting summary judgment in favor of plaintiffs on their statutory discrimination claim. The City's reimbursement policy did not treat Cedar Greene differently from other multi-family complexes in the provision of solid waste disposal services.

Judge CALABRIA dissenting.

CEDAR GREENE, LLC v. CITY OF CHARLOTTE

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

Appeal by defendant from judgment entered 14 December 2011 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2012.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot, A. Ward McKeithen, and Matthew F. Tilley, for plaintiff appellees.

Office of the City Attorney, by Senior Assistant City Attorney S. Mujeeb Shah-Khan and Assistant City Attorney Thomas E. Powers, III, for defendant appellant.

K&L Gates LLP, by Roy H. Michaux, Jr., for Greater Charlotte Apartment Association amicus curiae.

McCULLOUGH, Judge.

Defendant City of Charlotte (“the City”) appeals from the trial court’s summary and declaratory judgment finding and concluding that the City’s reimbursement policy for the disposal of supplemental solid waste collected from multi-family complexes constitutes unlawful, unreasonable, and arbitrary discrimination in the provision of a public enterprise service in violation of N.C. Gen. Stat. § 160A-314 (2011). On appeal, the City argues the trial court erred in (1) denying its motion to dismiss with respect to both plaintiffs under Rule 12(b)(1) of our Rules of Civil Procedure; (2) granting plaintiffs’ motion for summary judgment and denying its motion for summary judgment after finding the City’s reimbursement policy is discriminatory in violation of N.C. Gen. Stat. § 160A-314; and (3) imposing a specific injunctive remedy against the City to correct the discriminatory practice. After careful review, we reverse and remand for further proceedings.

I. Background

By local ordinance, and pursuant to statutory authority to engage in “public enterprises” under Chapter 160A of our General Statutes, the City furnishes solid waste services to multi-family complexes, including apartment complexes, condominiums, and trailer parks, that maintain dumpsters or compactors for the storage and collection of solid waste within its corporate limits. The City provides to each multi-family complex a fixed number of solid waste collections per week in accordance with a formula based on the ratio of residential units to dumpsters at the complex. This primary collection is provided by the City through a private contractor, Republic Services, Inc. (“Republic”). If a multi-family complex desires to receive any additional weekday collections, the complex must privately contract for such supplemental collection service.

CEDAR GREENE, LLC v. CITY OF CHARLOTTE

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In addition to its primary collection service, the City provides for the disposal of solid waste collected from multi-family complexes through the reimbursement of disposal fees charged by the City's designated landfill for the disposal of residential solid waste. Pursuant to the City's ordinances, the City levies on each separate multi-family complex an annual disposal fee for the disposal of all solid waste collected from the complex. This annual disposal fee, in the amount of \$27 per residential unit, corresponds to the fees charged by the City's designated landfill to dispose of the total amount of solid waste that a unit within a multi-family complex produces during one year. Accordingly, the annual disposal fee is calculated to account for the cost of the disposal of all solid waste collected from each multi-family complex through both the primary collection and any supplemental collections.

Pursuant to its contractual agreement with Republic, the City provides reimbursement to Republic for all disposal fees paid on account of both the primary collection and any supplemental collections for which Republic is hired. However, the City does not provide any reimbursement of disposal fees to supplemental collection service providers other than Republic. Republic was awarded the contract with the City after submitting a bid for the services, as did five other companies. In order to obtain the lowest possible rate for its primary collection service, the City included its reimbursement policy for disposal fees as a provision in the guidelines for consideration by the companies choosing to submit a bid for the services.

Plaintiff Cedar Greene, LLC ("Cedar Greene") owns and operates a residential apartment complex comprised of 224 units, known as Cedar Greene Apartments, within the corporate limits of the City. Accordingly, Cedar Greene Apartments is entitled to receive such solid waste services from the City. Based on the City's formula, Cedar Greene Apartments receives primary collection once per week by the City through Republic.

Cedar Greene sought to engage plaintiff O'Leary Group Waste Systems, LLC ("O'Leary," collectively with Cedar Greene, "plaintiffs") to provide supplemental collection services at a rate lower than that charged by Republic, on condition that the City provide reimbursement of the supplemental collection disposal fees. Specifically, O'Leary offered to provide supplemental collection service at a rate of \$12.50 per pickup from dumpsters and \$125.00 for pickup from compactors, versus Republic's rates of \$16.95 per pickup from dumpsters and \$168.98 per pickup from compactors.

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O'Leary represented to the City that it was prepared and willing to meet all uniformly applicable requirements the City may impose on providers of supplemental collection, including those requirements imposed on Republic under the City's contractual agreement, in order to receive reimbursement from the City of the supplemental collection disposal fees. Such requirements include (1) using designated vehicles for supplemental collection of solid waste from multi-family complexes, (2) not commingling solid waste from multi-family complexes with waste from other sources, (3) disposal of such solid waste at the designated landfill, (4) submitting to monetary penalties if it disposes of waste not from multi-family complexes, and (5) allowing the City to monitor collection to ensure compliance with these requirements. Nonetheless, the City informed O'Leary that it would continue to reimburse disposal fees for supplemental waste collected from multi-family complexes only to Republic and that it would not reimburse such disposal fees to O'Leary or any other supplemental collection provider. O'Leary did not previously submit a bid for the City's waste disposal business.

On 23 May 2011, plaintiffs commenced the present action by filing a verified complaint for declaratory judgment in Mecklenburg County Superior Court, alleging that the City's program of reimbursing supplemental collection disposal fees, for which Cedar Greene had already paid the City by way of the annual disposal fee levied on all multi-family complexes, to only those multi-family complexes who hire Republic for supplemental collection services, violated N.C. Gen. Stat. § 160A-314 and the equal protection clauses of the North Carolina and United States Constitutions. After the City removed the case to federal court based on the federal constitutional claim, plaintiffs filed an amended complaint on 27 June 2011 removing the federal claim, and the case was then remanded pursuant to the parties' joint motion to remand. On 26 July 2011, the City filed its answer to plaintiffs' amended complaint and a motion to dismiss plaintiffs' action pursuant to Rules 12(b)(1) and 12(b)(6) of North Carolina's Rules of Civil Procedure, alleging that neither plaintiff had standing to bring the claims set forth in their amended complaint.

On 22 September 2011, plaintiffs filed a motion for summary judgment, and on 4 November 2011, the City also filed a motion for summary judgment. The trial court conducted a hearing on the parties' respective motions on 15 November 2011, and on 14 December 2011, the trial court entered a summary and declaratory judgment denying the City's motion to dismiss and motion for summary judgment and

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granting plaintiffs' motion for summary judgment. The trial court's order concluded the City's policy of supplemental collection disposal fee reimbursement was in violation of N.C. Gen. Stat. § 160A-314. In light of that conclusion, the trial court made no ruling on plaintiffs' constitutional equal protection argument. The trial court ordered the City to

commence within 30 days of entry of this judgment the provision of disposal services for supplemental waste through the reimbursement of Disposal Fees for the benefit of all Multi-Family Complexes equally, without regard to the provider the Multi-Family Complex may choose to hire to provide Supplemental Collection, so long as that collection provider agrees to and complies with those uniformly-applicable requirements the City may prescribe for such service.

On 22 December 2011, the City filed a motion for reconsideration, or in the alternative, to amend or alter the judgment, or in the alternative, for relief from the judgment, pursuant to Rules 59(e), 60(b), and 62(b) of our Rules of Civil Procedure. The City also filed a contemporaneous motion for stay of execution of the judgment. By order dated 3 January 2012, the trial court modified the judgment only to extend the time within which the City must comply with the judgment, giving the City a new compliance deadline of 2 February 2012. On 5 January 2012, the City entered timely written notice of appeal to this Court from the trial court's 14 December 2011 judgment. The City also filed a contemporaneous motion for stay with the trial court, seeking a stay of the 14 December 2011 judgment pending appeal. On 18 January 2012, the trial court denied the City's motion for stay.

On 25 January 2012, the City filed a petition for writ of supersedeas and motion for temporary stay with this Court. On 26 January 2012, this Court granted the City's motion for temporary stay, and on 9 February 2012, this Court allowed the City's petition for writ of supersedeas. We now reach the merits of the City's appeal from the trial court's 14 December 2011 summary and declaratory judgment.

II. Discussion

A. Public Enterprise Statutes

Article 16 of Chapter 160A of our General Statutes authorizes all cities in North Carolina to "operate" or "contract for the operation of" those endeavors defined as "public enterprises." N.C. Gen. Stat. § 160A-312(a) (2011); *see City of Asheville v. State*, 192 N.C. App. 1,

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27, 665 S.E.2d 103, 123 (2008). Public enterprises are defined to include “[s]olid waste collection and disposal systems and facilities.” N.C. Gen. Stat. § 160A-311(6) (2011). The City admits that its policy of reimbursing Republic’s disposal costs associated with supplemental collection of solid waste from multi-family complexes is a component of the City’s chosen method for solid waste disposal under the public enterprise statutes.

Pursuant to N.C. Gen. Stat. § 160A-314(a), cities are empowered to “establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise.” N.C. Gen. Stat. § 160A-314(a) (2011). When a municipality sets rates or fees for public enterprise services, those rates or fees “may vary according to classes of service[.]” *Id.* “This rate-making function is a proprietary rather than a governmental one, limited only by statute or contractual agreement.” *Town of Spring Hope v. Bissette*, 305 N.C. 248, 250-51, 287 S.E.2d 851, 853 (1982). “[U]nder this broad, unfettered grant of authority, the setting of such rates and charges is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts *absent some showing of arbitrary or discriminatory action.*” *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 816, 517 S.E.2d 874, 881 (1999) (emphasis added) (quoting *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212-13, 280 S.E.2d 490, 492 (1981), *aff’d*, 305 N.C. 248, 287 S.E.2d 851 (1982)); *see also City of Asheville*, 192 N.C. App. at 27, 665 S.E.2d at 123.

Our case law has established that a city “may not discriminate in the distribution of services or the setting of rates.” *City of Wilson v. Carolina Builders*, 94 N.C. App. 117, 120, 379 S.E.2d 712, 714 (1989). “[T]he statutory authority of a city to fix and enforce rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services.” *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 149, 237 S.E.2d 484, 486 (1977); *see also Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E.2d 739, 745 (1979). “There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service.” *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 462, 78 S.E.2d 290, 298 (1953). Ultimately, a municipality engages in unreasonable discrimination by charging different rates for public enterprise services to similarly situated customers. *Cabarrus County v. City of Charlotte*, 71 N.C. App. 192,

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195, 321 S.E.2d 476, 479 (1984). “The burden of proof is on the party claiming that a rate-setting ordinance is unreasonable or discriminatory.” *Ricks v. Town of Selma*, 99 N.C. App. 82, 87, 392 S.E.2d 437, 440 (1990).

B. Standing to Maintain Discrimination Claim under Statute

[1] We first address the City’s argument that plaintiffs lacked the requisite standing to maintain a claim of discrimination under N.C. Gen. Stat. § 160A-314, and therefore, the trial court lacked subject matter jurisdiction to enter its summary and declaratory judgment in favor of plaintiffs. “‘Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.’” *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005).

Standing consists of three main elements:

“(1) ‘injury in fact’—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

Id. (quoting *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992))). “The issue of standing generally turns on whether a party has suffered injury in fact.” *Id.* Our Supreme Court has clarified that “[i]t is not necessary that a party demonstrate that injury has already occurred, but a showing of ‘immediate or threatened injury’ will suffice for purposes of standing.” *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)).

“ ‘ ‘Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position.’ ” *Town of Midland v. Morris*, ____ N.C. App. ____, ____, 704 S.E.2d 329, 341 (2011) (quoting *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (quoting *State v. Labor and Indus. Review Comm’n*,

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136 Wis.2d 281, 287 n.2, 401 N.W.2d 585, 588 n.2 (1987))), *disc. review denied*, 365 N.C. 198, 710 S.E.2d 3 (2011). Accordingly, in order to have standing to initiate a lawsuit, a party must, by substantive law, have “the legal right to enforce the claim in question.” *Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, ___ N.C. App. ___, ___, 705 S.E.2d 757, 765 (2011) (quoting *Carolina First Nat’l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249, 314 S.E.2d 801, 803 (1984)), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). “In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party.” *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283.

In the present case, the City contends O’Leary lacks standing to maintain a discrimination claim under N.C. Gen. Stat. § 160A-314 because O’Leary is not a customer of public enterprise services. The City maintains that the anti-discrimination principle embodied in N.C. Gen. Stat. § 160A-314 as enunciated under our case law protects only customers of public enterprise services, not service providers, and therefore, O’Leary lacks standing to maintain a discrimination claim under the substantive law of this statute. We agree.

As explained above, under this statute and our case law interpreting that statute, a city has broad discretion in setting rates and charges for the provision of public enterprise services, with the single limitation being that the city cannot act in an arbitrary or discriminatory manner in setting such rates and charges or in providing such services. *Smith Chapel*, 350 N.C. at 816, 517 S.E.2d at 881; *City of Wilson*, 94 N.C. App. at 120, 379 S.E.2d at 714. As the City points out, the statute at issue, N.C. Gen. Stat. § 160A-314, and the line of cases establishing that statute’s non-discrimination principle focus entirely on the discriminatory effect of a city’s rate structure on the customer or consumer. *See Mead Corp.*, 238 N.C. at 462, 78 S.E.2d at 298 (“There must be no unreasonable discrimination between *those receiving* the same kind and degree of service.” (emphasis added)); *Modern Cleaners*, 34 N.C. App. at 149, 237 S.E.2d at 486 (“[T]he statute must be read as a codification of the general rule that a city has the right to classify *consumers* under *reasonable* classifications based upon such factors as the cost of service . . . or any other matter which presents a substantial difference as a ground of distinction.” (first emphasis added) (internal quotation marks and citation omitted)); *Wall*, 41 N.C. App. at 659, 255 S.E.2d at 745 (“Numerous cases have recognized the rule that the statutory authority of a city to

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fix and enforce rates for public services furnished by it and to classify its customers is not a license to discriminate *among customers* of essentially the same character and services.” (emphasis added)). Given this authority, we must construe the statute and the cases interpreting that statute as conferring a claim for discrimination only on those consumers or customers who are adversely affected by a city’s differing rate structure or disparate provision of services.

As the City points out, the crux of plaintiffs’ arguments in the present case center on the alleged “dual rate structure” that plaintiffs contend is effected by the City’s policy of reimbursing disposal fees associated with supplemental collection to Republic only. Plaintiffs’ argument under the statute ultimately contends the City is treating similarly situated multi-family complexes differently by paying for the supplemental collection disposal fees for those complexes who hire Republic and not those who hire another supplemental collection provider, as those complexes who choose to hire a supplemental collection provider other than Republic are, in effect, forced to pay for disposal fees twice, having already paid the City the annual fee for all disposal and then having to pay again for disposal fees the City refuses to reimburse to the supplemental collection provider.

However, as the City correctly contends, these arguments do not pertain to O’Leary. O’Leary is not assessed an annual disposal fee by the City, and O’Leary is not a customer or consumer for whom the City provides solid waste services. Thus, O’Leary cannot be injured by the City’s alleged discriminatory dual rate structure under the provisions of N.C. Gen. Stat. § 160A-314. Although O’Leary contends that it is injured by the City’s reimbursement policy because the City’s policy prevents it from effectively competing in the market for supplemental collection services, such is not the requisite legal position for standing under N.C. Gen. Stat. § 160A-314. Accordingly, we fail to see how O’Leary can demonstrate it has standing to maintain a discrimination claim under N.C. Gen. Stat. § 160A-314, and the trial court erred in failing to grant the City’s motion to dismiss that claim with respect to O’Leary for lack of standing.

The City also contends that Cedar Greene lacks standing to maintain a discrimination claim under N.C. Gen. Stat. § 160A-314 because Cedar Greene cannot demonstrate an injury in fact. The City maintains that because Cedar Greene currently benefits from the City’s reimbursement policy by hiring Republic for supplemental collection services, Cedar Greene cannot show it has suffered an injury in fact. The City’s arguments, however, are misguided.

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The City recognizes that Cedar Greene is a customer under the public enterprise statute at issue in this case. In viewing the record in the light most favorable to Cedar Greene, we must conclude Cedar Greene has demonstrated an immediate or threatened injury by the City's actions. Considering the allegations in Cedar Greene's complaint as true, as a result of the City's policy of reimbursing only Republic for disposal of supplemental solid waste collected from multi-family complexes, Cedar Greene is faced with the choice of either losing the benefit of a portion of the disposal fee it pays to the City each year for the disposal of all solid waste collected from Cedar Greene Apartments and, in effect, paying twice for such disposal if it hires O'Leary for supplemental collection, or accepting the rates for supplemental collection service charged by Republic, which are higher than those of O'Leary, thereby preventing Cedar Greene from obtaining monetary savings in the collection and disposal of its supplemental solid waste. The fact that Cedar Greene has not already suffered either alleged monetary loss is inapposite for standing purposes, since "a showing of immediate or threatened injury will suffice for purposes of standing." *Mangum*, 362 N.C. at 643, 669 S.E.2d at 282 (internal quotation marks and citation omitted). Accordingly, because Cedar Greene has shown a threatened injury by the City's alleged discriminatory policy in the provision of disposal of supplemental solid waste collected from Cedar Greene Apartments, Cedar Greene has demonstrated the requisite standing to maintain the present discrimination action under N.C. Gen. Stat. § 160A-314.

C. Discriminatory Provision of Services

[2] We next consider the City's argument that Cedar Greene cannot meet its burden of showing a violation by the City of N.C. Gen. Stat. § 160A-314, and therefore, the trial court erred both in granting summary judgment in favor of plaintiffs and in denying summary judgment in favor of the City. On appeal from an order granting or denying summary judgment, our standard of review is *de novo*. *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007).

The standard for granting summary judgment is well established. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

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Crocker v. Roethling, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) [2011]). Where, as here, the parties have filed cross motions for summary judgment, and there is no dispute as to any material fact, “[w]e need only determine whether summary judgment was properly entered in plaintiffs’ favor, or conversely should have been entered in favor of defendant.’” *McDowell v. Randolph Cty.*, 186 N.C. App. 17, 20, 649 S.E.2d 920, 923 (2007) (alteration in original) (quoting *Geitner v. Mullins*, 182 N.C. App. 585, 589, 643 S.E.2d 435, 438 (2007)).

As noted previously, Cedar Greene presents the argument that the effect of the City’s reimbursement policy is to create a dual rate structure which results in higher disposal costs for certain customers who choose not to hire Republic, the City’s preferred contractor. Plaintiffs liken the facts of this case to a line of prior cases before this Court finding a city’s rate structure to be discriminatory under the statute.

The first of these cases is *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 237 S.E.2d 484 (1977). In *Modern Cleaners*, the Town of Taylorsville had established a different rate scale for customers of both sewer and water services and customers of sewer-only service. *Id.* at 147, 237 S.E.2d at 485. Under the rate scale at issue in *Modern Cleaners*, charges for sewer service were approximately fifteen percent higher for customers of sewer-only service than for customers of both sewer and water services. *Id.* The defendant in that case, a dry cleaning, laundry, and washerette business, was the only customer of the town’s sewer-only service. *Id.* Upon review of such a rate scale, this Court noted the evidence in that case revealed there existed no difference in the type of service provided nor in the cost of providing sewer services to customers of sewer-only service versus both sewer and water services. *Id.* at 149, 237 S.E.2d at 486. Thus, we held the town’s policy of charging a different rate for the same service to different customers was discriminatory in violation of its statutory rate-setting authority. *Id.*

Similarly, in *Wall v. City of Durham*, 41 N.C. App. 649, 255 S.E.2d 739 (1979), this Court reviewed the City of Durham’s “decapping” policy, a procedure utilized by the city to calculate water usage rates for certain apartment complexes. Under the decapping policy at issue in *Wall*, “the water usage shown by the meter [was] divided by the number of apartments served through the meter; then the water and sewer charge for the quantity resulting from this division [was] calculated; and, finally, this amount [was] multiplied by the number of

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apartments served through the meter.” *Id.* at 652, 255 S.E.2d at 741. This Court noted the decapping policy resulted in higher charges for water services to customers living in apartment complexes subject to the policy versus other customers not subject to such a policy who consumed an identical quantity of the same service. *Id.* at 659, 255 S.E.2d at 745. Accordingly, we ruled such a policy was discriminatory in violation of the statute. *Id.* at 659-60, 255 S.E.2d at 745.

Likewise, in *Cabarrus County v. City of Charlotte*, 71 N.C. App. 192, 321 S.E.2d 476 (1984), the City of Charlotte operated a sanitary landfill located in Cabarrus County and charged a set fee schedule for all users of the landfill. *Id.* at 192-93, 321 S.E.2d at 477-78. In response to the city’s fee schedule, Cabarrus County enacted an ordinance providing that residents of Cabarrus County would not be required to pay a fee for disposal of solid waste in the county’s landfills. *Id.* at 193, 321 S.E.2d at 478. Upon review of the county’s ordinance, this Court held that the county’s ordinance creating differing fee schedules for disposal of solid waste based on residence was arbitrary and discriminatory where the same kind of service was being provided to all customers. *Id.* at 194-95, 321 S.E.2d at 479.

Finally, in *Ricks v. Town of Selma*, 99 N.C. App. 82, 392 S.E.2d 437 (1990), the Town of Selma established a disparate water and sewer service rate structure for multiple-unit establishments. Under the Town of Selma’s rate structure, a customer who used both water and sewer service paid one flat fee for each service and a usage rate for each service. *Id.* at 87, 392 S.E.2d at 440. However, a customer who used only one of the services paid one flat fee for the service received, a usage rate for the service received, and for the service available but not received, one flat fee for each unit in the establishment. *Id.* at 86-87, 392 S.E.2d at 440. This Court held that the Town of Selma could properly charge an availability fee for services made available by the town but not used, but such availability fee could not be arbitrary and could not coerce customers to use the town’s service. *Id.* In *Ricks*, the town’s rate structure resulted in a differing fee for those customers using both services, who paid a single flat fee, versus those customers using only one service, who were required to pay the same fee but on a per unit basis rather than once. Thus, we held such a rate structure was discriminatory in violation of the statute. *Id.* at 87-88, 392 S.E.2d at 440-41. Here, however, unlike *Ricks*, we fail to see how the fact that the City provides reimbursement to Republic for disposal costs associated with supplemental collection coerces any multi-family complex, including Cedar Greene,

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into contracting for supplemental collection service in the first instance.

In addition, unlike *Modern Cleaners*, *Wall*, *Cabarrus County*, and *Ricks*, the City has not established a differing rate structure for customers of solid waste services. Rather, as the City argues, it currently charges the same disposal fee, \$27 per unit per year, to all multi-family complexes, regardless of their need for supplemental collection. In accordance with that fee, all complexes have equal opportunity to receive the same service provided by the City. The resulting difference in costs for supplemental collection and disposal, about which Cedar Greene presently complains, results solely from the decisions by the complex to hire or not a service provider for supplemental collection and if so, which service provider to hire.

Although the City's reimbursement policy with its preferred contractor may play a factor in a complex's decision-making process regarding which supplemental collection provider to hire, the decision whether to contract for supplemental collection services at all and with whom still remains with the complex, and any resulting differences are a product of the complex's decision. If a complex chooses to hire O'Leary or some other supplemental collection service provider rather than Republic, the City's policy of charging an annual disposal fee and reimbursing its preferred contractor pursuant to its contractual obligation does not become a discriminatory "dual rate structure." Under the City's current policy, all complexes who make the same decision, whether to hire Republic or to hire O'Leary or some other supplemental collection service provider, pay the same rate. In *Modern Cleaners*, *Wall*, *Cabarrus County*, and *Ricks*, this Court found the respective municipalities' rate structures to be discriminatory because the direct actions of the municipality caused similarly situated customers to pay differing rates. In those cases, no action or decision by the customer caused the resulting rate or service disparities with respect to the specific service being provided by the City. Such is not the case here, where the City's policy makes no differentiation among similarly situated multi-family complexes in the provision of collection and disposal of solid waste.

Notably, the reimbursement policy at issue deals directly with the supplemental collection service provider, not the individual multi-family complexes. Rather than being a product of an arbitrary rate structure or discriminatory provision of services to customers, the reimbursement of disposal fees to supplemental collection service

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providers is limited only by the City's contractual agreement with Republic—a contractual agreement for which the City announced the guidelines and accepted competing bids from six different service providers, not including O'Leary. As the City properly contends, by contracting with one service provider and providing that service equally to all customers, the City has not exceeded its authority under N.C. Gen. Stat. § 160A-314.

To the extent Cedar Greene argues the City's calculation of the \$27 annual disposal fee is too high and that the City is profiting from the unused portion of the annual disposal fee, such arguments are inapposite under their statutory discrimination claim, which concerns only arbitrary or discriminatory action either in setting rates or in the provision of public enterprise services. Cedar Greene has failed to show how the City's arithmetic in setting the annual disposal fee is arbitrary or discriminatory. Further, to the extent Cedar Greene maintains the City's policy stifles market competition in the provision of supplemental collection services or creates an effective monopoly for Republic, such is not a proper legal position for proceeding with a discrimination claim under the public enterprise statutes.

Under these facts, we fail to see how the City's chosen method of contracting with a single service provider for collection and disposal of solid waste, and providing the same uniform terms of that service to all multi-family complexes, results in the arbitrary or discriminatory provision of solid waste services or the rates charged therefor. Specifically, Cedar Greene has failed to show how it is being treated differently by the City from other similarly situated multi-family complexes, all of which pay the same annual disposal fee and have access to the same provision of services by the City. Accordingly, we hold the trial court erred in granting summary judgment in favor of Cedar Greene on its discrimination claim under N.C. Gen. Stat. § 160A-314, and the trial court should have granted summary judgment in favor of the City on that issue. In light of this holding, we need not address the City's remaining argument concerning the propriety of the trial court's injunctive remedy.

Upon ruling that the City's policy was discriminatory under the statute at issue, the trial court made no ruling on plaintiffs' remaining claim under the equal protection clause of the North Carolina Constitution. Because the trial court made no ruling on plaintiffs' constitutional claim in the judgment from which the City presently appeals, any such argument as to that issue is not properly before this Court. N.C. R. App. P. 10(a) (2012); *see Searles v. Searles*, 100 N.C.

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App. 723, 725, 398 S.E.2d 55, 56 (1990) (holding this Court is without authority to entertain an appeal where there has been no entry of judgment on the issue or claim being appealed). Having reversed the trial court's ruling on the statutory claim, we must therefore remand the cause back to the trial court for further proceedings on plaintiffs' constitutional claim.

III. Conclusion

We hold that O'Leary, a supplemental collection service provider, has failed to demonstrate the requisite standing to maintain a discrimination claim under N.C. Gen. Stat. § 160A-314(a), in light of our case law interpreting that claim in favor of customers or consumers of public enterprise services. Thus, the trial court erred in failing to grant the City's motion to dismiss the statutory discrimination claim with respect to O'Leary. However, Cedar Greene has shown a threatened financial injury by the City's alleged discriminatory reimbursement policy, and therefore, as a consumer or customer of the City's solid waste services, Cedar Greene has demonstrated sufficient standing to maintain a discrimination claim under N.C. Gen. Stat. § 160A-314. Thus, the trial court did not err in failing to grant the City's motion to dismiss the statutory discrimination claim with respect to Cedar Greene.

However, on the undisputed facts of this case, we fail to see how the City's reimbursement policy treats Cedar Greene differently from other multi-family complexes in the provision of solid waste disposal services. Accordingly, we hold the trial court erred in granting summary judgment in favor of plaintiffs on their statutory discrimination claim. That judgment is therefore reversed.

Because the trial court made no ruling on plaintiffs' remaining claim under the equal protection clause of the North Carolina Constitution, we must remand the cause back to the trial court for further proceedings on plaintiffs' remaining constitutional claim.

Reversed and remanded.

Judge BRYANT concurs.

Judge CALABRIA dissents.

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CALABRIA, Judge, dissenting.

I concur with the majority that plaintiff Cedar Greene, LLC (“Cedar Greene”) has standing to maintain a discrimination claim pursuant to N.C. Gen. Stat. § 160A-314. However, I disagree with the majority that O’Leary Group Waste Systems, LLC (“O’Leary”) lacks standing. Therefore, the trial court properly granted plaintiffs’ motion for summary judgment on their statutory discrimination claim. In addition, because the court found that the city exceeded its authority by setting rates and classifying customers under N.C. Gen. Stat. § 160A-314, the trial court properly decided it was unnecessary to address plaintiffs’ Equal Protection claim and made no ruling in that regard. For these reasons, I respectfully dissent.

I. Standing

The majority concludes that O’Leary is not a proper party and does not have standing because O’Leary is not a customer or consumer for whom the City provides solid waste services. The majority also concludes that N.C. Gen. Stat. § 160A-314 protects only customers, not service providers, by citing cases involving customers. Although the cases cited by the majority involved customers, the cases did not limit the application of N.C. Gen. Stat. § 160A-314(a) to *only* customers. In *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 464, 78 S.E.2d 290, 299 (1953), the Court held “when the dealings between [a parent company and its subsidiary] affect the rights of others,” the power company could not discriminate among customers. However, the Court said nothing to suggest that discrimination among service providers is permissible. *Id.* See also *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 149, 237 S.E.2d 484, 486 (1977) (Holding that “a city has ‘the right to classify consumers’” but included no language to suggest the statute applies exclusively to consumers) (citation omitted); *Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E.2d 739, 745 (1979) (Recognizing that the statute does not grant cities “a license to discriminate among customers,” but not establishing that a city could discriminate among service providers). In addition, the language of the subsection of the statute at issue does not address customers at all, but the services provided. See N.C. Gen. Stat. § 160A-314(a) (2011) (“Schedules of rents, rates, fees, charges, and penalties *may vary according to classes of service*[.]” (emphasis added)). The law does not explicitly limit discrimination solely to customers, but instead provides guidelines that different rates must be justified by a difference in the class of service.

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Since the law is not restricted solely to customers, O'Leary's standing depends on whether it meets the criteria for standing. The majority cites the federal standard for standing found in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 364 (1992), cited by this Court in *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) and *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002). However, our Supreme Court in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006) and *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 669 S.E.2d 279 (2008) set a different standard. The Court in *Goldston* specifically found that while the federal standard

can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine. *Compare Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) ("Only those persons may call into question the validity of a statute who have been *injuriously affected* thereby in their persons, property or constitutional rights." (emphasis added)), *with Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 119 L.Ed.2d at 364 (noting that one of the three elements of federal standing is an "injury in fact" that is "concrete and particularized").

361 N.C. at 35, 637 S.E.2d at 882.

When determining standing, the question for the Court to decide "is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverse-ness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282 (citations omitted). A party is not required to show that an injury has already occurred, but that an injury is *threatened or imminent*. *Id.* at 642-43, 669 S.E.2d at 282 (emphasis added).

In the instant case, the City of Charlotte refuses to reimburse Disposal Fees incurred by O'Leary for Supplemental Collection. Therefore, if O'Leary provides Supplemental Collection for Multi-Family Complexes, it must either absorb the cost of the Disposal Fees or charge their customers higher rates. Such a development directly interferes with O'Leary's business. Cedar Greene, as a potential cus-

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tomers, chose to utilize Republic instead of O'Leary due to the disparity in rates directly caused by the City's policy. This loss of business constituted a threatened or imminent injury to O'Leary's business, under *Goldston* and *Mangum*. Therefore, O'Leary has standing to maintain a claim of discrimination since the City of Charlotte's policy meets the criteria of a threatened or imminent injury under *Goldston* and *Mangum*.

II. Equal Protection

Finally, the trial court properly did not address plaintiffs' Equal Protection claim in its 14 December 2011 order. The order itself discussed the statutory provisions, and the trial court found for the plaintiffs based on N.C. Gen. Stat. § 160A-314. The trial court found that the City's policy exceeded its authority by setting rates and classifying customers under N.C. Gen. Stat. § 160A-314. *See Cabarrus County v. City of Charlotte*, 71 N.C. App. 192, 195, 321 S.E.2d 476, 479 (1984) ("There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service."); *Mead Corp.*, 238 N.C. at 465, 78 S.E.2d at 300 ("Classification must be based on substantial difference.").

The City, through its representative Carl Terrell, has admitted that the solid waste disposal service provided, whether by Republic, O'Leary, or another disposal service, is effectively the same. The identity of the provider does not indicate a different class of service. However, in refusing to pay any provider other than Republic, the City effectively subjects Multi-Family Complexes to pay elevated rates for their solid waste disposal. If a Multi-Family Complex hires Republic, they are subject to Republic's higher rates. If a Multi-Family Complex hires a different solid waste disposal service, they are subject to the Disposal Fees. In its order, the trial court found that the City's policy only reimbursed disposal fees to those Multi-Family Complexes that hired Republic to provide Supplemental Collection. The trial court determined that the City's policy constituted "unlawful, unreasonable, and arbitrary discrimination in the provision of a public enterprise service and rates charged for such service" violated N.C. Gen. Stat. § 160A-314. I agree.

In *Cabarrus County*, a case also based on N.C. Gen. Stat. § 160A-314, this Court held that if there are "sound statutory grounds" to substantiate a holding, the Court need not go further and address an

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Equal Protection claim. 71 N.C. App. at 195, 321 S.E.2d at 479. In this case, the trial court properly based its order on the sound statutory grounds of the claim. Therefore, it was unnecessary for the trial court to address the Equal Protection claim. *Id.* I would affirm the trial court's decision.

III. Conclusion

The majority correctly holds that plaintiff Cedar Greene has standing but mistakenly concludes that plaintiff O'Leary does not have standing. Our state Supreme Court has articulated the standard for the state in *Goldston* and again in *Mangum*. Therefore, O'Leary does have standing and the trial court also properly granted plaintiffs' motion for summary judgment because the court found that the city exceeded its authority by setting rates and classifying customers under N.C. Gen. Stat. § 160A-314.

Under the precedent of *Cabarrus County*, I would affirm the trial court's decision that it was unnecessary to address plaintiffs' Equal Protection claim and also affirm that he made no ruling in that regard.

HCW RETIREMENT AND FINANCIAL SERVICES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; HCWRFS, LLC, FORMERLY HILL, CHESSON & WOODY RETIREMENT & FINANCIAL SERVICES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; AND WILTON R. DRAKE, III, PLAINTIFFS v. HCW EMPLOYEE BENEFIT SERVICES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; HILL, CHESSON & WOODY, INC., A NORTH CAROLINA CORPORATION; PRESTWICK SIX, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; FRANK S. WOODY, III, AND TODD T. YATES, DEFENDANTS

No. COA11-1479

(Filed 7 August 2012)

1. Appeal and Error—interlocutory order—substantial right—denial of arbitration

An appeal from an interlocutory order denying arbitration was immediately appealable because it involved a substantial right which might be lost if appeal was delayed.

2. Arbitration and Mediation—arbitration clause—duty of good faith—fiduciary duties—operating agreement

The trial court erred by ruling that plaintiffs' claims, which rested on allegations that defendants breached the duty of good

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faith and breached their duties as fiduciaries, were not subject to arbitration. These claims arose out of or were in connection with, or in relation to the operating agreement, a fact which brought those claims within the scope of the operating agreement's arbitration clause.

3. Arbitration and Mediation—waiver—utilization of discovery procedures not available in arbitration—deposition

The trial court did not err by determining that defendants had waived their right to have the relevant claims submitted to arbitration by utilizing discovery procedures (deposing plaintiff Drake concerning the facts underlying the relevant claims) that would not necessarily have been available in arbitration.

Appeal by defendants from order entered 9 September 2011 by Judge Charles C. Lamm, Jr., in Orange County Superior Court. Heard in the Court of Appeals 21 March 2012.

Northen Blue, LLP, by J. William Blue, Jr., for plaintiff-appellees.

Coats & Bennett, PLLC, by Anthony J. Biller, Emily M. Haas, and Keith D. Burns, for defendant-appellants Frank S. Woody, III, and Todd T. Yates.

ERVIN, Judge.

Defendants Frank S. Woody, III, and Todd T. Yates appeal from an order denying their motion to compel arbitration with respect to the twelfth and thirteenth claims for relief asserted in the First Amended Complaint filed by Plaintiffs HCW Retirement and Financial Services, LLC; HCWRFS, LLC; and Wilton R. Drake, III.¹ On appeal, Defendants argue that the trial court erred by denying their motion to compel arbitration with respect to the claims in question on the grounds that a contract between Defendants and Mr. Drake contained language providing for arbitration of these claims and that Defendants had not waived the right to have these claims submitted to arbitration by participating in discovery. Upon careful consideration of Defendants' challenges to the trial court's order in light of the record and the

1. Although Plaintiffs asserted claims against several additional defendants, those additional parties defendant are not affected by the claims at issue in this appeal. As a result, the only parties defendant involved in the present appeal are Defendants Woody and Yates, who will be referred to as Defendants throughout the remainder of this opinion.

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applicable law, we conclude that, while the trial court erred by determining that the claims in question were not covered by the arbitration clause, it did not err by determining that Defendants had waived the right to have these claims resolved in arbitration, so that its order should be affirmed.

I. Factual BackgroundA. Substantive Facts

Plaintiffs HCW Retirement & Financial Services, LLC (“RFS”), and HCWRFS, LLC, (“HCWRFS”) are North Carolina limited liability companies, while Plaintiff Wilton Drake is a financial planner who offers retirement planning services. Defendants are financial advisers who offer investment and insurance services. Between the late 1990s and 2010, the parties were involved in various cooperative or collaborative business ventures that revolved around the provision of financial or investment advice.

On 12 August 2003, Defendants and Plaintiff Drake formed Prescott Office Management, LLC, for the purpose of entering into an office sharing arrangement pursuant to which Prescott would purchase part of an office condominium. At the conclusion of that process, Prescott became a 50% owner of Prestwick, which owns an office condominium utilized by the parties for the purpose of conducting their businesses.

At the time that they organized Prescott, the parties executed and signed an Operating Agreement that governed their rights and responsibilities with regards to Prescott and included an arbitration provision. Initially, each of the three principals had a one-third interest in and served as a manager of Prescott. In addition, the Operating Agreement provided that decisions involving the limited liability company required the approval of all three managers. In September, 2010, Defendants amended the Operating Agreement to provide that managers would be elected by majority vote and that decisions concerning Prescott could be made by a vote of 66% of the members; elected themselves managers for an indefinite term; and adopted other amendments to the Operating Agreement that gave Defendants increased authority over Prescott’s operations.² Using the authority granted to them by these amendments to the Operating Agreement,

2. In both his deposition and in an affidavit, Mr. Drake admitted that Defendants had the authority to adopt these amendments to the Operating Agreement.

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Defendants procured the non-renewal of Mr. Drake's lease for space in the Prestwick building when his lease expired in 2010.

B. Procedural History

On 26 January 2011, Plaintiffs filed a First Amended Complaint³ in which they sought 1) damages for an alleged violation of partnership obligations; 2) damages for trade name infringement; 3) cancellation of N.C. Trademark Registration No. T-020223; 4) a determination that Defendant EBS is not the owner of the trademark "Experience the Benefit"; 5) a determination that registration of the trademark "Experience the Benefit" had been obtained fraudulently; 6) cancellation of N.C. Trademark Registration No. T-020247; 7) a determination that Defendant EBS is not the owner of the HCW logo; 8) a determination that registration of the HCW logo had been fraudulently obtained; 9) cancellation of N.C. Trademark Registration No. T-020312; 10) a determination that Defendant EBS is not the owner of the trade name "Hill, Chesson & Woody"; 11) that registration of the trade name "Hill, Chesson & Woody" had been fraudulently obtained; 12) damages for breach of the duty of good faith by Defendants Yates and Woody; 13) damages for breach of fiduciary duty by Defendants Yates and Woody; 14) an accounting; 15) damages for breach of a lease agreement; 16) damages for conversion; and 17) damages for tortious interference with contractual relationships and prospective advantage. On 18 February 2011, Defendants filed an answer in which they denied the material allegations of the First Amended complaint and asserted various defenses to Plaintiffs' claims. In response to the breach of good faith and fair dealing and breach of fiduciary duty claims asserted in the First Amended Complaint, Defendants moved that further litigation be stayed and that these claims be referred to arbitration on the basis of the arbitration clause contained in the Operating Agreement.

After receiving Defendants' motion to compel, Plaintiffs filed a response denying that the claims in question were subject to arbitration and submitted an affidavit executed by Mr. Drake setting out in more detail the factual basis for the twelfth and thirteenth claims asserted in Plaintiffs' First Amended Complaint. On 8 August 2011, Plaintiffs filed a supplemental response to Defendants' motion to compel arbitration in which they asserted that:

3. We have not discussed the procedural history of this litigation prior to the filing of the First Amended Complaint given that the claims relevant to the issues that Defendants have raised on appeal were asserted for the first time in that document.

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2. . . . Defendants Yates and Woody have refused to respond to discovery propounded by Plaintiffs. . . .

3. . . . Defendants have made use of judicial discovery procedures not available in the arbitration that they seek to compel in that Defendants questioned Plaintiff Drake about the facts and circumstances relating to the Twelfth and Thirteenth Claims for Relief during the deposition of Plaintiff Drake, which was conducted in late July 2011.

. . . .

5. . . . Defendants Yates and Woody have waived arbitration by making use of judicial discovery procedures not available in arbitration, and Plaintiffs have been prejudiced by such discovery.

In an affidavit attached to Plaintiffs' supplemental response, Mr. Drake stated, in pertinent part, that:

3. On July 27, 2011, my deposition was conducted by counsel for Defendants. The deposition began at approximately 9:30 a.m. and ended at approximately 8:00 p.m. . . .

4. During the course of the deposition, I was asked questions about the Twelfth and Thirteenth Claims for Relief in my Amended Complaint[.]. . . Defendants inquired about the facts surrounding my claims as well as the loss and damage that I have suffered as a result of the actions that are the basis of my claims. . . . Defendants provided me a copy of the Affidavit in Opposition to Defendants' Motion to Compel Arbitration that I had previously filed, and questioned me about the Affidavit, including the various exhibits that were attached to the Affidavit. . . .

5. I was represented by counsel during the deposition, and am responsible for the expense incurred in connection with attendance by my counsel at the deposition, including the portion of the deposition that dealt with the questions concerning the Twelfth and Thirteenth Claims for Relief.

6. Previously, Plaintiffs propounded discovery to Defendants Yates and Woody[.] . . . Yates and Woody, through counsel, objected to discovery and refused to substantively respond on the grounds that the claims against them are subject to arbitration.

7. Plaintiffs are prejudiced by Defendants engaging in discovery on the Twelfth and Thirteenth Claims for Relief by ques-

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tioning me during my deposition, while Defendants Yates and Woody refuse to respond to discovery that Plaintiffs have propounded to them regarding those same claims. Plaintiffs are further prejudiced by the fact that Defendant Yates was present for most of my deposition.

On 18 August 2011, the trial court conducted a hearing concerning Defendants' motion to compel arbitration. On 9 September 2011, the trial court entered an order denying Defendants' motion in which it found, in pertinent part, that:

3. The Twelfth and Thirteenth Claims for Relief in the First Amended Complaint allege individual claims against Defendants Yates and Woody that are based upon common law duties of good faith and the fiduciary duty owed to Plaintiff Drake as a minority member. Plaintiffs assert that the actions of Defendants Yates and Woody were for the personal benefit of themselves and businesses owned by them, and to the personal detriment of Plaintiff Drake and his businesses, in breach of the common law duties owed by Defendants Yates and Woody. The Claims do not arise out of the Operating Agreement or any alleged breach or violation of the Operating Agreement.

4. After Defendants Yates and Woody filed their motion to compel arbitration of the Twelfth and Thirteenth Claims for Relief, Plaintiffs propounded requests for production of documents to Defendants Yates and Woody. Yates and Woody objected to the discovery on the basis that it was in violation of the arbitration provisions set out in the Prescott Operating Agreement.

5. On July 27, 2011, Defendants conducted the deposition of Plaintiff Drake. During the course of that deposition, counsel for Defendants asked Drake about facts and circumstances related to the Twelfth and Thirteenth Claims for Relief.

6. Plaintiffs incurred expense in connection with the portion of the deposition of Drake related to the facts and circumstances of the Twelfth and Thirteenth Claims for Relief in that Plaintiffs' counsel was present for that portion of the deposition, and Plaintiffs incurred expense for those professional services.

7. While Defendants Yates and Woody have refused to respond to discovery propounded to them, Defendants have utilized and benefited from discovery by questioning Plaintiff Drake concerning matters that relate to the claims Defendants seek to

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arbitrate—discovery that would be available in arbitration only if permitted by the arbitrator.

8. Defendants, by examining Plaintiff Drake during the course of his deposition concerning facts and circumstances related to the Twelfth and Thirteenth Claims for Relief, engaged in discovery, which is permitted by the Rules of Civil Procedure, but could occur in arbitration only with permission of the arbitrator as provided at N.C. Gen. Stat. § 1-569.17.

Based on these and other findings, the trial court concluded that:

2. The Twelfth and Thirteenth Claims for Relief fall outside the substantive scope of the arbitration provisions of the Prescott Operating Agreement;

3. That because the specific dispute alleged in the Twelfth and Thirteenth Claims for Relief does not fall within the scope of the arbitration provision of the Prescott Operating Agreement, the dispute is not subject to arbitration;

4. That Defendants have utilized discovery with regard to the Twelfth and Thirteenth Claims for Relief but have failed to respond to discovery propounded to them on those same claims, and that Plaintiffs have been prejudiced;

5. That by their acts and conduct with regard to discovery, Defendants Yates and Woody have impliedly waived any right that they might have to arbitration pursuant to the Prescott Operating Agreement.

Defendants noted an appeal to this Court from the trial court's denial of their motion to compel arbitration.

II. Legal Analysis

A. Appealability

[1] “As a preliminary matter, we note that Judge [Lamm’s] order denying [Defendants’] motion to compel arbitration is interlocutory ‘because it does not determine all of the issues between the parties and directs some further proceeding preliminary to a final judgment.’ However, this Court has previously determined that an appeal from an order denying arbitration, ‘although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.’ Accordingly, we reach the merits of this appeal.”

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Capps v. Virrey, 184 N.C. App. 267, 269, 645 S.E.2d 825, 827 (2007) (quoting *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999) (internal citation omitted), and *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (internal citations omitted)).

B. Standard of Review

As a general matter, public policy favors arbitration. However, before a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate. Thus, whether a dispute is subject to arbitration is a matter of contract law. . . . [The determination of whether] a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether “the specific dispute falls within the substantive scope of that agreement.” *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). This Court has adopted the *PaineWebber* analysis. In the case *sub judice*, the dispositive issue involves the second prong of the analysis (whether the parties’ dispute falls within the purview of the arbitration clause).

Raspet v. Buck, 147 N.C. App. 133, 135-36, 554 S.E.2d 676, 678 (2001) (citing *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 787 (1983); *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992); *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000); and *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23-24, 331 S.E.2d 726, 731 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)). In determining whether Defendants waived their right to have the present dispute submitted to arbitration, this Court has previously stated that:

“Waiver of a contractual right to arbitration is a question of fact.” In this regard, “findings of fact, when supported by any evidence, are conclusive on appeal. Conclusions of law, even if stated as factual conclusions, are reviewable. Nevertheless, when there is evidence in the record which supports the trial court’s findings of fact, and those findings support its conclusions of law that a party has waived its right to compel arbitration, the decision must be affirmed.”

Moose v. Versailles Condo. Ass’n, 171 N.C. App. 377, 382, 614 S.E.2d 418, 422 (2005) (quoting *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C.

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224, 229, 321 S.E.2d 872, 876-77 (1984), and *Prime South Homes*, 102 N.C. App. at 258, 401 S.E.2d at 825 (internal citation omitted), and citing *Prime South Homes*, 102 N.C. App. at 261, 401 S.E.2d at 827). We will now apply the applicable standards of review to evaluate the merits of Defendants' challenges to the trial court's order.

C. Scope of Arbitration Clause

[2] As an initial matter, Defendants contend that the trial court erred by ruling that Plaintiffs' twelfth and thirteenth claims, which rest on allegations that Defendants breached the duty of good faith and breached their duties as fiduciaries, are not subject to arbitration. In support of this argument, Defendants assert that, despite the absence of any dispute over the extent of their compliance with the Operating Agreement, the relevant claims arise from or are related to that agreement. On the other hand, Plaintiffs argue that, given their concession that Defendants' actions did not contravene the provisions of the Operating Agreement, the relevant claims are not subject to arbitration. We believe that Defendants' argument has merit.

The arbitration clause contained in the Operating Agreement provides, in pertinent part, that:

14.10 [] Any dispute, controversy or claim arising out of or in connection with, or relating to, this Operating Agreement or any breach or alleged breach [t]hereof shall, upon the request of any party involved, be submitted to, and settled by, arbitration in the State of North Carolina, pursuant to the commercial arbitration rules then in effect[.] . . .

In other words, the applicable arbitration provision requires the parties to arbitrate both disputes "arising out of or in connection with, or relating to, this Operating Agreement" and those "arising out of or in connection with, or relating to . . . any breach or alleged breach" of the Operating Agreement. Thus, we must examine the exact nature of Plaintiffs' claims in order to determine whether they are subject to arbitration.

The twelfth and thirteenth claims set out in Plaintiffs' First Amended Complaint rest upon allegations that:

TWELFTH CLAIM FOR RELIEF
(Breach of Good Faith by Defendants Yates
and Woody as LLC Members)

. . . .

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68. In the summer of 2003, Plaintiff Drake, Defendant Yates, and Defendant Woody formed a North Carolina limited liability company known as Prescott Office Management, LLC (hereinafter “Prescott”).

69. That Plaintiff Drake, Defendant Yates, and Defendant Woody were each members of Prescott, each holding a one-third interest in the limited liability company and each being a manager of the limited liability company.

70. That Plaintiff Drake, Defendant Yates, and Defendant Woody executed an operating agreement for Prescott and that the operating agreement provided that all the decisions and commitments regarding limited liability company matters should be carried out by the managers of the limited liability company subsequent to the approval of 100% of the members of the limited liability company.

. . . .

74. That in September 2010, without notice or consultation with Plaintiff Drake, Defendants Yates and Woody met and amended the operating agreement of Prescott, making numerous changes, all of which were to the benefit of Defendants Yates and Woody, both personally and to their business, and to the detriment of Plaintiff Drake and his business. . . .

75. That as a result of the amendments, Defendants Yates and Woody had the apparent authority to act on behalf of the limited liability company without the consent or authorization from Plaintiff Drake.

. . . .

78. That the lease signed by Plaintiff RFS as with Prestwick was set to expire on December 31, 2010[.] . . . Defendants Yates and Woody, having taken control of Prescott, attended a meeting of Prestwick and voted to cancel the lease of Plaintiff RFS at the conclusion of its term on December 31, 2010.

79. That the actions of Defendants Yates and Woody were not in the best interest of Prescott or Plaintiff Drake, the remaining member of Prescott, but instead, were for the personal benefit and interest of Defendants Yates and Woody[.] . . .

80. That Defendants Yates and Woody breached their obliga-

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tion of good faith to Plaintiff Drake in that Defendants Yates and Woody did not act in good faith or in the best interest of Prescott, but instead, acted in their own best interest and in the interest of other entities that they controlled.

81. That Plaintiff Drake and Plaintiff RFS have been damaged . . . and will incur substantial expense in connection with the new office space that they have been required to rent, and Plaintiffs have suffered additional damages to be further detailed in trial.

THIRTEENTH CLAIM FOR RELIEF

(Breach of fiduciary obligation to minority member)

. . . .

82. That Defendants Yates and Woody, by having unilaterally amended the operating agreement of Prescott, were able to dominate and control its activity.

83. That having amended the operating agreement so as to allow Defendants Yates and Woody to totally control the activities and decisions of the limited liability company, Defendants Yates and Woody, in their capacity of the controlling members of the limited liability company, owed a fiduciary duty to Plaintiff Drake.

84. That Defendants Yates and Woody breached their fiduciary duty by exercising their controlling authority in a way that damaged and harmed Plaintiff Drake, the minority member, in that Defendants Yates and Woody terminated the lease for the office space occupied by Plaintiff Drake's business so that the office space could be occupied by the business of Defendants Yates and Woody.

85. As a result of the breach by Defendants Yates and Woody of the fiduciary duty that they owed to Plaintiff Drake, as a minority member of the limited liability company, Plaintiff Drake has been damaged in that his business has been disrupted, [and] he has incurred substantial expense[.] . . .

As a result, the claims that Plaintiffs have asserted in the relevant claims for relief rest upon actions taken by Defendants using their authority as members of Prescott. Simply put, Plaintiffs have not sought to have Defendants held liable for torts committed against unrelated individuals or that have no relationship to Prescott.

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Instead, the relevant claims arise from duties that Defendants allegedly owed to Plaintiffs based solely upon their involvement in Prescott. In the absence of Defendants' involvement in Prescott, the claims at issue here would lack any viability whatsoever. As noted above, the Operating Agreement sets out the parties' rights and responsibilities as members of Prescott. As a result, we conclude that Plaintiffs' claims based upon Defendants' alleged breaches of fiduciary duty and the duty of good faith and fair dealing clearly "aris[e] out of or [are] in connection with, or [in] relati[on] to" the Operating Agreement, a fact which brings those claims within the scope of the Operating Agreement's arbitration clause.

In seeking to persuade us to reach a different result, Plaintiffs emphasize that the relevant claims rest upon alleged violations of "various common law duties that they owe to [Mr. Drake]" rather than upon alleged violations of the Operating Agreement. However, as we have already noted, these "common law duties" would not exist in the absence of the parties' involvement in Prescott and are informed by the authority granted to members and managers under the Operating Agreement,⁴ a fact that establishes that the relevant claims are "connected with" or "related to" the Operating Agreement as those terms are used in the arbitration clause.⁵

We utilized similar reasoning in deciding *Ellison v. Alexander*, ___ N.C. App ___, 700 S.E.2d 102 (2010), a case in which, following their decision to purchase shares in the defendant's business, the plaintiffs asserted various tort claims arising from the defendant's alleged misrepresentation concerning the nature and extent of his background and experience. At the time that they made purchases, the plaintiffs signed Subscription and Shareholder Agreements (SSAs) requiring arbitration of "[a]ll disputes and claims arising in connection with this Agreement[.]" *Ellison*, ___ N.C. App at ___, 700 S.E.2d at 106. In seeking to establish that their claims against the defendants were not subject to arbitration, the plaintiffs argued that, since their claims rested upon allegedly tortious acts that the defendant had

4. For example, Article 5 of the Operating Agreement specifies the "Rights and Duties of Managers," a subject that appears to be pertinent to Plaintiffs' claims.

5. Although Plaintiffs rely upon our decision in *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678, in support of their argument that the relevant claims do not come within the scope of the arbitration provision contained in the Operating Agreement, the arbitration clause at issue there, which applied to "matters in dispute and in controversy between [the members] and concerning, directly or indirectly, the affairs, conduct, operation and management of the" business, lacks the "arising out of," connected with, or "relating to" language found in the arbitration provision at issue here.

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committed personally, the claims were not subject to the SSAs' arbitration provision. In rejecting the plaintiffs' argument, we held that:

. . . Plaintiffs' complaint alleges that their investment in The Elevator Channel was induced by Defendant's misrepresentations. . . . Thus, Plaintiffs' claims stem from the circumstances surrounding their purchase of stock in The Elevator Channel, including whether Defendant misled them into making that investment. As we have previously demonstrated, the SSA spells out the terms and conditions under which Plaintiffs purchased shares in The Elevator Channel. Thus, Plaintiffs' claims are clearly "connected" with the SSAs, since the execution of those agreements was the vehicle by which Plaintiffs effectuated their decision to invest in The Elevator Channel.

Ellison, ___ N.C. App at ___, 700 S.E.2d at 110. Similarly, the claims that Plaintiffs have asserted in this case rest upon Defendants' breach of duties that they allegedly owed to Plaintiffs arising from actions that they allegedly took as members and managers of Prescott, a fact which establishes that, as in *Ellison*, the relevant claims clearly relate to or are connected with the Operating Agreement. Thus, for all of these reasons, we conclude that the trial court erred by concluding that the relevant claims were not subject to arbitration.

D. Waiver

[3] Secondly, Defendants argue that the trial court erred by determining that they had waived the right to have the relevant claims submitted to arbitration by utilizing discovery procedures that would not necessarily have been available in arbitration. We do not find Defendants' argument persuasive.

"Arbitration is a contractual right, and therefore, the right to arbitration may be waived by the conduct of the party seeking to enforce its right. . . . [However, in view of North Carolina's public policy favoring arbitration,] doubts over whether a certain issue is appropriate for arbitration should be resolved in a manner which favors arbitration. This is true 'whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *Capps*, 184 N.C. App at 269-70, 645 S.E.2d at 827 (citing *Miller Bldg. Corp. v. Coastline Assoc. Ltd. Partnership*, 105 N.C. App. 58, 63, 411 S.E.2d 420, 423 (1992), and *Smith v. Young Moving & Storage, Inc.*, 141 N.C. App. 469, 472-73, 540 S.E.2d 383, 386 (2000), *aff'd*, 353 N.C. 521, 546 S.E.2d 87 (2001), and quoting *Cyclone Roofing Co.*, 312 N.C. at 229, 321 S.E.2d at 876 (internal quotation

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omitted)). Accordingly, in order “to defeat an attempt to compel arbitration [on waiver-related grounds], the opposing party must demonstrate prejudice.” *Id.*

Our Supreme Court has described the type of prejudice [a party] must demonstrate in order to prevail. “A party may be prejudiced by his adversary’s delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.”

Smith, 141 N.C. App. at 472-73, 540 S.E.2d at 386 (quoting *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986)).

As we have already noted, the trial court predicated its determination that Defendants had waived their right to insist that the relevant claims be submitted to arbitration on the facts that (1) Defendants questioned Mr. Drake about the “facts and circumstances related to the Twelfth and Thirteenth Claims for Relief” during the course of his deposition; (2) Plaintiffs incurred “expense in connection with the portion of the deposition of Drake related to the facts and circumstances of the Twelfth and Thirteenth Claims for Relief” given that Plaintiff was represented by counsel during his deposition; (3) the discovery relating to the relevant claims in which Defendants had engaged “would be available in arbitration only if permitted by the arbitrator”; and (4) Defendants had refused to respond to discovery requests relating to the relevant claims on the grounds that those claims were subject to arbitration. As a result of the fact that Defendants have not challenged these findings, which appear to have adequate record support, they are conclusive for the purpose of appellate review. *See, e.g., King v. Owen*, 166 N.C. App. 246, 248, 601 S.E.2d 326, 327 (2004) (holding, in connection with a challenge to the denial of a motion to compel arbitration, that, where the appellant “does not challenge any of the trial court’s findings,” this Court’s review is “limited to whether those findings support the trial court’s conclusions of law”). Based on these and other findings, the trial court concluded that Defendants’ decision to utilize discovery procedures not available as a matter of right during arbitration while refusing to respond to discovery requests propounded by Plaintiffs concerning the same issues prejudiced Plaintiffs and worked a forfeiture of their right to have the relevant claims submitted to arbitration.

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Thus, the ultimate question which we must decide is whether the trial court's conclusions reflect a correct application of the pertinent law to the facts.

The extent to which a party has waived the right to have particular claims submitted to arbitration by utilizing discovery procedures that are not available in arbitration has been addressed by this Court and the Supreme Court on a number of occasions. *See, e.g., Moose*, 171 N.C. App. at 385, 614 S.E.2d at 424 (upholding the trial court's determination that the appellant waived the right to compel the submission of a particular dispute to arbitration by conducting extensive discovery, including deposing a party opponent and causing the opposing party to incur significant expenses), and *Prime South Homes*, 102 N.C. App. at 261, 401 S.E.2d at 825-26 (holding that a party had waived the right to have a dispute submitted to arbitration based, in part, upon that party's conduct in taking the deposition of a particular witness).

Discovery during arbitration, as opposed to litigation, is designed to be minimal, informal, and less extensive. Thus, contrary to a civil case, where a broad right of discovery exists, discovery during arbitration is generally at the discretion of the arbitrator. Moreover, participation in discovery not available at arbitration may constitute a waiver of a party's right to arbitrate.

McCrary v. Byrd, 148 N.C. App. 630, 637, 559 S.E.2d 821, 826 (2002) (citing *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 491-92, 499 S.E.2d 801, 803-04 (1998), and *Prime South Homes*, 102 N.C. App. at 260-61, 401 S.E.2d at 826)), *cert. denied*, 356 N.C. 674, 577 S.E.2d 625 (2003). As a result, North Carolina's waiver-related jurisprudence generally establishes that, in the event that a party makes material use of discovery procedures available in ordinary civil litigation that are not available in arbitration, that party has waived the right to insist that claims that were addressed during the discovery process be submitted to arbitration.

The record in this case clearly establishes that, during the deposition of Plaintiff Drake, Defendants questioned him for approximately one hour concerning the matters that underlie the relevant claims. The questioning of Plaintiff Drake concerning the claims which Defendants now seek to have arbitrated occupied some 48 pages of the deposition transcript. During the course of this portion of Plaintiff Drake's deposition, Defendants "prompted [Mr. Drake] to admit certain facts regarding the [claims]." *Capps*, 184 N.C. App. at

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272, 645 S.E.2d at 829. Although the exact amount of monetary cost that Plaintiff Drake incurred during the portion of the deposition that addressed the relevant claims is not spelled out in the record, the Supreme Court's description of the showing needed in order to establish the right to arbitration by engaging in discovery does not include a cost-related component. *Servomation Corp.*, 316 N.C. at 544, 342 S.E.2d at 854 (stating that a waiver of the right to have a claim submitted to arbitration can be waived if the party seeking arbitration "makes use of judicial discovery procedures not available in arbitration").⁶ Thus, we conclude that the trial court's determination that Defendants waived their right to have the relevant claims submitted to arbitration by engaging in discovery that would not have been available as a matter of right during the arbitration process has adequate support in both the trial court's findings and the record and provides adequate support for its conclusion that the Defendants waived the right to arbitration, separately from its findings regarding expense, and should, for that reason, be affirmed.

We have carefully considered, and ultimately rejected, Defendants' numerous contrary arguments. As an initial matter, Defendant contends that, by participating in the deposition and failing to move for a protective order, Plaintiff has lost the right to utilize the taking of this deposition as the basis for a claim that Defendants had waived the right to have the relevant claims submitted to arbitration. In support of this argument, Defendants rely upon the decision of the United States Court of Appeals for the Fourth Circuit in *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974 (4th Cir. 1985). The issue before the Court in *Maxum Foundations* was not whether a party had "impliedly waived" the right to insist that one or more claims be submitted to arbitration, but whether the party was subject to statutory default under Section 3 of the Federal Arbitration Act. 9 U.S.C. § 3. Although *Maxum Foundations* noted that "this prin-

6. The fact that Plaintiff Drake was represented by counsel during the portion of his deposition that addressed issues relating to the claims at issue here does, contrary to Defendants' contention, permit a determination that he incurred some expense as a result of Defendants' decision to inquire into the relevant claims during that proceeding. After all, as this Court has noted in addressing a similar situation, "[j]ustice does not require that courts profess to be more ignorant than the rest of mankind." *Herbert v. Marcaccio*, _____ N.C. App. _____, 713 S.E.2d 531, 536 (2011) (quoting *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 781 (1939)). Moreover, even if the level of expense that Plaintiffs incurred in defending the relevant portion of Plaintiff Drakes' deposition was relatively small, our ultimate decision with respect to the waiver issue for purposes of this case hinges upon the fact that Defendants took advantage of discovery opportunities that were not necessarily available in arbitration rather than upon the expense associated with their use of those discovery techniques.

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principle of ‘default’ is akin to waiver,” it also concluded that “the circumstances giving rise to a statutory default are limited” and declined to find that one had occurred in the case under consideration. *Maxum* at 981 (citation omitted). In view of the absence of any support in our own arbitration-related jurisprudence for the proposition that a party claiming that an opponent had impliedly waived the right to insist upon arbitration has a duty to explicitly object to the conduct upon which the alleged waiver is based and the fact that the issue addressed in *Maxum Foundations* is not identical to the one before us here, we decline to adopt a contemporaneous objection rule of the type contended for by Defendants in this case.

Secondly, Defendants contend that Plaintiffs failed to show that they had incurred the expenses associated with a long trial, lost helpful evidence, or expended significant sums of money during the litigation of the arbitrable claims as a result of Defendants’ delay in seeking arbitration. Although Defendants are correct that Plaintiffs failed to make any showing relating to these three *Servomation Corp.* factors, the trial court was entitled to find a waiver of arbitration on the basis of Defendants’ decision to question Plaintiff Drake during his deposition concerning the relevant claims without addressing these three additional criteria. As a result, this argument provides no basis for reversing the trial court’s order.

Next, Defendants argue that, given that the discovery activities in which they engaged were “limited,” those activities were legally “insufficient” to support the trial court’s waiver determination. In support of this argument, Defendants cite *Servomation Corp.*, 316 N.C. 543, 342 S.E.2d 853 (1986), *Smith*, 141 N.C. App. 469, 540 S.E.2d 383 (2000), and *Sturm v. Schamens*, 99 N.C. App. 207, 392 S.E.2d 432 (1990), which they contend stand for the proposition that “limited” discovery cannot be the basis for a waiver determination. However, we do not believe that these cases support Defendants’ position for at least two different reasons. First, none of these cases involved a situation in which a party seeking arbitration deposed a witness concerning the allegedly arbitrable claims. Secondly, in each of these cases, the reviewing court specifically found that the party resisting arbitration had failed to establish that its opponent had made use of any discovery that would not have been available during the arbitration process. Such is not the case here. Finally, assuming that the “limited” nature of the discovery in which a party seeking to compel arbitration engages is grounds for refusing to find a waiver of arbitration, we do not believe that devoting an hour in a day-long deposi-

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tion to allegedly arbitrable claims constitutes “limited discovery.”⁷ As a result, we conclude that the trial court did not err by determining that a waiver of arbitration had occurred given the “limited” nature of the discovery-related activities in which the party seeking to compel arbitration had engaged.

In addition, Defendants argue, in reliance upon our decision in *Sullivan v. Bright*, 129 N.C. App. 84, 497 S.E.2d 118 (1998), that

[The court] noted that depositions “could occur in arbitration only with permission of the arbitrator” under N.C. Gen. Stat. § 1-569.17. This statute, however, does not prohibit depositions. Further, that permission from the arbitrator would be needed to conduct a deposition is not enough to rise to the level of prejudice supporting waiver.

We do not find Defendants’ argument in reliance upon *Sullivan* persuasive.

The first problem with this aspect of Defendants’ argument is that *Sullivan* addressed the issue of waiver in light of the specific language of former N.C. Gen. Stat. § 1-567.8(b), which provided that, “[o]n application of a party and for use as evidence, the arbitrators may permit a deposition to be taken . . . of a witness who cannot be subpoenaed or is unable to attend the hearing.” In *Sullivan*, we focused our attention on the defendant’s failure to prove that the witnesses deposed by the plaintiff would have been available to appear at an arbitration hearing. Our opinion implies that, had the defendant established that these witnesses were available to appear at an arbitration hearing, such a showing would have supported a determination that the plaintiff had engaged in discovery unavailable in arbitration sufficient to support a waiver determination. This understanding of

7. In support of their “limited discovery” argument, Defendants contend that their “limited questions” “focused on whether the Twelfth and Thirteenth Claims for Relief arose from, were connected with, or related to the operating agreement and on clarifying Drake’s allegations in the Amended Complaint.” However, Defendants concede that “the questioning regarding the arbitral claims . . . comprised sixty-one minutes of the day-long deposition,” a fact which precludes any determination that Defendants questioned Plaintiff Drake in a cursory manner. In addition, our review of the deposition transcript indicates that Defendants sought to get Plaintiff Drake to admit that he did not claim that Defendants had violated the Operating Agreement and that Defendants questioned Plaintiff Drake in detail about the circumstances surrounding his rental of space in the Prestwick building and the non-renewal of his lease, issues which are clearly relevant to Plaintiffs’ contentions with respect to the relevant claims. Thus, the discovery in which Defendants engaged concerning the relevant claims cannot be fairly described as “limited” in terms of either its subject matter or its extent.

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Sullivan finds support in our decision in *Moose*, 171 N.C. App. at 383-84, 614 S.E.2d at 423, in which we distinguished *Sullivan* on the grounds that, in *Moose*, the defendant had deposed parties who would clearly be available at an arbitration hearing:

Sullivan construed N.C. Gen. Stat. § 1-567.8(b), which makes depositions in arbitration dependent upon witness availability. The issue in *Sullivan* was whether a witness who had been deposed under the Rules of Civil Procedure would have been unavailable to attend an arbitration hearing, and under N.C. Gen. Stat. § 1-567.8(b) subject to deposition in arbitration anyway. Because there was no evidence in the record one way or the other, it is to be expected that the court would find no waiver of arbitration rights. . . . Plaintiffs in this lawsuit are not witnesses who cannot be subpoenaed or are unable to attend the arbitration hearing. They filed the lawsuit and are vitally interested in it. They appeared for their depositions voluntarily, and without being subpoenaed. They are local residents residing at the same addresses where they resided when they filed this lawsuit, and they could have been subpoenaed to attend an arbitration hearing. Defendant did not present any evidence to the contrary. Accordingly, plaintiffs would not be subject to being deposed in arbitration. By taking their depositions before requesting arbitration, defendant took advantage of a discovery procedure not available in arbitration in order to gain access to evidence.

As a result, under N.C. Gen. Stat. § 1-567.8(b) as it existed when *Sullivan* and *Moose* were decided, deposition of a party who was available to attend an arbitration hearing did work a waiver of the right to compel arbitration.

Secondly, the Uniform Arbitration Act was repealed and replaced by the Revised Uniform Arbitration Act effective 1 January 2004. Under the relevant provisions of the Revised Uniform Arbitration Act, an arbitrator has the discretionary authority to authorize depositions regardless of witness availability. As a result, unlike the situation addressed in *Sullivan* and *Moose*, the availability of depositions in arbitration does not hinge upon the extent to which a particular witness is or is not available to testify during an arbitration proceeding.

Finally, even under the former statute, depositions of unavailable witnesses were discretionary with the arbitrator. In *Moose*, we held that, since the deposed parties were clearly available and since this fact eliminated any possibility that the witnesses in question would

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be deposed during the course of an arbitration proceeding, the party seeking to compel arbitration had engaged in discovery that was not available during such proceedings. In *Sullivan*, we held that, because the party opposing arbitration had failed to prove that the deposed witnesses were definitely available for arbitration, there was a possibility that these witnesses might be unavailable and would, for that reason, be subject to deposition in the arbitrator's discretion. Although our holding in *Sullivan* could suggest, in accordance with Defendants' contention, that the mere possibility that a witness could be deposed in the arbitrator's discretion would suffice to defeat a finding of waiver, we did not include such an explicit pronouncement in our opinion in *Sullivan*. Moreover, we have not found such a holding in any of our published post-*Sullivan* decisions addressing a waiver of arbitration issue predicated upon the taking of a deposition and do not believe that such a decision would be appropriate given the absence of any guarantee that the arbitrator would allow the party seeking to compel arbitration to depose the witness in question. As a result, for all of these reasons, we conclude that *Sullivan* does not require reversal of the trial court's order.

Finally, Defendants argue that they should not be penalized for having deposed Plaintiff Drake given that, had they not deposed him concerning the relevant claims, they risked "losing the opportunity to depose" Plaintiff Drake unless they asked him "arbitration-related questions during the deposition[.]" However, this aspect of Defendants' argument presupposes that Plaintiff Drake's responses to their deposition questions had a material bearing on the litigation of the allegedly arbitrable claims. In addition, the record does not contain any indication that Defendants sought to have the trial court delay the deposition of Plaintiff Drake until their motion to compel arbitration had been decided or to otherwise protect their right to depose Plaintiff Drake while their motion to compel arbitration was pending. In light of these facts, we do not find this aspect of Defendants' argument persuasive either. As a result, given that "there is evidence in the record which supports the trial court's findings of fact" and given that "those findings support [the trial court's determination] that a party has waived its right to compel arbitration" by engaging in discovery that would not necessarily have been available in arbitration, we conclude that "the [trial court's] decision must be affirmed." *Moose*, 171 N.C. App. at 382, 614 S.E.2d at 422.

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III. Conclusion

Thus, for the reasons discussed above, we hold that, even though the trial court erred by concluding that Plaintiff's claims were not encompassed within the arbitration provision contained in the Operating Agreement, it correctly determined that Defendants had waived the right to compel the submission of the relevant claims to arbitration by deposing Plaintiff Drake concerning the facts underlying the relevant claims. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges CALABRIA and THIGPEN concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST FROM DOUGLAS K. DRAFFEN AND JOSEPH B. WILLIAMS TO BB&T COLLATERAL SERVICE CORPORATION, TRUSTEE, DATED OCTOBER 19, 2005 RECORDED IN BOOK 1142, PAGE 164, CARTERET COUNTY REGISTRY

No. COA11-1403

(Filed 7 August 2012)

Mortgages and deeds of trust— foreclosure proceedings— motion to lift stay granted—compulsory counterclaim in federal action not required

The trial court did not err by granting petitioner BB&T's N.C.G.S. § 1A-1, Rule 60 motion to lift the stay of foreclosure proceedings against respondent to allow the foreclosure to proceed and by dismissing respondent's appeal to superior court. Since petitioner was not required to pursue the foreclosure action as a compulsory counterclaim in the federal action, N.C.G.S. § 1A-1, Rule 13(a) did not control and the foreclosure could not be stayed on that basis.

Appeal by respondent from order entered 21 June 2011 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 2 April 2012.

Poyner Spruill LLP, by Jenny M. McKellar, for petitioner-appellee.

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Harvell and Collins, P.A., by Russell C. Alexander, for respondent-appellant.

CALABRIA, Judge.

Douglas K. Draffen (“respondent”) appeals the trial court’s order granting Branch Banking and Trust Company’s (“petitioner”) Rule 60 Motion to Lift the Stay of Foreclosure Proceedings against respondent to allow the foreclosure to proceed and dismissed respondent’s appeal to Superior Court. We affirm.

I. Background

On 19 October 2005, respondent and Joseph B. Williams purchased an undeveloped lot in Cannonsgate in Carteret County, North Carolina. To finance the purchase, respondent executed a promissory note secured by a deed of trust in favor of petitioner in the amount of \$215,892.00. Respondent made monthly interest payments of \$1,128.96 to petitioner from the time of his purchase until 13 October 2009.

On 12 February 2010, respondent and numerous other plaintiffs initiated a civil action seeking damages against a variety of lenders, developers, marketing firms, appraisers, and others in the United States District Court for the Eastern District of North Carolina (“the federal action”). Petitioner was one of the lenders named as a defendant. The federal action alleged that the defendants engaged in a fraudulent scheme to induce the plaintiffs to buy real property at a severely inflated value.

As a result of respondent’s default, petitioner, as beneficiary, initiated a foreclosure proceeding against respondent pursuant to the power of sale included in the deed of trust on respondent’s property. Petitioner alleged that respondent was in default in that he had failed to make any payments after 13 October 2009.

The initial foreclosure proceeding was conducted by the Carteret County Clerk of Superior Court (“the Clerk”) on 3 June 2010. The Clerk found the existence of a valid debt, that respondent was in default of that debt, that the Trustee possessed the right to foreclose, and that all required parties received notice under N.C. Gen. Stat. § 45-21.16. The Clerk authorized the Trustee to proceed to foreclosure pursuant to the power of sale in the deed of trust and to proceed to give notice of and conduct a foreclosure sale.

Respondent appealed the Clerk’s order to Carteret County

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Superior Court. At the *de novo* hearing¹ resulting from respondent's appeal, respondent's counsel moved to have the foreclosure action stayed pending the outcome of the federal action or dismissed and filed as a compulsory counterclaim in the federal action. Respondent's counsel also informed the court that respondent and petitioner had entered into settlement negotiations and they were close to reaching a settlement. On 8 February 2011, the superior court entered an order staying the foreclosure. In its order, the court found that "Counsel for Draffen also reported to the Court that Draffen and BB&T were in the process of settling all matters arising out of the federal litigation, and that it was his understanding that a final settlement was forthcoming."

Approximately four months later, on 6 June 2011, petitioner filed a motion to lift the stay on the basis that no settlement was actually forthcoming between respondent and petitioner. On 21 June 2011, the superior court entered an order lifting the stay, upholding the Clerk's findings, dismissing respondent's appeal of the foreclosure order and allowing the Substitute Trustee or any subsequent trustee, to proceed with the foreclosure. Respondent appeals.

II. Compulsory Counterclaim

Respondent argues that the superior court erred by lifting the stay which had been previously entered on 8 February 2011. Specifically, respondent contends that petitioner's foreclosure action was a compulsory counterclaim in the federal action and that the foreclosure could not proceed until the federal action was completed. We disagree.

Respondent argues that the instant case is controlled by Rule 13(a) of the North Carolina Rules of Civil Procedure, which states, in relevant part, that

[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

N.C. Gen. Stat. § 1A-1, Rule 13(a) (2011). Respondent argues that, pursuant to this rule, petitioner was required to pursue its foreclosure as

1. Joseph B. Williams did not file a notice of appeal from the Clerk's order and did not appear at the *de novo* hearing. He is not a party to this appeal.

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a counterclaim in the federal action. Since petitioner did not do so, respondent contends that N.C. Gen. Stat. § 1A-1, Rule 13(a) requires that the foreclosure action “must be either (1) dismissed with leave to file it in the former case or (2) stayed until the conclusion of the former case.” *Brooks v. Rogers*, 82 N.C. App. 502, 507, 346 S.E.2d 677, 681 (1986).

Respondent is mistaken. The North Carolina Rules of Civil Procedure do not apply to Federal Court proceedings. *See* N.C. Gen. Stat. § 1A-1, Rule 1 (2011) (“These rules shall govern the procedure in the superior and district courts *of the State of North Carolina* in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.” (emphasis added)). Consequently, N.C. Gen. Stat. § 1A-1, Rule 13(a) could not compel petitioner to pursue its foreclosure in the federal action.

The rules which govern whether petitioner’s foreclosure action was required to be filed as a compulsory counterclaim in the federal action are the *Federal* Rules of Civil Procedure. *See* Fed. R. Civ. P. 1 (2012) (“These rules govern the procedure in all civil actions and proceedings in the United States district courts[.]”). Although Fed. R. Civ. P. 13(a), which governs compulsory counterclaims in federal cases, is substantially the same as N.C. Gen. Stat. § 1A-1, Rule 13(a), it is subject to an important limitation. Under 28 U.S.C. § 2072, the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072 (2011).

In *Douglas v. NCNB Tex. Nat’l Bank*, 979 F.2d 1128 (5th Cir. 1992), the United States Court of Appeals for the Fifth Circuit considered whether Fed. R. Civ. P. 13(a) required a lender pursuing a foreclosure action by power of sale, which had been filed in Texas state court, to file the state foreclosure claim as a compulsory counterclaim in a federal case. The Court reasoned that

[u]nder Texas law, lenders have a substantive right to elect judicial or nonjudicial foreclosure in the event of a default, and debtors have no right to force the lender to pursue a judicial foreclosure remedy. Application of Rule 13(a) in the instant case would abridge the lender’s substantive rights and enlarge the debtor’s substantive rights.

Id. at 1130. Thus, the Court concluded, 28 U.S.C. § 2072 mandated that Fed. R. Civ. P. 13(a) could not apply to the lender’s foreclosure action. *Id.*

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In North Carolina, as in Texas, there are two methods of pursuing a foreclosure: foreclosure by judicial action and foreclosure by power of sale. *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 97, 392 S.E.2d 410, 411 (1990).

A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial. General Statute 45-21.16 requires a hearing before the clerk of court to determine specified issues prior to authorizing the trustee to proceed with the sale. At the hearing the clerk is required to determine four facts: (i) a valid debt; (ii) a default; (iii) the trustee's right to foreclose under the deed of trust; and (iv) sufficient notice to the debtor. G.S. 45-21.16(d). Unless there is an upset bid as provided in G.S. 45-21.27, there is no legal requirement that the clerk either confirm the sale or direct the execution of a trustee's deed as a prerequisite to legal consummation of such sale by the trustee. Sales conducted pursuant to Article 2A of Chapter 45 are not pursuant to judicial action; the article does not affect any right to foreclosure by action in court, and is not applicable to any such action.

Id. at 98, 392 S.E.2d at 411-12 (internal citations omitted).

In the instant case, petitioner initiated the foreclosure by the power of sale provision that was included in the section regarding the remedies of the beneficiary in the deed of trust secured by respondent's property. If petitioner were required to pursue respondent's foreclosure as a compulsory counterclaim in the federal action, its contractual right to avail itself of the expedited procedure provided for lenders in a foreclosure by power of sale would be lost.

Respondent contends that the reasoning of *Douglas* is inapplicable to the instant case because "[t]he Texas foreclosure statute provides for a pure contract right of foreclosure that is not subjected to any form of judicial review, and in which the Clerk merely holds the paperwork for a very short time." Respondent further contends that foreclosure by power of sale in North Carolina "is not a 'pure' contract right that can be abridged as the Texas non-judicial foreclosure" because "[f]oreclosure under power of sale in North Carolina . . . is still governed by a judicial process, overseen and approved by the Clerk of Court, who acts with the full authority of the Superior Court."

Respondent mischaracterizes the purpose of the notice and hearing requirements in N.C. Gen. Stat. § 45-21.16. As this Court has previously explained,

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[h]istorically, foreclosure under a power of sale has been a private contractual remedy. The intent of the 1975 General Assembly in enacting the notice and hearing provisions of G.S. 45-21.16 *was not to alter the essentially contractual nature of the remedy*, but rather to satisfy the minimum due process requirements of notice to interested parties and hearing prior to foreclosure and sale which the district court in *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), held that our then existing statutory procedure lacked.

In re Foreclosure of Burgess, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980)(emphasis added and internal citations omitted). Thus, the notice and hearing provisions in N.C. Gen. Stat. § 45-21.16 do not alter the contractual nature of a foreclosure by power of sale in North Carolina. Consequently, requiring petitioner to pursue its foreclosure as a counterclaim in the federal action “would abridge the lender’s substantive rights and enlarge the debtor’s substantive rights.” *Douglas*, 979 F.2d at 1130. Therefore, we hold that, pursuant to 28 U.S.C. § 2072, Fed. R. Civ. Pro. 13(a) does not apply to petitioner’s foreclosure by power of sale and thus, did not require petitioner to file the foreclosure action as a compulsory counterclaim in the federal action. Respondent’s argument is overruled.

III. Conclusion

Since petitioner was not required to pursue the foreclosure action as a compulsory counterclaim in the federal action, N.C. Gen. Stat. § 1A-1, Rule 13(a) does not control and the foreclosure could not be stayed on that basis.² The superior court properly lifted the stay, dismissed respondent’s appeal of the Clerk’s order, and allowed the foreclosure to proceed. The trial court’s order is affirmed.

Affirmed.

Judges STEELMAN and BEASLEY concur.

2. We offer no opinion on the applicability, if any, of N.C. Gen. Stat. § 1A-1, Rule 13(a), and the cases which apply it, to a State court action that should have been brought as a compulsory counterclaim in Federal court, as that issue is not before us.

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IN THE MATTER OF HENRY EDWARD MURDOCK

No. COA12-79

(Filed 7 August 2012)

1. Appeal and Error—appealability—mootness—prior discharge— involuntary commitment

Although defendant's term of involuntary commitment was expired, a prior discharge would not render questions challenging the involuntary commitment proceeding moot.

2. Mental Illness— involuntary commitment—violent crime— fact-based analysis—resisting an officer—assault with deadly weapon

The trial court did not err in an involuntary commitment case by conducting a fact-based analysis in determining whether defendant was charged with a violent crime under N.C.G.S. § 15A-1003(a). Based on the underlying factual scenario giving rise to defendant's charges, the trial court did not err by concluding that defendant was charged with a violent crime because the crime of resisting an officer involved an assault with a deadly weapon.

Appeal by defendant from orders entered 16 September 2010 by Judge Richard T. Brown in Scotland County District Court. Heard in the Court of Appeals 6 June 2012.

Roy Cooper, Attorney General, by Richard Slipsky, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Emily H. Davis, Assistant Appellate Defender, for defendant-appellant.

THIGPEN, Judge.

Henry Edward Murdock ("Defendant") appeals from two involuntary commitment orders following the determination that he was incapable of proceeding to trial. We must decide whether the trial court erred by concluding that Defendant was charged with a violent crime pursuant to N.C. Gen. Stat. § 15A-1003(a) (2011). We hold the trial court did not err by conducting a fact-based analysis in determining whether Defendant was charged with a violent crime under N.C. Gen. Stat. § 15A-1003(a). We further hold that based on the underlying factual scenario giving rise to Defendant's charges, the

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trial court did not err by concluding that Defendant was charged with a violent crime. Accordingly, we affirm.

I. Factual and Procedural Background

On 5 October 2009, Defendant was indicted for possession of a firearm by a felon, misdemeanor resisting an officer, and habitual felon status. Defendant's counsel moved to have his client evaluated to determine his capacity to proceed to trial. A capacity hearing was held on 15 September 2010. The State presented evidence, including a report from Dr. David Hattem, a psychologist who had evaluated Defendant. Dr. Hattem's report concluded that Defendant lacked capacity to proceed, and the trial court found Defendant incapable of proceeding to trial. The trial court then conducted a hearing pursuant to N.C. Gen. Stat. § 15A-1003 to determine whether Defendant met the criteria for involuntary commitment.

At the N.C. Gen. Stat. § 15A-1003 hearing, James Munger, an officer with the Laurinburg Police Department, testified that on 16 July 2009, he and Officer Wilkerson went to Defendant's residence to serve a trespassing warrant on Defendant. When they arrived, Defendant was sitting on the porch drinking a beer. The officers advised Defendant that they were there to arrest him for trespassing. Defendant became agitated, said he wasn't going, and ran into the house. The officers followed him into the back bedroom where Officer Wilkerson observed an open lock box on the bed and yelled, "gun." The lock box contained a loaded revolver that was within "hand's reach" of Defendant. Officer Munger grabbed Defendant and a "tussle" ensued. Defendant was subsequently taken to the ground and handcuffed. Officer Munger testified that Defendant resisted when he removed Defendant from the bedroom, and Defendant also resisted while being handcuffed. As a result of the events on 16 July 2009, Defendant was charged with possession of a firearm by a felon and misdemeanor resisting an officer.

Based on the evidence presented at the N.C. Gen. Stat. § 15A-1003 hearing, the trial court found that Defendant was incapable of proceeding and had been charged with a violent crime. The trial court also made the following findings in its 16 September 2010 involuntary commitment orders:

[Defendant] is charged with a violent crime in violation of [N.C. Gen. Stat.] 14-415.1; 14-223, in that the Def[endant] upon being informed that he was to be arrested, fled from the officers by

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moving from his porch to his bedroom, where the officers in immediate pursuit, found the Def[endant] within arms reach of a firearm; that the Def[endant], again within arms reach of the firearm, fought with the officers as they attempted to arrest him.

The trial court ordered Defendant taken into custody and transported to Cherry Hospital, a 24-hour facility, for “temporary custody, examination and treatment pending a district court hearing.”

On 10 October 2011, Defendant filed a petition for writ of certiorari seeking review of the 16 September 2010 involuntary commitment orders. This Court entered an order granting Defendant’s petition on 25 October 2011.

Defendant’s sole argument on appeal is that the trial court erred by concluding that Defendant was charged with a violent crime pursuant to N.C. Gen. Stat. § 15A-1003(a). Specifically, Defendant contends the trial court erred by applying a fact-based analysis in determining whether Defendant was charged with a violent crime.

II. Analysis

[1] As a preliminary matter, we note that although Defendant’s term of involuntary commitment has expired,¹ “a prior discharge will not render questions challenging the involuntary commitment proceeding moot.” *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472 (2009) (citation and quotation marks omitted). “When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot.” *Id.* at 217, 689 S.E.2d at 472-73 (citation omitted). We, therefore, address the merits of this appeal.

“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*.” *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009) (quotation marks omitted), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010). “In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute.” *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations omitted). “Dictionaries may be used to determine the plain meaning of words.” *Moore v. Proper*, ___ N.C.

1. At the district court commitment hearing on 23 September 2010, Defendant was committed for a period not to exceed 90 days. On 16 December 2010, Defendant was discharged into the custody of the sheriff.

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App. ____, ____, 715 S.E.2d 586, 594 (2011) (quotation omitted), *aff'd in part and remanded*, ____, N.C. ____, 726 S.E.2d 812 (2012). “Courts also ascertain legislative intent from the policy objectives behind a statute’s passage and the consequences which would follow from a construction one way or another.” *Electric Supply*, 328 N.C. at 656, 403 S.E.2d at 294 (citation and quotation marks omitted).

[2] N.C. Gen. Stat. § 15A-1003 governs the referral of an incapable defendant for civil commitment proceedings and provides in relevant part:

If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge’s custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found incapable of proceeding.

N.C. Gen. Stat. § 15A-1003(a).

Defendant contends the term “violent crime” in N.C. Gen. Stat. § 15A-1003(a) indicates the legislature’s intent to look at the elements of the offense charged in determining what constitutes a violent crime rather than looking at the underlying facts of the case. Thus, Defendant contends the trial court erred by applying a fact-based analysis instead of an elements-based analysis in determining whether Defendant was charged with a violent crime. The State, however, argues that N.C. Gen. Stat. § 15A-1003(a) “allows for either a fact based analysis or an element based analysis”; thus, the trial court did not err. We agree with the State.

The relevant portion of N.C. Gen. Stat. § 15A-1003(a) uses the words “violent crime” followed by the parenthetical phrase “including a crime involving assault with a deadly weapon[.]” First, we must determine whether the legislature intended the words “violent crime” to mean an element based offense or a factually based offense.

Black’s Law Dictionary defines “violent crime” as “[a] crime that has *as an element* the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another.” Black’s Law Dictionary 378 (7th ed. 1999) (citation omitted) (emphasis added). Thus, the definition of violent crime suggests that the legislature intended for courts to apply an elements-based analysis under N.C. Gen. Stat. § 15A-1003(a). *See also State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) (holding that “[t]he General Assembly’s repeated use of the term ‘conviction’ compels us

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to conclude that, when making a determination pursuant to N.C.G.S. § 14-208.40A [of whether the defendant committed an ‘aggravated offense’ for purposes of sex offender monitoring], the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction”), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010).

However, our analysis does not end here. We must also look to the parenthetical phrase of N.C. Gen. Stat. § 15A-1003(a) which states, “including a crime involving assault with a deadly weapon[.]” In interpreting the parenthetical phrase, we find a comparison to N.C. Gen. Stat. § 15A-2000(e)(3) instructive. N.C. Gen. Stat. § 15A-2000(e) (2011) lists the aggravating circumstances that may be considered in determining whether a defendant found guilty of a capital felony should be sentenced to death or life imprisonment, including that “[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person[.]” N.C. Gen. Stat. § 15A-2000(e)(3). In interpreting N.C. Gen. Stat. § 15A-2000(e)(3), our Supreme Court has stated:

The statute does not state that the jury may only consider as an aggravating circumstance those felonies in which the use or threat of violence to the person is an element of the offense. The statute contains the word “involving,” which indicates an interpretation much more expansive than one restricting the jury to consider only felonies having the use or threat of violence to the person as an element. Crimes that do not have violence as an element may be committed by the use or threat of violence. By using “involving” instead of language delimiting consideration to the narrow class of felonies in which violence is an element of the offense, we find the legislature intended the prior felony in N.C.G.S. 15A-2000(e)(3) to include any felony whose commission involved the use or threat of violence to the person. Thus we hold that for purposes of N.C.G.S. 15A-2000(e)(3), a prior felony can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but *the use or threat of violence to the person was involved in its commission*.

State v. McDougall, 308 N.C. 1, 18, 301 S.E.2d 308, 319 (internal citation omitted) (emphasis added), *cert. denied*, 464 U.S. 865, 104 S. Ct. 197, 78 L.Ed.2d 173 (1983).

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Following *McDougall*, we conclude that the legislature's inclusion of the parenthetical phrase in N.C. Gen. Stat. § 15A-1003(a) and its use of the word "involving" indicate an intent for courts to apply a fact-based analysis. We note, however, that the term "involving" is used only in the parenthetical phrase. We believe the legislature's choice to use the term "involving" only in the parenthetical phrase indicates its intent for a fact-based analysis to apply only to the determination of whether assault with a deadly weapon was involved in the commission of the crime charged.

Accordingly, considering the entirety of the relevant statutory language, we hold that in determining whether a defendant is charged with a violent crime pursuant to N.C. Gen. Stat. § 15A-1003(a), courts may consider the elements of the offense a defendant is charged with and the underlying factual scenario giving rise to the charge. However, pursuant to the plain language of N.C. Gen. Stat. § 15A-1003(a), in conducting the fact-based analysis, courts are to determine only whether the crime charged involved assault with a deadly weapon. Thus, we hold that for purposes of N.C. Gen. Stat. § 15A-1003(a), a "violent crime" can be either one which has as an element "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another[,]" Black's Law Dictionary 378, or a crime which does not have violence as an element, but assault with a deadly weapon was involved in its commission.

In this case, Defendant was charged with possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1 and resisting an officer pursuant to N.C. Gen. Stat. § 14-223. Violence is not an element of either of these offenses. *See State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (stating that the elements of possession of a firearm by a felon are that "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm"), *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007); *see also State v. Hardy*, 298 N.C. 191, 197, 257 S.E.2d 426, 430 (1979) (analyzing N.C. Gen. Stat. § 14-223 and stating that "[v]iolence or direct force is not necessarily an element of the crime of resisting an officer"). Thus, in applying an elements-based analysis, neither of the crimes Defendant was charged with is a violent crime.

However, in applying a fact-based analysis, we examine the underlying facts giving rise to Defendant's charges to determine whether assault with a deadly weapon was involved in the commission of the crimes. The elements of assault with a deadly weapon are: (1) an assault of a person; (2) with a deadly weapon. N.C. Gen. Stat.

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§ 14–33(c)(1) (2011). A gun is a deadly weapon. *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924). Our Supreme Court defines the common law offense of assault as follows:

an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Roberts, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (quotation marks and citations omitted).

In this case, based on the underlying factual scenario giving rise to Defendant’s charges, we believe an assault with a deadly weapon was involved in the commission of the crime of resisting an officer. Specifically, Defendant’s actions of stating that he wasn’t going with the officers, running into the bedroom where he stood within arm’s reach of a loaded revolver, and resisting while being handcuffed and removed from the bedroom were an “unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to” the officers. *Id.*; see also *State v. Barksdale*, 181 N.C. App. 302, 307, 638 S.E.2d 579, 583 (2007) (holding that “we are not persuaded by defendant’s contention that an assault did not take place because he never ‘made physical contact with the weapon.’ In light of the evidence showing that the gun was only inches from defendant’s outstretched hand and that defendant was actively, forcefully, and to some degree successfully resisting the officers’ attempt to arrest him, we do not believe, in light of our State’s definition of assault, that defendant’s failure to physically touch the weapon precludes the commission of an assault with the firearm.”) (citation omitted).

In sum, the trial court did not err by conducting a fact-based analysis in determining whether Defendant was charged with a “violent crime” pursuant to N.C. Gen. Stat. § 15A-1003(a). Furthermore, based on the underlying factual scenario giving rise to Defendant’s charges, the trial court did not err by concluding that Defendant was charged with a violent crime because the crime of resisting an officer involved an assault with a deadly weapon.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

IN THE COURT OF APPEALS

LAMB v. D.S. DUGGINS WELDING, INC.

[222 N.C. App. 52 (2012)]

JASON B. LAMB AND ANDREA LAMB, PLAINTIFFS v. D.S. DUGGINS WELDING, INC.
AND MABE STEEL, INC., DEFENDANTS

No. COA12-129

(Filed 7 August 2012)

Construction Claims—negligence—completed and accepted work doctrine

Where a sub-subcontractor completed its work on a construction project and the work was accepted by the general contractor, and where the condition of the work as completed by the sub-subcontractor was changed by the general contractor after the work had been accepted, the completed and accepted work doctrine applied to bar the recovery of damages in a negligence action by an employee of the general contractor against the sub-subcontractor.

Appeal by plaintiffs from Order entered 10 November 2011 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 6 June 2012.

Smith, James, Rowlett & Cohen, LLP, by Margaret Rowlett and Seth R. Cohen, for plaintiff-appellants.

Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers, Richard L. Pinto, and L. Lamar A. Armstrong, III, for defendant-appellee Mabe Steel, Inc.

BRYANT, Judge.

Where a sub-subcontractor completed its work on a construction project and the work was accepted by the general contractor, and where the condition of the work as completed by the sub-subcontractor was changed by the general contractor after the work had been accepted, the completed and accepted work doctrine applies to bar the recovery of damages in a negligence action by an employee of the general contractor against the sub-subcontractor.

Facts and Procedural History

This case arises out of an accident at a construction site that occurred on 18 December 2008. Evidence gathered during discovery reveals that plaintiff Jason B. Lamb (“Lamb”) has been employed by Lomax Construction, Inc. (“Lomax”) since 1999. In 2008, Lomax

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assigned Lamb to be site superintendent on a construction project to put an addition on the High Point Public Library in High Point, North Carolina. Lomax subcontracted with D.S. Duggins Welding, Inc. (“Duggins”) to install the steel decking on the project. In turn, Duggins subcontracted the installation of the steel decking to Mabe Steel, Inc. (“Mabe”).

During the installation of the steel decking, Duggins requested that Mabe also install a perimeter safety cable, as required by OSHA regulations. OSHA regulations require a safety cable to be installed at a height of forty-two (42) inches above the walking level and that the cable is able to withstand a force of at least 200 pounds in any outward or downward direction without deflecting more than three (3) inches. When Mabe installed the perimeter safety cable on the third floor, Mabe terminated the end of the cable by wrapping it around a vertical column near the wall of the existing structure and secured it with clamps and a turnbuckle. On the columns between the termination points, Mabe threaded the cable through pre-existing holes in the columns or, where there were no pre-existing holes, field welded nuts to the columns and threaded the cable through the holes in the nuts. The purpose of threading the cable through columns and nuts was to maintain the cable at the required height of forty-two (42) inches above the walking level. Mabe completed the installation of the steel decking and perimeter safety cable by 13 October 2008.

At some point after Mabe left the construction project, the column to which Mabe terminated the third floor safety cable was removed. As a result, Lomax employees moved the termination point of the third floor safety cable to an adjacent column at the direction of Lamb. However, instead of wrapping the cable around the column and securing it, as it was previously terminated by Mabe, the Lomax employees terminated the safety cable to a nut Mabe had welded onto the column.

As site superintendent of the construction project, one of Lamb’s duties was to inspect the perimeter safety cables. Lamb performed this duty everyday. On 18 December 2008, Lamb was testing the deflection of the third floor safety cable by applying weight to it when the weld attaching the nut to the column broke and the cable fell slack. As a result, Lamb lost his balance and fell over the edge of the third floor to the ground below, sustaining severe injuries.

Lamb and his wife, Andrea Lamb, filed suit against Duggins and Mabe on 30 August 2010 in Randolph County Superior Court alleging

negligence and loss of consortium. Mabe timely answered plaintiffs' complaint on 10 November 2010. Duggins failed to answer plaintiffs' complaint and upon plaintiffs' filing of a motion and affidavit for entry of default on 5 November 2010, entry of default was entered against Duggins. Following a period of discovery, Mabe filed a motion for summary judgment on 8 September 2011 on the grounds that plaintiffs' claims against Mabe "are barred by the principles surrounding the completed and accepted work doctrine, by the applicable case precedent concerning the legal responsibility of a contractor to the employees of another contractor, and by principles of proximate cause as a matter of law." Following a 31 October 2011 hearing, Judge Long granted Mabe's motion for summary judgment on 8 November 2011. The order was filed 10 November 2011. Plaintiffs appeal.

On appeal, plaintiffs raise the issue of whether the trial court erred in granting Mabe's Motion for Summary Judgment.

"Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, 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." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001) (citation omitted). The purpose of summary judgment is to "eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Id.* (citation omitted).

"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, 523-24, 649 S.E.2d 382, 385 (2007)). "On appeal from summary judgment, we review the evidence in the light most favorable to the nonmoving party." *Griggs v. Shamrock Bldg. Services, Inc.*, 179 N.C. App. 543, 546, 634 S.E.2d 635, 637 (2006) (citation omitted). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996) (citing *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)).

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“In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury.” *Hahne v. Hanzel*, 161 N.C. App. 494, 497-98, 588 S.E.2d 915, 917 (2003) (emphasis and citation omitted). However, “[a]s a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant but should be resolved by trial in the ordinary manner.” *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980) (internal quotation and citation omitted). But, “where the facts are undisputed, [t]he issue of whether a duty exists is a question of law for the court.” *Finley Forest Condominium Ass’n v. Perry*, 163 N.C. App. 735, 739, 594 S.E.2d 227, 230 (2004) (citation omitted).

In the case *sub judice*, the material facts are undisputed. Thus, we must determine whether Mabe is entitled to judgment as a matter of law. If plaintiffs’ recovery is precluded as a matter of law based on the completed and accepted work doctrine, the question of Mabe’s negligence need not be reached and summary judgment is appropriate. In granting Mabe’s motion for summary judgment, the trial court cited the holding of *Price v. Johnston Cotton Co. of Wendell, Inc.*, 226 N.C. 758, 40 S.E.2d 344 (1946), which applied the completed and accepted work doctrine, and determined that Mabe was entitled to judgment as a matter of law. Plaintiffs contend this finding was in error. Specifically, plaintiffs argue that the completed and accepted work doctrine does not apply in this case. In the alternative, plaintiffs argue that this case falls within an exception to the completed and accepted work doctrine. We disagree with both of plaintiffs’ contentions.

The completed and accepted work doctrine provides “that an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner.” *Id.* at 759, 40 S.E.2d at 344. Furthermore, the court noted that, “a fortiori, [an independent contractor] is not liable where . . . the injury is not due to the condition in which he left the work.” *Id.* at 759, 40 S.E.2d at 345.

While the completed and accepted work doctrine remains the law in North Carolina, it is rarely applied. *See Griggs*, 179 N.C. App. at 546, 634 S.E.2d at 637 (“Only three cases dealing with the completed and accepted rule have been decided by our appellate courts since 1946.”). But where we have addressed the completed and accepted work doctrine, we have limited its applicability to cases dealing with

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construction and repair contracts. See *Thrift v. Food Lion, Inc.*, 336 N.C. 309, 442 S.E.2d 504 (1994) (The “completed and accepted” doctrine does not apply to the delivery of goods.); *Griggs*, 179 N.C. App. 543, 634 S.E.2d 635 (The “completed and accepted” doctrine does not apply to service contracts.). Because the case *sub judice* involves a construction contract, we must examine whether the doctrine is applicable.

Plaintiffs contend that the completed and accepted work doctrine “does not apply . . . because [Lamb] was not a third party on the construction site but rather one of the people to whom Mabe owed a duty of safety.” In support of their argument, plaintiffs cite to the line of cases that establishes the “completed and accepted work” doctrine. In these cases, a third party filed suit against the general contractor for damages suffered as a result of a defect in construction. See, e.g., *Price*, 226 N.C. 758, 40 S.E.2d 344 (1946) (Owner of a tobacco barn hired defendant contractor to construct a platform to hold a kerosene tank, which later collapsed when plaintiff was filling the kerosene tank.). Plaintiffs note that the facts in the present case are different in that an employee of a general contractor, Lamb, has brought suit against a subcontractor, Mabe. Therefore, plaintiffs claim that Lamb is not a third party as required by the completed and accepted work doctrine.

Despite the fact that Lamb is an employee of the general contractor and Mabe is a subcontractor, we think the completed and accepted work doctrine applies. Plaintiffs, citing *Williams v. Charles Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496 (1936), argue that the completed and accepted work doctrine in negligence actions is based on the borrowed concept of privity from contracts law. In *Williams*, our Supreme Court noted that an independent contractor owed no duty to a third party on the grounds that there was no privity of contract. *Id.* at 597, 184 S.E. at 499. In the present case, evidence gathered through discovery reveals that Lomax subcontracted the installation of the steel decking to Duggins. Duggins in turn subcontracted the work to Mabe pursuant to a verbal agreement. Accordingly, Lamb, a Lomax employee, is a third party to the agreement between Duggins and Mabe. Because there was no contract between Lomax and Mabe, plaintiffs’ argument must fail.

Additionally, as noted *supra*, the *Price* court stated that “a for-tiori, [an independent contractor] is not liable where . . . the injury is not due to the condition in which he left the work.” *Price*, 226 N.C. at 759, 40 S.E.2d at 345. In the present case, there is no question that the perimeter safety cable was not in the same condition as it was when

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Mabe left the construction project. When Mabe installed the safety cable, it terminated the cable by wrapping it around a column near the existing building and then secured it with clamps and a turn-buckle. After Mabe left the project, Lomax employees, at the direction of Lamb, moved the termination point of the safety cable to the nut that Mabe had welded onto a column. Therefore, the “injury is not due to the condition in which [Mabe] left the work.”

Although no North Carolina case has ever addressed the issue of whether the completed and accepted work doctrine applies when an employee of a general contractor seeks damages against a subcontractor, other jurisdictions have. We find *Fischbach and Moore, Inc. v. Foxworth*, 246 Miss. 814, 152 So.2d 714 (1963), particularly on point and persuasive.

In *Fischbach*, an employee of a general contractor filed a negligence suit against an electrical subcontractor after he suffered an electrical shock when the steel ladder he was climbing came into contact with an electrical circuit that had been installed by the subcontractor. *Id.* at 816-17, 152 So.2d at 714-15. In reversing the decision of the lower court and finding in favor of the defendant subcontractor, the court noted that the completed and accepted work doctrine “is applied to subcontractors, so as to relieve them from liability to the original employer where their work has been finished and accepted by the original contractor.” *Id.* at 819, 152 So.2d at 716. In applying the completed and accepted work doctrine, Mississippi’s Supreme Court found that the electrical subcontractor was not liable and owed no duty to the employee of the general contractor where the subcontractor had completed and turned over its work on the construction project to the general contractor months before the accident and thereafter, a third party changed the condition of their work by removing a portion of the overlapping roof, causing the electrical circuit to be exposed. *Id.* at 820, 152 So.2d at 716.

In the instant case, where the material facts are similar to those in *Fischbach*, we find that the completed and accepted work doctrine does apply to prevent an employee of a general contractor from recovering damages from a subcontractor after the subcontractor had completed their work, the general contractor had accepted the work, and the subcontractor owed no further duty to the general contractor.

Plaintiffs also contend that, if the completed and accepted work doctrine applies, the present case falls under an exception to the doctrine. In *Price*, the court acknowledged that

“[t]here are also well recognized exceptions to the general rule, one of which is that the contractor is liable where . . . the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided . . . the contractor knows, or should know, of the dangerous situation created by him, and the owner or contractee does not know of the dangerous condition or defect and would not discover it by reasonable inspection.”

Price, 226 N.C. at 759, 40 S.E.2d at 345 (citation omitted). “Our Supreme Court has stated that an object is ‘imminently dangerous’ if injury will reasonably occur when the object is used for its declared purpose.” *Nifong*, 121 N.C. App. at 769, 468 S.E.2d at 465 (citing *Rulane Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 274, 56 S.E.2d 689, 693 (1949)). See also *Reynolds v. Manley*, 223 Ark. 314, 322, 265 S.W.2d 714, 719 (1954) (“ ‘There must be knowledge of a danger, not merely possible, but probable.’ ” (citation omitted)).

Evidence shows that the nut welded to the column by Mabe was not meant to be used to terminate the safety cable. The purpose of the nut was to maintain the perimeter safety cable at a height of forty-two (42) inches above the walking level, as required by OSHA regulations. As best we can determine from the evidence, the nut adequately performed this function. It was only after the termination point of the cable was moved to the nut and the nut was used in a manner that was unintended by Mabe that the 18 December 2008 fall occurred. Therefore, the nut as welded by Mabe was not imminently dangerous and plaintiffs’ argument is overruled.

Because we find that the completed and accepted work doctrine applies and that Mabe is entitled to judgment as a matter of law, we need not address other possible grounds for summary judgment.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Judges STEPHENS and THIGPEN concur.

M SERIES REBUILD, LLC v. TOWN OF MOUNT PLEASANT

[222 N.C. App. 59 (2012)]

M SERIES REBUILD, LLC, PLAINTIFF v. TOWN OF
MOUNT PLEASANT, NC, DEFENDANT

No. COA12-194

(Filed 7 August 2012)

1. Civil Procedure—motion to dismiss—summary judgment

Although plaintiff contended the trial court considered defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) but erroneously also utilized a summary judgment standard in making its conclusions, neither defendant's motion nor the trial court's order cited any particular rule other than N.C.G.S. § 159-28.

2. Immunity—sovereign immunity—breach of contract—unjust enrichment

The trial court did not err by granting defendant Town's motion dismissing plaintiff's breach of contract and unjust enrichment claims. Although plaintiff raised a breach of contract claim, plaintiff conceded on appeal that an enforceable contract could not exist with defendant because there was no written agreement with a pre-audit certificate as required of all contracts with municipalities under N.C.G.S. § 159-28. Likewise, plaintiff's complaint made no allegations regarding any pre-audit certification as required by N.C.G.S. § 159-28(a). No valid contract was formed between plaintiff and defendant and defendant therefore did not waive its sovereign immunity to be sued for contract damages. The trial court did not have jurisdiction over defendant on the claim for unjust enrichment.

3. Immunity—sovereign immunity—notice

Even assuming for purposes of argument that defendant was required to plead a defense of sovereign immunity, contrary to plaintiff's arguments, defendant did plead sovereign immunity in its answer. Defendant's fourth defense gave plaintiff sufficient notice that defendant was asserting plaintiff's failure to comply with the requirements of N.C.G.S. § 159-28(a), and thus, the defense of sovereign immunity as it existed in the context of plaintiff's allegations.

Appeal by plaintiff from order entered 24 January 2012 by Judge William G. Hamby, Jr. in District Court, Cabarrus County. Heard in the Court of Appeals 7 June 2012.

M SERIES REBUILD, LLC v. TOWN OF MOUNT PLEASANT

[222 N.C. App. 59 (2012)]

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for plaintiff-appellant.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant-appellee.

STROUD, Judge.

M Series Rebuild, LLC, (“plaintiff”) appeals from a trial court’s order granting the Town of Mount Pleasant’s (“defendant”) motion and dismissing plaintiff’s claims. For the foregoing reasons, we affirm the trial court’s order.

I. Background

Plaintiff filed a complaint on 17 August 2011 alleging the following: In early 2011, plaintiff contacted Chief Chris Honeycutt with the Mount Pleasant Volunteer Fire Department, a subsidiary of the Town of Mount Pleasant, a municipal corporation located in North Carolina. Plaintiff offered to install a “prototype hydraulic steering system” in defendant’s M35A2C fire truck “at no charge” to defendant, and Chief Honeycutt accepted.

Prior to delivery of the truck to plaintiff, plaintiff received a call from “a representative of the Mt. Pleasant Volunteer Fire Department” requesting plaintiff to also do some minor repairs to the truck: to fix the left front axle seal, a broken u-bolt, and a door latch. In the course of installing the steering system, plaintiff found a number of other repairs that needed to be done. Plaintiff got approval from Chief Honeycutt to make repairs to the radiator. Plaintiff also discovered other additional repairs, including “rotted and cracked, damaged hoses, oil and fuel leaking around the filter canisters, and fuel leaking from several sections of the injector return line assembly” and notified “Sean,” a “representative” of the fire department. “Sean” approved the additional repairs and requested that plaintiff perform a routine service on the fire truck. These repairs were completed and the truck returned. Plaintiff sent an invoice to defendant for the work done, not including work installing the power steering system, totaling \$7,911.16. Plaintiff requested immediate payment, but defendant refused to pay. Based on these allegations, plaintiff raised claims for breach of contract and unjust enrichment. Plaintiff also included a copy of the invoice with its complaint.

Defendant filed its answer on 24 October 2011. Defendant admitted that plaintiff contacted Chief Honeycutt with an offer to install a

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hydraulic steering system on the fire truck and that Chief Honeycutt accepted. Defendant also admitted that plaintiff was asked to repair the left front axle seal, the broken u-bolt, and the door latch. Defendant further admitted that Chief Honeycutt gave plaintiff permission to fix the radiator. Defendant admitted to receipt of an invoice from plaintiff which it refused to pay in full but claims it offered to pay for the repairs it agreed to have done. However, defendant denied agreeing to any other additional repairs. Defendant asserted several defenses, *inter alia*, that plaintiff's complaint failed "to state a claim upon which relief can be granted." It also stated that "[t]he alleged contract upon which this action is based is illegal in that it does not comply with the pre[-]audit certificate requirements contained in N.C. Gen. Stat. § 159-28, as required by law. The alleged contract is thus invalid and unenforceable and this action is barred."

Following a hearing on defendant's motion, the trial court on 24 January 2012 entered an order dismissing plaintiff's claims. Plaintiff filed timely written notice of appeal on 25 January 2012. Plaintiff makes three arguments on appeal challenging the trial court's ruling regarding its claim for unjust enrichment: (1) the trial court erred in applying a summary judgment standard to defendant's motion to dismiss, (2) the trial court erred in dismissing plaintiff's unjust enrichment claim, and (3) the trial court erred in applying sovereign immunity.

II. Standard of Review

[1] Plaintiff argues that the trial court "apparently considered Defendant's Motion to Dismiss under Rule 12(b)(6)" but in error it also utilized a summary judgment standard in making its conclusions. Plaintiff concludes that "this Court should remand for the trial court to apply the appropriate motion to dismiss standard." Defendant counters that the trial court "did not err in considering this matter under a summary judgment standard as opposed to a motion to dismiss standard" because plaintiff's claims would fail under either standard.

In its answer, defendant raised as its "second defense" that "Plaintiff's Complaint fails to state a claim upon which relief can be granted, and it should therefore be dismissed." This is similar to the language of N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2011) (permitting a motion to dismiss for "[f]ailure to state a claim upon which relief can be granted."). Although the parties in their briefs before this Court treat the motion to dismiss as arising under Rule 12(b)(6), actually neither the defendant's motion nor the trial court's order as noted above cite any particular rule other than N.C. Gen. Stat. § 159-28.

M SERIES REBUILD, LLC v. TOWN OF MOUNT PLEASANT

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Plaintiff points us to this statement by the trial court to support its argument that the trial court erred by applying a summary judgment standard:

This Motion to Dismiss shall be determined *in the same manner as a Motion for Summary Judgment* where, as here, the pleadings and admissions of the parties show that there is no issue as to any material fact, and the factual allegations are considered in the light most favorable to the non-moving party.

(Emphasis added). Although the language of this statement is similar to the standard for summary judgment, *see Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84-85, 590 S.E.2d 15, 18 (2004) (stating the review for a ruling on a motion for summary judgment), an examination of the trial court's order shows that its ultimate ruling was based on defendant's "fourth defense" in its answer. Defendant's answer raised as its "fourth defense" that "[t]he alleged contract upon which this action is based is illegal in that it does not comply with the pre[-]audit certificate requirements contained in N.C. Gen. Stat. § 159-28, as required by law. The alleged contract is thus invalid and unenforceable and this action is barred." The trial court dismissed plaintiff's claims because there was no allegation of a valid contract between the parties, based on plaintiff's failure to comply with the requirements of N.C. Gen. Stat. § 159-28; without an allegation of a valid contract, plaintiff did not demonstrate that defendant had waived its sovereign immunity; and therefore, the trial court lacked jurisdiction over defendant. *See Arrington v. Martinez*, ____ N.C. App. ____, ____, 716 S.E.2d 410, 417 (2011) (stating that "[w]aiver of immunity must be established at the outset of a lawsuit."). Also, the parties' briefs address the issue of sovereign immunity. A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.¹

1. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982) (noting that "Courts have differed as to whether sovereign immunity is a matter of personal or subject matter jurisdiction"); *Green v. Kearney*, 203 N.C. App. 260, 264, 690 S.E.2d 755, 760 (2010) (stating that "the doctrine of sovereign immunity involves a question of personal jurisdiction rather than subject matter jurisdiction."); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009) (stating that "an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable."), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010); *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116-17 (1987) (stating that "Whether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction is an unsettled area of the law in North Carolina.").

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N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) permits a party to move for dismissal based on “[l]ack of jurisdiction over the subject matter[.]” and Rule 12(b)(2) permits dismissal based on “[l]ack of jurisdiction over the person[.]”

“Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo* Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].” *Peninsula Prop. Owners Ass’n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005) (citations and quotation marks omitted). The standard of review of the trial court’s decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court’s determination that the exercise of jurisdiction over defendants would be inappropriate. *See Stann v. Levine*, 180 N.C. App. 1, 22, 636 S.E.2d 214, 227 (2006).

Stacy v. Merrill, 191 N.C. App. 131, 134, 664 S.E.2d 565, 567 (2008). In cases where waiver is at issue, “it is irrelevant whether immunity implicates personal or subject matter jurisdiction. Because it is a jurisdictional matter, a plaintiff’s complaint must affirmatively demonstrate the basis for the waiver of immunity when suing a governmental entity which has immunity.” *Arrington*, ____ N.C. App. at ____, 716 S.E.2d at 417 (citation omitted). Therefore, we will apply the these standards to the parties’ substantive arguments to determine if plaintiff’s complaint “affirmatively demonstrate[d] the basis for the waiver of immunity[.]” *See id.*

We also note that the trial court in its order made findings of fact and conclusions of law. Plaintiff argues that the trial court incorrectly made “findings of fact” and “conclusions of law” upon which it based its order and that we should remand this case for the trial court to correct this error. However, findings of fact are generally not binding on appeal from a trial court’s ruling on motion to dismiss under Rule 12. The purpose of a motion to dismiss is to test law of a claim, not to resolve evidentiary conflicts. *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). As “[r]esolution of evidentiary conflicts is . . . not within the scope” of Rule 12, “[w]e are not bound by the trial court’s findings[.]” *Id.* Also, as noted above, we will use a *de novo* standard of review to address these issues. We next turn to address the parties’ substantive arguments.

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III. Trial Court's Dismissal

[2] Plaintiff argues that the trial court erred in dismissing the complaint because North Carolina law provides for recovery against a municipality on a claim for unjust enrichment.² Plaintiff relies on *Wing v. Town of Landis*, 165 N.C. App. 691, 599 S.E.2d 431 (2004), *Charlotte Lumber & Manufacturing Co. v. City of Charlotte*, 242 N.C. 189, 87 S.E.2d 204 (1955), and *Hawkins v. Town of Dallas*, 229 N.C. 561, 50 S.E.2d 561 (1948), to support its argument. Defendant, citing *Finger v. Gaston County*, 178 N.C. App. 367, 631 S.E.2d 171 (2006); *Data General*, 143 N.C. App. 97, 545 S.E.2d 243 (2001); and *L&S Leasing v. City of Winston-Salem*, 122 N.C. App. 619, 471 S.E.2d 118 (1996), argues that plaintiff is not entitled to an unjust enrichment award because N.C. Gen. Stat. § 159-28(a) requires a signed pre-audit certificate in order to be a valid contract, plaintiff failed to adhere to the requirements of this statute, and without a valid contract plaintiff cannot recover under a claim of unjust enrichment.

N.C. Gen. Stat. § 159-28(a) (2011) outlines requirements to enter into a valid contract with a local government or corporate municipality:

No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year. . . . If an obligation is evidenced by a contract or agreement requiring the payment of money .

. . the contract [or] agreement . . . shall include on its face a certificate stating that the instrument has been preaudited The certificate . . . shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board An obligation incurred in violation of this subsection is invalid and may not be enforced. . . .

2. While plaintiff admits that it “dismissed its claim for breach of contract at the hearing,” this Court was not provided a transcript of the hearing. Plaintiff makes no argument on appeal challenging the trial court’s dismissal of its claims for breach of contract. Therefore, any argument regarding the dismissal of plaintiff’s breach of contract claim has been abandoned. *See* N.C.R. App. P. 28(b)(6) (stating that “Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). Accordingly, this Court will limit its analysis to plaintiff’s unjust enrichment claim.

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Therefore, if there is no pre-audit certificate, or if that certificate is not signed by the appropriate individual, then the local government has not entered into a valid contract. *See Id.* “The language of [N.C. Gen. Stat. § 159-28(a)] makes the pre-audit certificate a *requirement* when a town will have to satisfy an obligation in the fiscal year in which a contract is formed.” *Myers v. Town of Plymouth*, 135 N.C. App. 707, 713, 522 S.E.2d 122, 126 (1999) (emphasis in original), *disc. review improvidently allowed*, 352 N.C. 670, 535 S.E.2d 355 (2000).

This Court in *Data General* addressed the issues of whether the plaintiff had followed the requirements of N.C. Gen. Stat. § 159-28 to show that the defendant had entered into a contract, waiving its sovereign immunity, and whether waiver of immunity could be established by a *quasi* or implied contract claim. In that case, the plaintiff, Data General Corporation, and the defendant, Durham County, signed a written lease agreement for computer hardware and software. 143 N.C. App. at 99, 545 S.E.2d at 245. The plaintiff brought claims for, *inter alia*, breach of contract, *quantum meruit*, and estoppel, when the defendant did not exercise the purchase option after having made the agreed-upon payments. *Id.* The defendant brought a motion to dismiss based on sovereign immunity and a lack of personal jurisdiction or subject matter jurisdiction pursuant to Rules 12(b)(1) and (b)(2), but the trial court denied its motion. *Id.* On appeal, the defendant’s argued that trial court erred in denying its motion to dismiss because it did not waive sovereign immunity. *Id.* In considering the defendant’s immunity as it related to the plaintiff’s claim for breach of contract, this Court stated, “It is 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 to sovereign immunity.” *Id.* This Court noted, however, that “a government entity may waive its governmental immunity . . . [when it] purchases liability insurance [*or when*] . . . the entity enters into a valid contract.” *Id.* (emphasis added). This Court further stated that

[i]n [*Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976)], our Supreme Court held that “whenever the State of North Carolina, through its authorized officers and agencies, enters into a *valid* contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.” *Id.* at 320, 222 S.E.2d at 423-24 (Emphasis added.) That is, in the absence of a valid contract, a state entity may not be subjected to contractual liability. *See id.* at 310, 222 S.E.2d at 417 (citing 72 Am. Jur. 2d *States, Etc.* § 88 (1974)).

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“N.C. Gen. Stat. § 159-28(a) sets forth the requirements and obligations that must be met before a county may incur contractual obligations.” *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 407, 399 S.E.2d 758, 759 (1991); N.C. Gen. Stat. § 159-28 (1994). N.C. Gen. Stat. § 159-28(a) requires in part that for any county obligation “evidenced by a contract or agreement requiring the payment of money . . . for supplies and materials,” such contract or agreement “shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection.” N.C. Gen. Stat. § 159-28(a). The statute further provides a form certificate with which the required preaudit certificate must substantially conform, and states that “an obligation incurred in violation of this subsection is invalid and may not be enforced.” *Id.* Where a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail. *See Cincinnati Thermal Spray*, 101 N.C. App. at 408, 399 S.E.2d at 759.

Data General, 143 N.C. App. at 102-03, 545 S.E.2d at 247 (emphasis in original). This Court then held that since

there is insufficient evidence in the record that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, we conclude that no valid contract was formed between Data General and Durham County, and Durham County therefore has not waived its sovereign immunity to be sued (and Data General may not maintain a suit) for contract damages.

Id. at 103, 545 S.E.2d at 247-48. Therefore, this Court held the trial court lacked jurisdiction and dismissed the plaintiff’s breach of contract claim. *Id.*

This Court then considered the defendant’s sovereign immunity as it pertained to the plaintiff’s “*quantum meruit* and estoppel” claims. *Id.* at 103, 545 S.E.2d at 248. This Court stated,

Quantum meruit operates as an equitable remedy based upon a quasi contract or a contract implied in law, such that a party may recover for the reasonable value of materials and services rendered in order to prevent unjust enrichment. In *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998), our Supreme Court declined to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of *quantum meruit*, and we decline to do so here.

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Id. (citation and quotation marks omitted). This Court then explained that because it had already found that there was no valid contract, there was no waiver of sovereign immunity; therefore, this Court stated,

As Durham County enjoys [sovereign] immunity with respect to these claims, the trial court was therefore without . . . jurisdiction over Durham County as to Data General's claims based on *quantum meruit* and estoppel.

Id. at 104, 545 S.E.2d at 248 (citation and quotation marks omitted).

This Court is unable to distinguish the case at hand from *Data General*.³ First, we note that although plaintiff raised a breach of contract claim, plaintiff concedes on appeal that “an enforceable contract cannot exist with Defendant because there is no written agreement with a pre[-]audit certificate as required of all contracts with municipalities under N.C. Gen. Stat. § 159-28.” Likewise, plaintiff’s complaint makes no allegations regarding any pre-audit certification as required by N.C. Gen. Stat. § 159-28(a). Therefore, we need not go through any analysis regarding plaintiff’s adherence to the requirements of N.C. Gen. Stat. § 159-28(a). This also means that “no valid contract was formed between” plaintiff and defendant and defendant “therefore has not waived its sovereign immunity to be sued . . . for contract damages[.]” *See id.* at 103, 545 S.E.2d at 247-48. In contrast to *Data General*, which addressed a claim for *quantum meruit*, which is “based upon a quasi contract or a contract implied in law, such that a party may recover for the reasonable value of materials and services rendered in order to prevent unjust enrichment[.]” *see id.* at 103, 545 S.E.2d at 248, here, plaintiff raised a claim for unjust enrichment. But like *quantum meruit*, unjust enrichment “is a claim in quasi contract or contract implied in law” which arises when a party “confers a benefit upon another which is not required by a contract either express or implied [in fact] or a legal duty [and] the recipient thereof is . . . unjustly enriched and [is] required to make restitution therefor.” *D.W.H. Painting Co. v. D.W. Ward Constr. Co.*, 174 N.C. App. 327, 334, 620 S.E.2d 887, 892 (2005) (citations and quotation marks omitted). Therefore, based on the reasoning in *Data General* and *Whitfield*, we decline “to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of” unjust enrichment. *See Data General*, 143 N.C. App. at 103, 545 S.E.2d at 248. Accordingly, as plaintiff did not make any allegations estab-

3. Because we find *Data General* indistinguishable from the case before us, we need not address the other cases cited by defendant in support of its argument.

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lishing a valid contract pursuant to N.C. Gen. Stat. § 159-28, defendant did not waive its sovereign immunity, and the trial court did not have jurisdiction over defendant on the claim for unjust enrichment. *See Stacy*, 191 N.C. App. at 134, 664 S.E.2d at 567; *Arrington*, ___ N.C. App. at ___, 716 S.E.2d at 417. Thus, we affirm the trial court's dismissal of that claim.

Plaintiff urges this Court to follow this Court's reasoning in *Wing*. In *Wing*, the plaintiff, a developer, hired an engineer at a cost of \$22,469.00 in early 2001 to complete an application for the extension of the defendant-town's water service to his development, which was sent to the North Carolina Department of Environmental and Natural Resources ("DENR") for approval on 14 May 2001. 165 N.C. App. at 691-92, 599 S.E.2d at 432. DENR approved the extension on 3 January 2002, so defendant-town notified the plaintiff, but the plaintiff's agent informed the defendant-town that the plaintiff no longer needed the extension. *Id.* The plaintiff brought a breach of contract claim and an unjust enrichment claim against defendant-town, both for \$22,469.00. *Id.* Plaintiff relies heavily on this Court's statement in *Wing*: "A party may recover from a municipality under a *quantum meruit* theory upon a proper showing," 165 N.C. App. at 693-94, 599 S.E.2d at 433, but *Wing* is an inappropriate precedent to follow for this case. First, the *Wing* Court stated that since the defendant had not raised sovereign immunity, it was not going to address that issue. *Id.* at 694 n.1, 599 S.E.2d at 433 n.1. Here, the central issue is that plaintiff failed to properly allege that defendant waived its sovereign immunity by entering into a valid contract, and defendant raised this defense in its answer. Secondly, *Wing* was concerned with the application of N.C. Gen. Stat. § 160A-16, which states, "All contracts made by or on behalf of a city shall be in writing. A contract made in violation of this section shall be void and unenforceable unless it is expressly ratified by the council," whereas the case at hand is concerned with the specific requirements of N.C. Gen. Stat. § 159-28 and sovereign immunity. As noted above, "[t]he language of [N.C. Gen. Stat. § 159-28(a)] makes the pre-audit certificate a *requirement* when a town will have to satisfy an obligation in the fiscal year in which a contract is formed." *Myers*, 135 N.C. App. at 713, 522 S.E.2d at 126. N.C. Gen. Stat. § 159-28 was inapplicable in *Wing* because the alleged contract was created in 2001 while the obligation to pay was created in 2002. *Wing*, 165 N.C. App. at 692, 599 S.E.2d at 432. The case at hand, however, involves an alleged contract and obligation to pay both created in the same fiscal year. *See Myers*, 135 N.C. App. at 713, 522 S.E.2d at 126. In making its

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statement regarding *quantum meruit*, the Court in *Wing* relied on *Charlotte Lumber & Manufacturing Co. v. City of Charlotte*, 242 N.C. 189, 87 S.E.2d 204 (1955) and *Hawkins v. Town of Dallas*, 229 N.C. 561, 50 S.E.2d 561 (1948), upon which plaintiff also relies in its argument. However, these cases were decided before N.C. Gen. Stat. § 159-28 was enacted and thus did not address the effect of that statute. Therefore, plaintiff's argument is overruled and we affirm the dismissal of plaintiff's claims.

IV. Affirmative defense

[3] Plaintiff further argues that *DeMurry v. Department of Corrections*, 195 N.C. App. 485, 673 S.E.2d 374 (2009) requires that a state actor must plead the affirmative defense of sovereign immunity in order to be afforded its protection in a contract claim. In support of its argument that the trial court in error relied upon sovereign immunity when defendant did not affirmatively plead that defense, plaintiff points us to this portion of the trial court's order:

The Court does NOT have jurisdiction over the Defendant Town for an equitable claim of quasi-contract, quantum meruit, estoppel or unjust enrichment, since such a claim presupposes that there was no specific valid contract, and therefore no waiver of sovereign immunity by the Defendant Town.

But even were we to assume for purposes of argument that defendant was required to plead a defense of sovereign immunity, contrary to plaintiff's arguments, defendant did plead sovereign immunity in its answer. In its "fourth defense" defendant's answer states that "[t]he alleged contract upon which this action is based is illegal in that it does not comply with the pre[-]audit certificate requirements contained in N.C. Gen. Stat. § 159-28, as required by law. The alleged contract is thus invalid and unenforceable and this action is barred." N.C. Gen. Stat. § 1A-1, Rule 8 sets forth the general rules of pleadings, including the requirements for "(a) Claims for relief" and "(c) Affirmative defenses." We have stated that

[t]he language in Rule 8(a), dealing with general pleading, and that in Rule 8(c), dealing with pleading affirmative defenses, is largely identical: (such pleading shall contain) "a short and plain statement . . . sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." Under our new Rules of Civil Procedure, the requirements for pleading an affir-

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mative defense are no more stringent than those for pleading a cause of action.

Bell v. Traders & Mechanics Ins. Co., 16 N.C. App. 591, 593, 192 S.E.2d 711, 712 (1972). See *Lewis v. Gastonia Air Service, Inc.*, 16 N.C. App. 317, 318-19, 192 S.E.2d 6, 7 (1972) (“[u]nder notice pleading a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.” (citation and quotation marks omitted)). Given our Courts’ holdings in *Whitfield* and *Data General* regarding waiver of sovereign immunity based on a valid contract and the requirements of N.C. Gen. Stat. § 159-28, as discussed above, we hold that defendant’s “fourth defense” gave plaintiff sufficient notice that defendant was asserting plaintiff’s failure to comply with the requirements of N.C. Gen. Stat. § 159-28(a), and thus the defense of sovereign immunity as it exists in the context of plaintiff’s allegations. Plaintiff’s argument is overruled.

V. Conclusion

For the aforementioned reasons, this Court holds that the trial court properly dismissed plaintiff’s unjust enrichment claim, and affirms the trial court’s order.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

MCC OUTDOOR, LLC D/B/A FAIRWAY OUTDOOR ADVERTISING, PLAINTIFF V. THE
TOWN OF WAKE FOREST, NORTH CAROLINA, DEFENDANT

No. COA11-1279

(Filed 7 August 2012)

Zoning—special use permit condition—billboard—lease agreement—taking—§ 1983 damages—summary judgment improper

The trial court erred in a dispute over a lease agreement case by entering summary judgment in favor of plaintiff because there were genuine issues of material fact concerning whether plaintiff

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could have continued to operate its billboard in the absence of defendant's special use permit condition, for the takings claim, and for the § 1983 damages issue. The case was reversed and remanded.

Appeal by defendant from order entered 11 April 2011 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 26 April 2012.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., for plaintiff.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Charles George, and Tobias S. Hampson, for defendant.

ELMORE, Judge.

The Town of Wake Forest (defendant or the Town) appeals from an order entering summary judgment in favor of MCC Outdoor, LLC d/b/a Fairway Outdoor Advertising (plaintiff). Because there are genuine issues of material fact, summary judgment was not appropriate for either party, and we reverse the order of the trial court and remand for further proceedings.

This case revolves around a billboard that was situated along Route 1 in Wake Forest for 45 years until its removal in 2008. Plaintiff acquired ownership of the billboard in 1978, through one of its predecessors. Although plaintiff owned the sign itself, it leased the land on which the sign was located. In 1996, The Mason Group (Mason) acquired the underlying property but continued to lease it to plaintiff. Plaintiff and Mason entered into a written lease agreement on 11 September 1997. Under the terms of the lease, Mason leased the property necessary to maintain the billboard and agreed to the following lease term:

This Lease shall be for a term of (1) years beginning on August 1, 1997, with the right to the Lessee [plaintiff] to extend this Lease from year to year upon the same terms and conditions. This Lease shall automatically renew itself from year to year after the term hereof. The total of such extensions is not to exceed 10 years, unless it is terminated by Lessee at the end of the original term or any annual extension period by mailing written notice to the Lessor [Mason] not less than thirty (30) days prior to the end of such term or extension period.

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On 29 September 2005, plaintiff contacted Mason about purchasing a permanent easement for its billboard to “insure the life of [its] business by protecting [its] signs, while at the same time providing a windfall lump sum payment to [its] Lessors.” More than a year later, on 17 October 2006, Mason responded, explaining that it had entered into a purchase contract with Regency Realty Group, Inc. (Regency), and thus no longer had any authority to negotiate a permanent easement agreement. In that letter, Mason also noted that the billboard would have to be removed:

Also, it is my understanding from the land planner that the billboard is currently “grandfathered” but will be required to be removed by the City of Wake Forest as a condition of site plan approval for a shopping center. It is my further understanding that the billboard would be located in a buffer zone and therefore, not permitted.

Before acquiring the property in January 2008, WFC-Purnell, LLC (WFC), and its managing member, Regency, applied for and received a special use permit (SUP) from the Town to build a shopping center on the property. On 21 August 2007, the Town issued the SUP subject to several conditions, one of which was: “The existing billboard is to be removed as soon as possible with no new lease or lease extension allowed.” On 15 October 2007, Regency notified plaintiff of this condition by letter:

Regency received a Special Use Permit from the Town of Wake Forest which allows us to develop the property for our intended use. One of the conditions of issuance of the Special Use Permit is that “The existing billboard is to be removed as soon as possible with no new lease or lease extension allowed.” Thus, if we close on the property, your lease expiration of July 31, 2008 will remain in effect.

WFC acquired the property on 11 January 2008, and Mason assigned its rights under the lease agreement to WFC. Pursuant to the lease agreement, WFC Vice President Chris Widmayer (Widmayer) sent plaintiff a notice that it had taken over as the lessor. In that letter, Widmayer again notified plaintiff that “your lease expiration of July 31, 2008 is in effect, and no new lease, nor lease extension, will be considered.” He also explained that plaintiff’s previous annual rent payment of \$2,500.00 for the 2008 calendar year would be prorated for the seven-month period during which the lease would be in effect.

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A 6 February 2008 letter from plaintiff's Director of Real Estate suggests that Regency and plaintiff had explored the possibility of keeping the billboard:

Thank you for the time spent discussing Fairway's sign on US1 in Wake Forest and our desire to continue our leasing arrangement with Regency.

* * *

We are currently awaiting notice that the Town has rescinded the removal requirement, or will allow us to relocate the sign from its current location.

* * *

I look forward to talking with you again concerning this matter and finding a solution which will result in a win-win for us both.

Nevertheless, on 2 July 2008, Widmayer sent plaintiff another letter reaffirming the billboard's removal:

Unless either (i) the items the items [*sic*] have been removed by September 15, 2008, or (ii) alternative arrangements for their removal have been mutually agreed between Lessor and Lessee, then lessor will assume that the items have been abandoned in place by Lessee, and shall thereafter become the property of the Landlord.

Plaintiff acceded to WFC's request and removed the billboard on 15 September 2008.

Plaintiff then sued the Town, alleging that it was entitled to just compensation for the removal of its sign, pursuant to N.C. Gen. Stat. § 136-131.1. It also alleged that the Town had effected a taking without paying just compensation and that plaintiff was also entitled to damages pursuant to 42 U.S.C. § 1983. Both parties moved for summary judgment and submitted affidavits in support of their motions. Following a hearing, the trial court entered summary judgment in favor of plaintiff.

In its order, the trial court concluded that plaintiff was entitled to summary judgment because there were no genuine issues as to any material fact and plaintiff was entitled to judgment as a matter of law because the Town had "caused" the removal of plaintiff's billboard by conditioning the SUP upon the billboard's removal. It also concluded that defendant had effected a taking without just compensation by denying plaintiff the economically viable use of its property and that

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plaintiff was entitled to damages pursuant to § 1983. We reverse the order because the parties' affidavits raise genuine issues of material fact.

We review orders granting or denying summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). 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 (2011). “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.’” *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citations omitted).

The state statute at issue, N.C. Gen. Stat. § 136-131.1, states in relevant part:

No municipality . . . shall, without the payment of just compensation in accordance with the provisions that are applicable to the Department of Transportation as provided in paragraphs 2, 3, and 4 of G.S. 136-131, remove or *cause to be removed* any outdoor advertising adjacent to a highway on the National System of Interstate and Defense Highways or a highway on the Federal-aid Primary Highway System for which there is in effect a valid permit issued by the Department of Transportation pursuant to the provisions of Article 11 of Chapter 136 of the General Statutes and regulations promulgated pursuant thereto.

N.C. Gen. Stat. § 136-131.1 (2011) (emphasis added). Here, it is undisputed that plaintiff held a valid permit for the billboard; the only question is whether the Town caused the sign to be removed.

The trial court based its conclusion that the Town had caused the sign to be removed on plaintiff's evidence that the only reason that WFC did not enter into a new lease agreement or a lease extension was because defendant's SUP forbade it. Plaintiff's evidence, particularly the affidavit of Paul G. Hickman, supports this factual finding and the conclusion. However, defendant's evidence does not; instead, defendant's evidence shows that WFC would not have allowed the billboard to remain, even absent the SUP condition: Chris Widmayer, in his affidavit, stated that WFC had informed defendant that it “had no intention of entering into a long-term lease with Fairway Outdoor

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Advertising after the lease with the Mason Group was to expire on or about July 31, 2008.” Moreover, Widmayer explained that WFC

would not have acquired the Property from the Mason Group if it had been legally obligated to allow the billboard to remain on the Property for some extended period of time, or alternatively would have negotiated a buy-out of a long term billboard lease had such a long-term lease been in existence, as the continued presence of the billboard on the Property was inconsistent with WFC-Purnell’s long-term plans to develop a shopping center on the property.

Thus, defendant’s evidence is in conflict with plaintiff’s as to a genuine issue of material fact—whether plaintiff could have continued to operate its billboard in the absence of defendant’s SUP condition. Accordingly, summary judgment was not appropriate for either party on this issue.

This issue of material fact is also central to the takings claim and the § 1983 damages issue, and thus summary judgment was not appropriate for either party on those matters either.

We reverse the order of the trial court and remand for further proceedings.

Reversed.

Judges GEER and THIGPEN concur.

GREGORY K. MOSS, PLAINTIFF v. JACQUELINE MOSS, DEFENDANT

No. COA11-1313

(Filed 7 August 2012)

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

Defendant failed to object at a civil contempt hearing to the procedural defect when the judge indicated that she had the burden of proof at the show cause hearing. Thus, defendant waived the right to raise the issue on appeal.

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2. Contempt—civil—willful failure to comply—equitable distribution consent order

The trial court did not err by finding defendant in civil contempt for willful failure to comply with an equitable distribution consent order. The trial court's findings of fact were supported by sufficient, competent evidence presented at the show cause hearing and the findings supported the conclusions of law that the defendant's failure to pay for the Mercedes was willful.

Appeal by defendant from order entered 18 March 2011 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 21 March 2012.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for plaintiff-appellee.

Marshall A. Swann, for defendant-appellant.

CALABRIA, Judge.

Jacqueline Moss ("defendant") appeals from an order finding her in civil contempt for willful failure to comply with a Consent Order for Equitable Distribution ("consent order"). We affirm.

I. Background

Defendant and Gregory K. Moss ("plaintiff") were married and subsequently divorced. Their respective claims for equitable distribution were resolved by a consent order in May 2010. Defendant was in possession of a Yukon Denali ("Denali") and plaintiff was in possession of a Mercedes Benz ("Mercedes"). The consent order provided that the parties would swap their current vehicles, effective 9 April 2010. Although the Denali was titled in both parties' names, the Mercedes was only titled in plaintiff's name. Pursuant to their agreement in the consent order, plaintiff took possession of the Denali and defendant took possession of the Mercedes. Each party was required to make all reasonable efforts to remove the other parties' name from the vehicle's title within one year. In addition, each party was solely responsible for "any and all costs associated with the vehicle" and agreed to hold the other party harmless from all liability arising from such costs. Despite the agreement in the consent order, defendant never refinanced the Mercedes in her name, so plaintiff remained liable for the debt associated with that vehicle.

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On 23 August 2010, plaintiff received a collection letter from Coastal Federal Credit Union (“CFCU”) indicating that the Mercedes had been repossessed and sold. After the sale, a deficiency remained on the account in the amount of \$12,284.89. The CFCU letter further stated that the deficiency had been charged to plaintiff.

As a result of the repossession and deficiency, plaintiff filed a verified motion on 7 February 2011 based on defendant’s alleged willful failure to abide by the court’s order. Plaintiff requested that the trial court find defendant in civil or criminal contempt and order her to pay plaintiff’s costs and attorney’s fees for prosecution of the motion. That same day, defendant was ordered to show cause why she should not be held in contempt. The order was signed by an Assistant Clerk of Superior Court. After a hearing in Mecklenburg County District Court, the trial court granted plaintiff’s motion in part, denied plaintiff’s motion in part and ordered defendant to pay a portion of plaintiff’s attorney’s fees. Defendant appeals.

II. Waiver of Procedural Defect

[1] Defendant alleges that the trial court committed prejudicial error by placing the burden of proof on defendant to present competent and sufficient evidence that defendant did not willfully fail to comply with the court’s consent order. We disagree.

Proceedings for civil contempt can be initiated in three different ways: (1) “by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt[;]” (2) “by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt[;]” or (3) “by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt.” N.C. Gen. Stat. § 5A-23(a), (a1) (2011). Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. N.C. Gen. Stat. § 5A-23(a) (2011). However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, N.C. Gen. Stat. § 5A-23(a1) (2011), because there has not been a judicial finding of probable cause. *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004).

The statute defines “judicial official” as the “trier of facts at the show cause hearing.” N.C. Gen. Stat. § 5A-23(d) (2011). “Except when

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the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court.” N.C. Gen. Stat. § 5A-23(b) (2011).

In the instant case, plaintiff filed a motion and notice of hearing to determine why defendant should not be held in contempt. The order to show cause was signed by an assistant clerk of court, who is not included in the definition of judicial official. N.C. Gen. Stat. § 5A-23(b), (d) (2011). Since an assistant clerk rather than a district court judge signed the show cause order, defendant contends that N.C. Gen. Stat. § 5A-23(a1) applies and that plaintiff had the burden of proof at the hearing to show cause why defendant should be held in contempt.

Defendant alleges that the trial court failed to adhere to the statute by shifting the burden of proof to defendant. At the beginning of the hearing the judge stated, “[a]right [defendant], tell me why she needs to present evidence why she should not be held in contempt. You need to _____ for those two issues. Deficiency on the Mercedes and the tax _____.” After the judge’s statement, defense counsel began questioning defendant about her compliance with the order. Defendant took the stand and presented her evidence. Defendant failed to object to the judge’s statement at the hearing. In addition, defendant never indicated to the court that the Show Cause order was signed by an assistant clerk of court or that plaintiff, rather than defendant, had the burden of proof at the hearing.

Both the Supreme Court and this Court state that a party who comes “into court to answer the charges of the show cause order” waives the right to complain about any procedural defects that were utilized to initiate the underlying civil contempt proceeding. *Lowder v. Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981). *See also Bethea v. McDonald*, 70 N.C. App. 566, 568-69, 320 S.E.2d 690, 692 (1984) (holding that, despite the fact that the plaintiff’s motion “instigating the civil contempt proceedings” did not include “a sworn statement or affidavit” and the fact that “no order or notice by a judicial official directing the defendant to appear and show cause . . . was ever issued or served . . . [,]” the defendant’s appearance in court on the scheduled date and participation in the contempt hearing sufficed to support the trial court’s decision to exercise jurisdiction over the defendant).

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In the instant case, defendant never objected to the trial court's allocation of the burden of proof to her or challenged the fact that an assistant clerk rather than a member of the judiciary signed the show cause order. Therefore, the fact that an assistant clerk, rather than a judicial official, entered the show cause order necessarily means that defendant's contempt proceeding was initiated by the filing of a motion rather than the entry of a show cause order. According to N.C. Gen. Stat. § 5A-23(a1), which governs the conduct of civil contempt proceedings initiated by the filing of a motion, "[t]he burden of proof in [such circumstances] shall be on the aggrieved party." N.C. Gen. Stat. § 5A-23(a1) (2011). As a result, plaintiff, rather than defendant, should have been required to bear the burden of proof at the contempt hearing. Since defendant failed to object to the trial court's action and acquiesced in the procedure employed by the trial court, however, defendant waived the right to complain about this procedural defect.

Defendant relies on *Trivette*, in which this Court vacated a contempt order when the judge placed the burden of proof on the contemnor, instead of the aggrieved party. 162 N.C. App. at 61, 590 S.E.2d at 303. Although *Trivette* was also a contempt proceeding that had also been initiated by the aggrieved party, rather than a judicial official, *Trivette* is distinguishable. *Id.* at 60, 590 S.E.2d at 303. In *Trivette*, there was no indication that the parties raised or that the Court decided the issue of whether the defendant had waived the right to challenge the trial court's decision with respect to the burden of proof.

In the instant case, on the other hand, plaintiff has explicitly argued that "[d]efendant waived any objection to the burden of proof issue on appeal [because she] did not object to this issue at trial." As defendant "came into court to answer the charges of the show cause order," she has waived the right to complain about any defects in the procedures utilized to initiate the underlying civil contempt proceeding. *See Lowder*, 301 N.C. at 583, 273 S.E.2d at 260; *see also Bethea*, 70 N.C. App. at 568-69, 320 S.E.2d at 692. According to well-established principles of North Carolina law, we are bound by these decisions. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (holding that the Court of Appeals lacked the authority to overrule decisions of the Supreme Court of North Carolina and has, instead, a "responsibility to follow those decisions, until otherwise ordered by the Supreme Court"); *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "a panel of the

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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”).

III. Civil Contempt

[2] Defendant contends that the trial court erred by finding and concluding that the defendant was in civil contempt when there was no competent or sufficient evidence to support the findings of fact and conclusions of law to the effect that she willfully failed to comply with the prior equitable distribution order. We disagree.

“The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Trivette*, 162 N.C. App. at 60, 590 S.E.2d at 302-03 (citation omitted). It is well-settled that “it is within the trial court’s discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.” *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (citation omitted). “The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.” *Id.* (citation omitted).

When a party fails to comply with an order of a court the civil contempt continues as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2011). This Court has held that “willfulness” is “(1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so.” *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002).

The trial court addressed the issue of willfulness in its findings of fact 9, 10, 12 and 14, which state:

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9. Plaintiff sent [d]efendant a copy of the August 23, 2010 correspondence after he received the same from CFCU....

10. As of the date of the hearing, [d]efendant had made no payments towards the deficiency resulting from the sale of the Mercedes nor had she made any efforts to resolve the matter with CFCU. Defendant has not made any efforts to pay this obligation because she does not believe it is her responsibility since she only had the car for four (4) months.

...

12. Defendant also maintains a Nationwide Insurance General account with Bank of America with an account number ending in 3727. From July 1, 2010 through January 31, 2011, [d]efendant made deposits into this account in the total amount of \$67,813.71. The [c]ourt finds that [d]efendant uses this account for her personal expenses.

...

14. Defendant has the present means and ability to comply with said Consent Order with the payment of the deficiency balance owed on the Mercedes in the amount of \$12,284.89, or has the ability to take reasonable measures, which would enable compliance and her failure to do so has been willful and without just cause.

“Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence.” *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted).

Based on defendant’s testimony, the court found that defendant had the ability to comply with the consent order and pay the deficiency for the Mercedes. According to plaintiff’s evidence, defendant had a business expense account with deposits totaling \$67,813.71 from July 2010 through January 2011. Defendant confirmed that she used the account for personal expenses as well as business expenses. Based on this information, the court found that defendant had the ability to pay the \$12,284.89 deficiency.

There was also sufficient evidence that defendant willfully failed to pay the deficiency. During the hearing, defendant testified that the Mercedes was distributed to her on 9 April 2010 pursuant to the consent order and that the Mercedes was repossessed in the summer of

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2010. Defendant knew that the car had been repossessed and had a conversation with the bank two days later regarding the repossession. Plaintiff's attorney asked defendant if it was her position that she did not owe the \$12,000 deficiency. Defendant replied that she only had access to the car for three months, that she paid for those three months, that the car was in plaintiff's name when they repossessed the car and that the repossession was not her fault. Defendant also testified that she was obligated to pay the deficiency if it was "within [her] control" but the repossession was not within her control. Defendant's position was that she had made three payments on the car, had only missed one payment and that the Mercedes was repossessed for reasons other than her failure to pay. The evidence presented showed that defendant was aware that the car had been repossessed, knew that there was a deficiency, did not pay any portion of the deficiency and did not believe she owed the deficiency. The trial court's findings of fact were based on competent evidence.

Defendant contends that there was no evidence that her failure to pay was willful because there was no competent evidence that she was aware of the deficiency. However, plaintiff testified that he sent the letter to defendant after he was notified of the deficiency. The trial court has discretion to determine which facts were established by the evidence. *See Phelps*, 337 N.C. at 357, 446 S.E.2d at 25. The trial court found defendant had sufficient knowledge of the deficiency and we hold that the evidence supported the judge's finding.

IV. Conclusion

Defendant failed to object at the hearing to the procedural defect when the judge indicated that she had the burden of proof at the show cause hearing. Therefore, defendant waived the right to raise the issue on appeal. Furthermore, the trial court's findings of fact were supported by sufficient, competent evidence presented at the show cause hearing and the findings supported the conclusions of law that the defendant's failure to pay for the Mercedes was willful. Therefore, defendant was properly held in contempt. We affirm.

Affirmed.

Judges ELMORE and ERVIN concur.

PLASMA CTR. OF AMERICA v. TALECRIS PLASMA RESOURCES

[222 N.C. App. 83 (2012)]

PLASMA CENTERS OF AMERICA, LLC PLAINTIFF, v. TALECRIS PLASMA
RESOURCES, INC. DEFENDANT

No. COA11-1266

(Filed 7 August 2012)

1. Contracts—breach—motion for JNOV—modification not barred by statute of frauds—other arguments not preserved

The trial court did not err in a breach of contract case by denying defendant's motion for JNOV on the issues of whether the parties modified the completion dates contained in Schedule 4 and whether defendant waived its right to enforce plaintiff's failure to meet those deadlines. Because the arguments as to mutual assent and willing and able to perform the agreement were not properly raised at the time of the motion for directed verdict, they were not considered. Further, the trial court correctly determined that the modification alleged by plaintiff was not barred by the statute of frauds under N.C.G.S. § 22-2.

2. Damages and Remedies—motion for new trial—reasonable certainty

The trial court did not err by denying defendant's motion for a new trial as to damages because it was reasonably certain that the plasma center would have been open and producing plasma in time to comply with the deadlines as amended during the status update meetings.

Appeal by defendant from judgment entered 30 December 2010 and order entered 2 March 2011 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 25 April 2012.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Clifton L. Brinson, for plaintiff-appellee.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and Richard D. Dietz, and Graebe Hanna & Welborn, PLLC, by Christopher T. Graebe and Mark R. Sigmon for defendant-appellant.

STEELMAN, Judge.

PLASMA CTR. OF AMERICA v. TALECRIS PLASMA RESOURCES

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Arguments not raised by defendant in its motion for a directed verdict will not be considered by this Court when reviewing the denial of the motion for judgment notwithstanding the verdict. The trial court correctly concluded that the contract did not fall under the statute of frauds. Plaintiff's damages were proven with reasonable certainty, and defendant's motion for a new trial was properly denied.

I. Factual and Procedural Background

This appeal arises out of a contract dispute between Plasma Centers of America, LLC ("PCA") and Talecris Plasma Resources, Inc. ("Talecris"). Talecris Biotherapeutics, Inc. ("TBI"), the parent company of Talecris, is a biotechnology company that sells medical therapies. These therapies require human plasma, which is collected from donors at plasma centers. Medical professionals, including physicians, staff these centers. In October 2006, TBI contracted with Bio-Medics, Inc. ("Bio-Medics"), the parent company of PCA. Under this agreement (the "2006 Agreement"), Bio-Medics agreed to supply plasma to TBI and to provide TBI with the right to purchase plasma centers that were to be constructed by Bio-Medics.

Several months after entering into the 2006 Agreement, the parties began negotiating a more detailed and expansive contract. During this time, TBI formed Talecris and Bio-medics formed PCA. Talecris and PCA negotiated a new contract (the "2007 Agreement"), which differed from the 2006 Agreement in several respects. First, PCA was required to supply specific annual amounts of plasma. Second, PCA was required to open three plasma centers in 2007 and five in 2008 by deadlines contained in Schedule 4 of the agreement. Third, a "Conditional Purchase Obligation" required Talecris to purchase plasma centers that met certain specifications within eighteen months of the center's opening date. Finally, there was a "Termination for Cause" provision. The termination provision allowed Talecris to terminate the contract if PCA failed to meet any of the individual supply requirements or opening deadlines.

Pursuant to the 2007 Agreement, the representatives of the parties held weekly meetings, typically by telephone. Before those meetings, each party submitted PowerPoint slides that Talecris assembled for use at the meeting. The first PowerPoint slide submitted by PCA indicated that PCA would miss its first deadline—opening the San Bernardino, California center by 31 October 2007. Instead, the slide had an opening date of 12 November 2007. The language "To be reviewed and agreed upon today" was contained on the slide.

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In early October 2007, PCA began submitting slides stating that it would miss the opening deadline for another center. The “[t]o be reviewed and agreed upon today” language did not appear on these or future slides. PCA continued to submit slides at each of the 45 weekly meetings indicating that it would miss upcoming deadlines.

By the end of 2007, PCA had failed to meet the three 2007 opening deadlines listed in Schedule 4. In February 2008, Talecris hired a construction management company, Equis, to oversee the progress of the construction of four of the centers. In April 2008, Talecris loaned PCA \$2.3 million. After nearly six months of negotiations, the parties executed a new agreement on 6 June 2008 (the “2008 Agreement”). The 2008 Agreement was a “blackline” document. It contained a copy of the 2007 Agreement, striking through certain contractual provisions and underlining new or changed ones. The completion deadlines were extended for the centers that were originally due to be completed in 2008. But the deadlines for centers that were due to be completed in 2007 were not changed, even though these deadlines had already passed.

Less than a month after the parties executed the 2008 Agreement, PCA missed the 30 June 2008 deadline listed in Schedule 4 to open a center in Stockton, California. The parties continued to hold weekly status update meetings. The slides presented at these meetings projected start dates beyond those contained on Schedule 4. On 12 August 2008, Talecris’s parent company announced that it had agreed to be acquired by a foreign competitor, CSL Ltd. As part of the acquisition, Talecris entered into a plasma supply agreement with ZLB Plasma, a subsidiary of CSL.

The day after the merger, Jim Moose, a Talecris Senior Vice President, contacted PCA President Gary Crandall and stated, “[E]verything’s going to be the same. We are still going to be working with you.” The parties held a status update meeting on 21 August 2008. An internal analysis by Talecris showed that the agreement with ZLB Plasma would provide plasma that would exceed its manufacturing capacity. The analysis showed that Talecris could avoid the expense of acquiring the centers from PCA. On 25 August 2008, Moose contacted Crandall and informed him Talecris was terminating the contract, stating, “[W]e don’t need you guys anymore. We don’t need the plasma and we are terminating the contract.”

Based on the missed Stockton center deadline, Talecris sent a notice of default and thirty-day right to cure on 26 August 2008. PCA

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failed to cure the default. PCA sued Talecris for breach of contract based on two theories: (1) Talecris waived its right to terminate based on the Stockton center opening date and (2) the parties agreed to modify the Schedule 4 deadlines at the weekly status meetings to conform to the slides. Before the case was submitted to the jury, Talecris moved for directed verdict. That motion was denied. The jury ruled for PCA on both theories, specifically finding that the parties modified their agreements, both orally and in writing, and that Talecris waived rights and remedies under the agreement. The jury awarded PCA \$37 million in damages. The trial court denied Talecris's motions for Judgment Notwithstanding the Verdict (Rule 50(b)) ("JNOV") and for a new trial (Rule 59).

Talecris appeals.

II. Judgment Notwithstanding the Verdict

[1] In its first argument, Talecris contends that the trial court erred in denying its motion for JNOV on the issues of (1) whether the parties modified the completion dates contained in Schedule 4 and (2) whether Talecris waived its right to enforce PCA's failure to meet those deadlines. We disagree.

A. Standard of Review

The standard of review for the denial of a motion for JNOV requires us to

determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury. A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.

Shelton v. Steelcase, Inc., 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009) (citations omitted) (internal quotation marks omitted). We review questions of law *de novo*. *Powell v. City of Newton*, 200 N.C. App. 342, 344, 684 S.E.2d 55, 58 (2009).

B. Analysis

PCA litigated this case based on several theories. One theory was that at each weekly status update meeting, the parties orally agreed to modify Schedule 4 of the 2008 agreement. More specifically, each

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time representatives of the parties met telephonically, they agreed to change the completion deadlines to those contained on the slides that they reviewed. Under this theory, the completion deadlines contained on the slides that were presented at the last status update meeting would control. Talecris counters that its representatives did not agree to modify the completion deadlines and that mutual assent, an essential element of a contract, was missing. *See Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (discussing elements of a contract). Talecris also contends that, even if there was mutual assent to modify Schedule 4, oral modifications were barred by the statute of frauds. *See infra* Section II.B.2 (discussing the statute of frauds). Talecris further argues that PCA cannot recover because it was not willing and able to perform under the 2008 Agreement.

PCA contends that Talecris has not preserved its mutual assent and “willing and able” arguments for appellate review. Therefore, PCA argues, if the contract is not governed by the statute of frauds, this Court must assume that there was sufficient evidence of mutual assent and that PCA was willing and able to perform its contract obligations to submit those issues to the jury.

1. Preservation Issues

Talecris argues that the trial court erred in denying its motion for JNOV because (1) there was no evidence of mutual assent to the alleged modifications of the completion dates and (2) there was no evidence that PCA was “willing and able” to perform its obligations under the contract. We do not address the substance of these arguments because Talecris did not preserve these issues for appellate review.

“To have standing after the verdict to move for JNOV, a party must have made a directed verdict motion at trial on the specific issue which is the basis of the JNOV.” *Lassiter v. English*, 126 N.C. App. 489, 492–93, 485 S.E.2d 840, 842 (1997) *overruled on other grounds*, *In re Will of Buck*, 350 NC 261, 629, 516 S.E.2d 858, 863 (1999); *accord Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 100, 515 S.E.2d 30, 36 (1999). “A motion for a directed verdict shall state the specific grounds therefor.” N.C. Gen. Stat. § 1A-1, Rule 50(a) (2011). Talecris asserted only two arguments in its motion for directed verdict: (1) the statute of frauds barred PCA’s claim and (2) Talecris did not waive the opening deadline for the Stockton center. Talecris presented no other argument in support of its motion during the directed verdict hearing. Thus, Talecris lacked standing to raise additional issues before the trial court upon its motion for JNOV.

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Talecris argues that the Supreme Court has held that “courts need not inflexibly enforce” the requirement for specificity in Rule 50(a) “when the grounds for the motion are apparent to the court and the parties.” *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E.2d 585, 588 (1974), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 631–32, 507 S.E.2d 882, 892 (1998). In *Anderson*, the Court stated that it was “obvious that the motion challenged the sufficiency of the evidence to carry the case to the jury” and that “[t]here was no misapprehension on the part of the trial judge or the adverse parties as to the grounds for the motion.” *Id.* at 729, 202 S.E.2d at 588–89. In this case, however, Talecris only argued two very specific grounds for its directed verdict motion. This would cause the trial court justifiably to disregard unasserted, but potentially viable, arguments in favor of a directed verdict. In complex civil cases such as this one, where the parties have argued multiple defenses and theories of liability, it is critical that the movant direct the trial court with specificity to the grounds for its motion for a directed verdict.

Because the arguments as to mutual assent and willing and able to perform the agreement were not properly raised at the time of the motion for directed verdict, we will not consider them for the first time on appeal. *See Jones v. Allred*, 52 N.C. App. 38, 46–47, 278 S.E.2d 521, 526 (refusing to address an argument on appeal because it was not argued in the defendants’ directed verdict motion), *aff’d per curiam*, 304 N.C. 387, 283 S.E.2d 517 (1981); *Topper v. Topper*, 105 N.C. App. 239, 241, 412 S.E.2d 173, 174 (1992) (stating that arguments not properly raised at trial cannot be argued for the first time on appeal).

2. Statute of Frauds

One of PCA’s theories of liability was that the parties orally modified the contract to provide that PCA was not required to comply with the center completion deadlines contained in Schedule 4 of the 2008 Agreement. PCA contends that, during each weekly status update meeting, the parties orally agreed to modify the completion deadlines in accordance with the completion dates listed on the status update slides. Talecris contends that any oral modification of the agreement is unenforceable under the statute of frauds because the 2008 Agreement requires the assignment of a lease of real property greater than three years. We conclude that the trial court correctly determined that the modification alleged by PCA was not barred by the statute of frauds.

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The statute of frauds provides:

All . . . contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2011). In this case, the party to be charged is Talecris. While this statute declares that certain contracts are “void” when they are not in writing, our courts have construed this to mean they are *voidable*. *Herring v. Volume Merch., Inc.*, 249 N.C. 221, 224, 106 S.E.2d 197, 200 (1958). If a contract falls within the statute of frauds, the party against whom enforcement is sought may generally avoid enforcement if there is no written memorandum of that party’s assent to the contract. This rule also applies to the modification of contracts that must be in writing. *Concrete Mach. Co. v. City of Hickory*, 134 N.C. App. 91, 95, 517 S.E.2d 155, 158 (1999) (stating the oral modification of a contract that was required to be in writing was unenforceable).

The 2008 Agreement required Talecris to buy plasma centers from PCA if they complied with certain contractual criteria. Talecris asserts that if these criteria were met, the 2008 Agreement also required the assignment and assumption of the lease obligations for the land on which the centers were built. The assignment of a lease that lasts for more than three years after the making of the lease is subject to the statute of frauds. *Herring*, 249 N.C. at 225, 106 S.E.2d at 200. However, Talecris has not referred us to any provision in the 2008 Agreement document that even *references* the assignment of a lease. Nor have we discovered one.

Talecris argues that Gary Crandall, the owner of Bio-Medics and PCA, conceded at trial that he believed the 2008 Amendment included the assignment and assumption of lease obligations for the land upon which the centers were built. These leases, which are contained in the record, are for terms in excess of three years. But we are not persuaded that the 2008 Agreement required the assignment of a lease.

The 2008 Agreement contains the following provision: “This Agreement . . . contains the entire understanding of the parties with respect to the subject matter of this Agreement No rights or duties on the part of Talecris, Parent [or PCA] shall be implied, inferred or created beyond those expressly provided for in this

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Agreement.” When the intent of the parties “is expressed in clear and unambiguous language,” a court may determine the parties’ intent as a matter of law. *Wallace v. Bellamy*, 199 N.C. 759, 763, 155 S.E. 856, 859 (1930). The 2008 Agreement plainly states that no rights and duties were created other than those expressly stated in the 2008 Agreement. Nothing in the 2008 Agreement explicitly—or even implicitly—states that the assignment of a lease is required. Therefore, the trial court correctly concluded that this contract is not governed by the statute of frauds.

Because Talecris is barred from arguing that it did not agree to oral modifications made at the status update meetings, *supra* Section II.B.1, we will not disturb the jury’s finding that Talecris agreed orally to modify the 2008 Agreement such that the deadlines contained in the status update slides superseded those in Schedule 4. We hold that the trial court did not err in denying Talecris’s motion for JNOV. As a result, we do not reach Talecris’s argument that it did not waive the Schedule 4 deadlines.¹

III. Motion for New Trial

[2] In its second argument, Talecris contends that the trial court erred in denying its motion for new trial as to damages. We disagree.

A. Standard of Review

Generally, “[a] motion for new trial is addressed to the sound discretion of the trial judge.” *Watts v. Schult Homes Corp.*, 75 N.C. App. 110, 111, 330 S.E.2d 41, 41 (1985). But when the grant or denial of a motion for new trial is based on a question of law, we review the trial court’s decision *de novo*. *See id.* at 111, 330 S.E.2d at 41–42.

B. Analysis

The jury awarded PCA damages in the amount of \$37 million. The amount of this verdict is based upon income² PCA would have

1. Several aspects of waiver differentiate it from the oral modification of a contract. 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 39:16, at 567 (4th ed. 2000) (“[U]nlike modification of a contract, the efficacy of a waiver of contractual rights is generally not thought to require special tokens of reliability, such as a writing, consideration, reliance, judicial screening, or a heightened standard of proof.”).

2. The parties disagree over whether the damages awarded were “lost profits.” We need not address that question. Talecris’s argument is that the jury’s damages calculation rested on the faulty premise that PCA would have performed in a timely manner. Other than that issue, Talecris does not quibble with the amount awarded by the jury. *See infra*.

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allegedly realized from the completion of the contract. Talecris argues that the trial court should have granted its motion for new trial on the issue of damages because PCA failed to establish these profits with reasonable certainty.

A party claiming damages from a breach of contract must prove its losses with “reasonable certainty.” *Matthews v. Davis*, 191 N.C. App. 545, 551, 664 S.E.2d 16, 20 (2008) (citing *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585 (1987)). “While the reasonable certainty standard requires something more than ‘hypothetical or speculative forecasts,’ it does not require absolute certainty.” *Id.* at 551, 664 S.E.2d at 21 (quoting *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407–08, 466 S.E.2d 324, 329 (1996)). “[D]amages for lost profits will not be awarded based on hypothetical or speculative forecasts.” *McNamara*, 121 N.C. App. at 407–08, 466 S.E.2d at 329. The amount of damages is generally a question of fact, but whether that amount has been proven with reasonable certainty is a question of law we review *de novo*. See *Matthews*, 191 N.C. App. at 551, 664 S.E.2d at 21 (citing *Olivetti*, 319 N.C. at 548, 356 S.E.2d at 586–87).

PCA offered expert testimony explaining how PCA would satisfy the Conditional Purchase Obligation in the contract by producing sufficient plasma following each center’s opening.³ Talecris contends that the damages estimations offered by PCA rest on the faulty premise that all eight plasma centers would be open and producing plasma in time to trigger the “Conditional Purchase Obligation” in the 2008 Agreement. Talecris does not challenge PCA’s *calculation* of the damages; it argues that PCA could not have satisfied the conditions necessary to *trigger* recovery.

The Conditional Purchase Obligation clause provides: “Talecris shall have the obligation to purchase each Talecris Designated Center which satisfies each of the Purchase Requirements (defined below) on or prior to the date which is eighteen (18) months following such center’s opening (such date, the “Deadline Date”)” The jury found that the parties modified the opening dates that were listed in Schedule 4. The trial court correctly rejected Talecris’s attack on this ruling at the directed verdict and JNOV stages. *Supra* Section II.B. Talecris does not argue on appeal that it is entitled to a new trial on this ground. Thus, for our consideration of Talecris’s new trial argument, the modified

3. Eric Segal testified as an expert regarding projections of plasma collections, but he was not permitted to testify as an expert regarding projected opening dates for the centers.

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deadlines from the final team meeting on 21 August 2008 are applicable. The only issue raised by Talecris is whether it was reasonably certain that PCA would have performed by those deadlines.

The forecasted opening schedule from the last weekly status meeting indicated that one center, in San Bernardino, California, was already open. The scheduling slide provided the following opening dates for the other centers:

- Sacramento-Florin Road: 7 October 2008
- Fresno: 25 November 2008
- Sacramento-Northgate: 4 November 2008
- Saturn-Indianapolis: 16 September 2008
- Modesto: 21 October 2008
- Stockton: 11 November 2008
- Titan-Anderson: 8 September 2008

The document indicated that two of the centers, Stockton and Sacramento-Northgate, were “at-risk” of missing their deadlines. (The opening dates were highlighted in red.) At trial, Eric Segal testified that these centers would likely open within a few weeks of the deadlines because most of the work “had already been done or was progressing along.”⁴ Internal documents prepared by Talecris estimated that the opening date for the Stockton center was 6 November. The estimated date for the Sacramento center was 8 October.⁵ At trial, Moose testified that Talecris tended to use conservative estimates for the documents, i.e. the reports would err on the side of predicting PCA would take longer than needed to complete the centers.

Equis provided a construction tracking document on 21 August. That document projected site opening dates for four centers:

- Indianapolis: 23 September 2008
- Anderson: 8 September 2008

4. Segal was not testifying as an expert when he made this statement. *See supra* note 3.

5. This document has the two Sacramento centers listed as “Sacramento 1” and “Sacramento 2.” The Sacramento 1 center’s date is listed as 5 September; Sacramento 2 is listed as 8 October. We assume that Sacramento 2 refers to Sacramento-Northgate, because the projection slide, which was reviewed in the meeting between parties, had a later opening date for Sacramento-Northgate.

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- Modesto: 25 October 2008
- Stockton: 29 October 2008

Talecris instructed Equis to “drive the project to on time completion,” and it appears that Equis felt it was on pace to do so based on the latest deadlines. These completion estimates were based on completed and scheduled construction benchmarks.

Even though some of the documents at trial indicated the centers would not be completed by the applicable deadlines, the 2008 Agreement contained a thirty-day cure provision. Thus, PCA would have an additional thirty days from the applicable deadlines—not those contained in Schedule 4—to open the centers. We conclude that PCA presented sufficient evidence to establish that it was reasonably certain that the centers would be open in time to satisfy the Conditional Purchase Obligation.

This argument is without merit.

IV. Conclusion

We do not consider Talecris’s mutual assent and ready and able to perform JNOV arguments because they were not raised in Talecris’s motion for directed verdict. The trial court did not err in denying Talecris’s motion for JNOV because it correctly determined that the statute of frauds did not govern the 2008 Amendment. The trial court did not err in denying Talecris’s motion for a new trial because it was reasonably certain that the plasma center would have been open and producing plasma in time to comply with the deadlines as amended during the status update meetings.

The judgment and orders appealed from are

AFFIRMED.

Judge CALABRIA concurs.

Judge BEASLEY concurs in result only.

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MAUREEN PLOMARITIS (WARD), PLAINTIFF v. TITUS PLOMARITIS, JR., DEFENDANT

No. COA11-1554

(Filed 7 August 2012)

1. Appeal and Error—appellate rules violations—sanctions not required

Plaintiff's request for sanctions based on defendant's various appellate rules violations was denied. The errors alleged by plaintiff related to nonjurisdictional requirements of the rules, those alleged errors did not impair review, and the adversarial process was not frustrated.

2. Divorce—equitable distribution—setting aside pretrial order

The trial court erred by setting aside the pretrial order prior to entry of its equitable distribution judgment. Thus, the trial court's 9 April 2008 order and 14 April 2008 judgment, the trial court's subsequent 8 May 2008, 29 June 2008, 30 April 2010, 30 November 2010, and 11 November 2011 orders were reversed and remanded to the trial court for further proceedings.

Appeal by defendant from judgment entered 14 April 2008, and orders entered 9 April 2008, 30 April 2010, and 30 November 2010 by Judge Joseph E. Turner in District Court, Guilford County. Heard in the Court of Appeals 24 May 2012.

Hill Evans Jordan & Beatty, PLLC, by Elaine Hedrick Ashley, for plaintiff-appellee.

Robert N. Weckworth, Jr., for defendant-appellant.

STROUD, Judge.

"It is a truism that justice delayed is frequently justice denied." *Rice v. Rigsby*, 259 N.C. 506, 519, 131 S.E.2d 469, 478 (1963). The complaint in this matter was filed in 2003, the equitable distribution trial was held in 2006, and, by this opinion, we unfortunately must reverse the equitable distribution order and remand for a new trial. It is particularly troubling that this case has been so protracted as equitable distribution is one of the few types of claims which has time goals for completion of various steps of the case set forth by statute. See N.C. Gen. Stat. § 50-21 (2006). Titus Plomaritis, Jr. ("defendant") appeals from (1) the trial court's 9 April 2008 order setting aside the

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trial court's 19 October 2006 pre-trial order; (2) the 14 April 2008 equitable distribution judgment; (3) the 30 April 2010 order granting in part and denying in part defendant's motions for reconsideration and to amend the 14 April 2008 equitable distribution judgment and the 9 April 2008 order; and (4) the 30 November 2010 order granting in part and denying in part defendant's motion for reconsideration of the 30 April 2010 order. For the following reasons, we reverse and remand for further proceedings consistent with this opinion.

I. Procedural history

On or about 4 December 2003, Maureen Plomaritis ("plaintiff") filed a complaint against defendant, raising claims for custody of the minor children, child support, alimony, and equitable distribution. On or about 15 March 2004, defendant filed an answer, raising several defenses, including a motion for a change of venue, and a counterclaim for equitable distribution. On 26 March 2004, plaintiff filed a motion to strike defendant's answer and counterclaim, arguing that defendant's pleadings "were not filed timely[.]" On 9 November 2004, the trial court denied defendant's motion for change of venue and allowed defendant's answer and counterclaim. Upon motion by plaintiff, the trial court entered an order awarding plaintiff an interim distribution of "fifty percent" of defendant's retirement account.

On 2 June 2005, plaintiff filed a motion for temporary restraining order and preliminary injunction, alleging that the parties' marital residence was destroyed by fire on 30 November 2003; that an insurance proceeds check was issued and deposited in an account to pay off the outstanding mortgage on that property; that the bank issued one check for the remaining balance to defendant; that defendant deposited it into his bank account; and that this money was marital property. Plaintiff requested that defendant be enjoined from "dissipating, wasting or disposing of the marital property of the parties[.]" On 2 June 2005, the trial court granted plaintiff's motion for a temporary restraining order and scheduled a hearing for a preliminary injunction on 9 June 2005, but, following the hearing, the trial court entered an order denying plaintiff's request for a preliminary injunction and dismissing her temporary restraining order. On 12 October 2006, plaintiff filed a motion in *limine* requesting that the trial court prohibit defendant from introducing evidence that either party was involved in the fire that destroyed their marital residence on 30 November 2003 as evidence surrounding this event was "opinion, speculative, and irrelevant" to the equitable distribution matter. The trial court granted this motion.

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On 19 October 2006, the trial court entered an equitable distribution pre-trial order in which the parties made numerous stipulations regarding values, classifications, and distribution of specific items of marital property; agreed to the identity and value of divisible property and martial debts; set forth the parties' contentions for unequal distribution; and limited the issues in dispute to disagreements between the parties regarding the value, distribution, or classification of other specific properties of the marital estate. The trial court held an equitable distribution trial on 19, 20, 24, 25, 26, and 27 October 2006. At the conclusion of the trial, the trial court made no ruling but took the matter "under advisement[,]" to announce a decision at a later date.

Approximately 18 months after the conclusion of the equitable distribution trial, on 9 April 2008, the trial court, on its own motion and without any prior notice to the parties, entered an order setting aside the 19 October 2006 pre-trial order. On 14 April 2008, the trial court entered an equitable distribution judgment, deciding not only the issues which the parties had disagreed upon in the pre-trial order, but also various issues as to which the parties had stipulated in the pre-trial order which the trial court had recently set aside.

On 21 April 2008, defendant filed a motion for reconsideration and to amend the trial court's order setting aside the pre-trial order and for the court to open the judgment and take additional testimony and amend its judgment. On 24 April 2008, defendant filed a motion for a mistrial, a new trial and for reconsideration of the trial court's 14 April 2008 equitable distribution judgment, alleging that there was insufficient evidence presented at the trial to justify several of the trial court's findings of fact and conclusions of law.¹ A hearing on defendant's motions was continued from 6 October 2008 until January 2009. On 21 April 2009, defendant filed motions to continue and for leave to amend his pending motions for reconsideration, and for a new trial to include new requests for relief based on allegations that plaintiff was the prime suspect in a criminal investigation surrounding the arson of their marital residence on 30 November 2003. Defendant also alleged that plaintiff and Rocky Manning, a witness at the equitable distribution trial, were suspected co-conspirators in two other separate arson attempts of defendant's new home in June and December of 2007, which occurred after the trial but before entry of the trial court's equitable distribution judgment.

1. On 8 May 2008, the trial court entered orders staying the 9 April 2008 order and the 14 April 2008 judgment pending disposition of defendant's motions.

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On 29 June 2009, the trial court entered an order granting defendant's motion to leave to amend his original motion for reconsideration, explaining that evidence regarding "a concert of personal interest between the plaintiff and plaintiff's witnesses . . . could have had a significant impact on the valuation of the golf course" and the final ruling on equitable distribution. On 29 June 2009, defendant filed an amended motion for new trial/reconsideration of judgment, including allegations surrounding the arson investigations. Following witness depositions in August, September, and October of 2009, a hearing on defendant's motion for reconsideration was held on 28 October 2009, where new evidence regarding the criminal investigations was taken. The trial court took the matter under advisement and continued the matter for further hearing if necessary, but made no ruling. On 12 April 2010, the trial court entered an order making a partial ruling, denying defendant's motion to set aside the judgment and order and for a new trial based on evidence presented on 28 October 2009. The trial court allowed counsel for both parties to present further argument but not to introduce any additional evidence.² On 30 April 2010, the trial court entered an order denying defendant's 21 April 2008 motion regarding the trial court's decision to set aside the pre-trial order; allowing in part defendant's 24 April 2008 motion, amending findings of fact in the 14 April 2008 judgment of equitable distribution regarding two items of marital property which resulted in the modification to the distributive award to plaintiff; and denying the remaining requests in defendant's motion to set aside the equitable distribution judgment and for a new trial.

On 10 May 2010, defendant filed a motion for reconsideration of the 30 April 2010 order. Following a hearing on 30 June 2010, the trial court entered an order on 30 November 2010 allowing in part and denying in part defendant's 10 May 2010 motion for reconsideration of the order filed on 30 April 2010. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52, the trial court amended the findings of fact in the 30 April 2010 order to state that the alleged misconduct of plaintiff, even if true, would not have altered the equitable distribution judgment and did not constitute newly discovered evidence pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60. The trial court denied the remaining requests of defendant's motion. On 28 December 2010, defendant filed notices of appeal from (1) the trial court's 9 April 2008 order; (2) the 14 April 2008 judgment of equitable distribution; (3) the 30 April

2. Transcripts from the 28 October 2009 hearing and the 12 April 2010 order were not included in the record on appeal.

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2010 order; and (4) the 30 November 2010 order. On appeal defendant contends (1) that the trial court erred in its 9 August 2008 order in setting aside the 19 October 2006 pre-trial order; (2) that the 18 month delay from the date of trial to the entry of the original judgment on 14 April 2008 and the 31 month delay from the original judgment to the entry of the final amended judgment of 29 November 2010 amounted to a violation of defendant's due process rights; (3) that the trial court erred in not properly considering whether evidence should be re-opened, whether additional findings of fact should be made, or whether there should be a new trial; and (4) the trial court erred by not considering testimony and evidence in this case and disregarded testimony which led to multiple errors in its findings and conclusions, thereby making its rulings unsupported by the evidence, contrary to existing law, and an abuse of discretion.³ Plaintiff contends on appeal that defendant's appeal should be dismissed for "his numerous violations of and substantial failure to comply with the North Carolina Rules of Appellate [sic] Procedure." We will address plaintiff's argument first.

II. Sanctions

[1] Plaintiff argues that defendant's brief failed to comply with Rules 9, 26, and 28 of the North Carolina Rules of Appellate Procedure in that the brief does not contain correct citations to the record and transcript, "includes an incorrect Certificate of Service," the table of cases is not in alphabetical order, the summary of facts is argumentative, the brief contains "incorrect date style, lacks an inside caption of the case, utilizes varying fonts and type point changes, incorrect margins for the Index and for quotes within the brief and exceeds the number of pages or words in the brief without permission of this Court." Plaintiff contends that these violations amount to a "substantial failure" or a "gross violation" of the Rules of Appellate Procedure and we "should strike Defendant's brief and as a proper and appropriate sanction, [and] dismiss Defendant's appeal." Defendant raises no argument in response.

In *Gentry v. Big Creek Underground Utils., Inc.*, we addressed a similar motion for sanctions:

Defendant filed a motion with this Court for sanctions against plaintiff. Defendant notes numerous failures to comply with the North Carolina Rules of Appellate Procedure in plaintiff's brief

3. On 11 November 2011, the trial court entered an order denying the parties' motions to quash certain subpoenas and for a protective order.

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including violations of Rules 26(g)(1)-(2) and 28(b)(4)-(7). “In *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, our Supreme Court set out the proper analysis for this Court to use when a party fails to comply with the Rules of Appellate Procedure in some respect which does not deprive this Court of jurisdiction[.]” *Honeycutt v. Honeycutt*, ___ N.C. App. ___, ___, 701 S.E.2d 689, 691 (2010), such as those violations of which defendant complains. See *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (“The final principal category of default involves a party’s failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules[.] . . . Two examples of such rules are those at issue in the present case: Rule 10(c)(1), which directs the form of assignments of error, and Rule 28(b), which governs the content of the appellant’s brief.” (emphasis added)).

Based on the language of Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party’s noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a “substantial failure” or “gross violation.” In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.

. . . .

In determining whether a party’s noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court’s task of review and whether and to what extent review on the merits would frustrate the adversarial process. The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.

Id. at 199-200, 657 S.E.2d at 366-67. As our review has not been impaired nor has the adversarial process been frustrated, we conclude that the violations of which defendant complains of are neither substantial nor gross and as such we will not impose sanctions. See *id.* Accordingly, we deny defendant’s motion for sanctions.

___ N.C. App. ___, ___, 711 S.E.2d 462, 464 (emphasis in original), *disc. review denied*, 365 N.C. 345, 717 S.E.2d 393 (2011). Likewise, here the errors alleged by plaintiff relate to nonjurisdictional require-

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ments of the rules. Those alleged errors have not impaired our review and the adversarial process has not been frustrated. Therefore, the violations of which plaintiff complained of are neither “substantial” nor “gross[,]” *see id.*, and, accordingly, we deny plaintiff’s request for sanctions. Next, we turn to address defendant’s arguments on appeal.

III. The Pre-trial Order

[2] Defendant contends that the trial court erred in setting aside the pre-trial order prior to entry of its equitable distribution judgment. Defendant argues that the trial court was “obligated to follow the terms and conditions of the Pre-Trial Order that had been agreed to by the parties and approved by the Court, as the terms of the pre-trial stipulations were binding and conclusive upon the trial court[.]” Defendant concludes that “[t]he Trial Court’s decision, upon its own motion, to set aside the Pre-Trial Order, without notice to either party, is a clear abuse of discretion, amounting to reversible error, warranting that the judgment entered be set aside in its entirety and a new trial be ordered.” Plaintiff counters that it was within the trial court’s discretion to set aside the pre-trial order. Plaintiff argues that pre-trial stipulations are not binding because Chapter 50 of our General Statutes specifically mandates the trial court to equitably distribute the parties’ property and the stipulations here were unworkable and unlikely without further litigation. Plaintiff further argues that the stipulations required the parties to sell real property and divide the proceeds, leaving issues for a future determination and this Court has held equitable distribution is incomplete “when the trial court failed to follow the prescribed three-step process to classify, value and distribute property by *not* distributing the property but providing that property be sold to third parties.” (emphasis in original). Plaintiff argues that it is within a trial court’s discretion to set aside a stipulation when it is necessary to prevent injustice if the stipulation may require the trial court to award a distributive award not contemplated by the parties which neither party could pay. Plaintiff cites to *Carr v. Carr*, 92 N.C. App. 378, 379, 374 S.E.2d 426, 427 (1988), and *Edwards v. Edwards*, 152 N.C. App. 185, 188, 566 S.E.2d 847, 849-50, *disc. review denied*, 356 N.C. 611, 574 S.E.2d 679 (2002) in support of her arguments.

We must consider several different statutes as well as the applicable local rules in examining the effect of the pre-trial order and the stipulations of the parties in the order and in determining whether the trial court properly set the order aside. We will discuss these statutes starting with the law of general application and concluding with the

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statutes and rules specifically applicable to equitable distribution cases. As a general rule, this Court has noted that “[a]ny material fact that has been in controversy between the parties may be established by stipulation.” *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004) (citation omitted).

“A stipulation is an agreement between counsel with respect to business before a court” 83 C.J.S. *Stipulations* § 1, at 2. “Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged.” *Rural Plumbing and Heating, Inc. v. H.C. Jones Construction Co., Inc.*, 268 N.C. 23, 32, 149 S.E.2d 625, 631 (1966). “‘While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. . . .’” *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) (citation omitted). “Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position.” *Rural Plumbing and Heating, Inc.*, 268 N.C. at 31, 149 S.E.2d at 631.

Moore v. Richard W. Farms, Inc., 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993). See *Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E.2d 482, 486 (1971) (stating that “stipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge.” (citations omitted)). Accordingly, “[t]he effect of a stipulation by the parties withdraws a particular fact from the realm of dispute.” *Carlsen*, 165 N.C. App. at 678, 599 S.E.2d at 584 (citing *Despathy v. Despathy*, 149 N.C. App. 660, 662, 562 S.E.2d 289, 291 (2002)).

N.C. Gen. Stat. § 1A-1, Rule 16(a) (2006) states that “the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider” issues of the case, amendments to the pleadings, admissions of fact and “documents which will avoid unnecessary proof[,]” the number of expert witnesses, a reference of the case, matters of judicial notice, and any other matters “as may aid in the disposition of the action.” Rule 16(a)(7) further states, in pertinent part, that

[i]f a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and *the agreements made by the par-*

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ties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . .

Id. (emphasis added).

In addition to the provisions of Rule 16(a)(7), which apply to cases of all types, N.C. Gen. Stat. § 50-21(d) (2006) has specific requirements as to pre-trial conferences, timing, and entry of a final pre-trial order in equitable distribution cases:

(d) Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference. If that party fails to make application, then the other party may do so. At the conference the court shall determine a schedule of discovery as well as consider and rule upon any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and shall set a date for the disclosure of expert witnesses and a date on or before which an initial pretrial conference shall be held.

At the initial pretrial conference the court shall make inquiry as to the status of the case and shall enter a date for the completion of discovery, the completion of a mediated settlement conference, if applicable, and the filing and service of motions, and shall determine a date on or after which a final pretrial conference shall be held and a date on or after which the case shall proceed to trial.

The final pretrial conference shall be conducted pursuant to the Rules of Civil Procedure and the General Rules of Practice in the applicable district or superior court, adopted pursuant to G.S. 7A-34. The court shall rule upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

N.C. Gen. Stat. § 7A-34 (2006) gives the Supreme Court of North Carolina authority to “prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.” Under this authority, the Supreme Court has adopted General Rules of Practice for the

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Superior and District Court, and as a part of these General Rules of Practice, Rule 22, entitled “Local court rules,” provides that “[i]n order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court.” The 18th Judicial District, which includes Guilford County, has adopted local rules for District Court, Guilford County, which require the parties to an equitable distribution case to enter into a pre-trial order, in accord with the mandates of N.C. Gen. Stat. § 50-21(d):

At the conclusion of the foregoing process [which includes filing the complaint, service on the opposing party, calendaring the case, filing out inventory forms, and serving responsive affidavits] but no later than six (6) months from the filing of the Equitable Distribution claim, the moving party shall prepare a Pretrial Order accurately reflecting all of the positions and contentions of both parties.

The Eighteenth Judicial District Local Rule 31.9. The local rules also direct the moving party to follow a form document in creating the pre-trial order, including attached schedules setting forth lists of all property and the extent of the parties’ agreement on the classification, valuation, and distribution of that property. *Id.* at Rules 31.10 and 31.11. Also the parties are directed to “work to finalize the Pretrial Order for the Judge’s signature.” *Id.* at Rule 31.13. The rules state that “[u]nless the Pretrial Order has been signed by all participants, both parties and their respective attorneys must be present in the courtroom at the time of the Final Pretrial Conference so that any additions, deletions and stipulations and any new time-lines may be approved immediately.” *Id.* at Rule 31.14. The 19 October 2006 pre-trial order and the attached schedules followed this form document, as directed by the local rules.

This Court has recognized that in equitable distribution cases, a pre-trial order containing a stipulation that all property to be classified, evaluated, and distributed . . . [is] binding upon the parties as to all assets classified as marital property. *See Hamby v. Hamby*, 143 N.C. App. 635, 642-43, 547 S.E.2d 110, 114-15 (2001) (where parties stipulated in pre-trial order that retirement and deferred compensation plans were marital property, neither party could later challenge this classification). However, with respect to any property not listed in the pre-trial agreement between the parties, plaintiff has not waived its inclusion in the

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equitable distribution. *See Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 521 (2003) (plaintiff spouse did not waive inclusion of defendant's profit-sharing plan in marital property distribution where parties did not enter into any agreement concerning the plan prior to trial).

Allen v. Allen, 168 N.C. App. 368, 373-74, 607 S.E.2d 331, 335 (2005).

The 19 October 2006 "Equitable Distribution Pretrial Order" ("the pre-trial order") was entered in accordance with N.C. Gen. Stat. § 50-21(d), Rule 16(a), and Local Rules 31.9, 31.10, 31.11, 31.13, and 31.14, after the trial court conducted a pre-trial conference. The pre-trial order states that action at the conference included the following: "[t]he parties have reached agreement on certain facts and on certain issues and have delineated the areas of agreement and disagreement." The pre-trial order further states that "[t]he parties, by their signatures affixed hereto, stipulate agreement with the facts and issues represented herein as agreed upon. They further stipulate that the facts and issues represented herein as being in dispute are accurately reflected and are the only issues to be determined by the Court." Specifically, the parties made stipulations in attached "schedules" addressing "all of the property owned by the parties at the date of separation." In Schedule A, the parties agreed to the classification of six items of property as marital, its distribution, and its value. In Schedule B, the parties agreed to the distribution of five other properties but disagreed as to the values. In Schedule C, the parties agreed to the value of six other properties but disagreed as to their distribution. In Schedule D, the parties listed three other properties for which they disagreed as to the value and distribution. In Schedule E, the parties listed two items of property for which they disagreed as to the classification. In Schedule F, the parties listed the divisible property of the parties. Schedule I contained stipulations as to the parties' marital debts. Schedule J listed post separation "debts which each party has paid and for which each party seeks credit in equitable distribution, or in the alternative requests as a distributional factor." The pre-trial order goes on to state

14. The Presiding Judge shall rule on the following:

(a) If the parties do not agree that an equal division is an equitable division of the marital and divisible property, the Judge shall enter an equitable distribution of marital assets and debts.⁴

4. The parties did not agree to an equal division, and Schedule G of the pretrial order included the contentions of each party for unequal distribution.

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(b) The judge shall decide all issues raised in Schedules B, C, D, E, F, I and J attached hereto.

The order was signed by the trial court, both parties, and counsel for both parties.

The terms of the stipulations in the pre-trial order were “definite and certain[.]” *see Moore*, 113 N.C. at 141, 437 S.E.2d at 531, as they expressed the extent of the parties’ agreements regarding many items of marital and divisible property, removing those matters agreed upon from dispute. *See Carlsen*, 164 N.C. App. at 678, 599 S.E.2d at 584. Therefore, these stipulations were binding on all parties and the trial judge, *see Crowder*, 11 N.C. App. at 63, 180 S.E.2d at 486, and this pre-trial order “when entered control[ed] the subsequent course of the action[.]” *See* N.C. Gen. Stat. § 1A-1, Rule 16(a)(7).

Approximately 18 months following the October 2006 equitable distribution trial, and without any prior notice to the parties, the trial court on 9 April 2008, on its own motion, entered an order setting aside the 19 October 2006 pre-trial order, explaining that the

[e]vidence presented and arguments considered by this Court clearly show that strictly following the Pretrial Order distributions will require Defendant to pay a distributive award far in excess of his ability to do so, even over a protracted time period. An appropriate distribution would lessen that burden and make it possible for Defendant to make payments, over time, that will end this case.

Furthermore, these parties have endured long and protracted litigation over all family law claims and shown an inability to agree on major issues between them. The Pretrial Order contemplates leaving the parties responsible for transactions that will require them to agree on price and agent, negotiate and accept offers to purchase at other than agreed upon prices, and properly close the transactions and divide the proceeds within a reasonable time. This appears unworkable and unlikely without further litigation and Court Orders. An appropriate distribution of property in kind would avoid such further litigation[.]

Accordingly, a few days later, on 14 April 2008, the trial court entered an equitable distribution judgment which did not follow the stipulations of the pre-trial order in its division of the parties’ property.

We have examined when and how stipulations may be entered and their effect, so now we must consider whether the trial court

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properly set aside the stipulations contained in the pre-trial order. Stipulations may be set aside in certain circumstances. This Court has noted that:

“A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party.” *Norfolk S. R. Co. v. Horton and R.R. Co. v. Oakley*, 3 N.C. App. 383, 389, 165 S.E.2d 6, 10 (1969). “Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto.” *Id.* Whether a motion is “seasonably made,” however, cannot be determined with mathematical precision. *Cf. Willoughby v. Wilkins*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 100 (1983) (applying “seasonably” in context of Rule 26(e)(1) of the North Carolina Rules of Civil Procedure), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 698 (1984). *Compare In re Marriage of Jacobs*, 128 Cal. App. 3d 273, 180 Cal. Rptr. 234 (Ct. App. 1982) (motion to set aside a stipulation filed six months after date of judgment was timely) *with Hawai'i Housing Authority v. Uyehara*, 77 Haw. 144, 883 P.2d 65 (Haw. 1994) (motion to set aside stipulation filed over three years after entry of judgment was untimely).

Lowery v. Locklear Constr., 132 N.C. App. 510, 513-14, 512 S.E.2d 477, 479 (1999). Here, neither party made a request to set aside the pre-trial order. In fact, it appears that the parties were still in agreement on the stipulations during the six days of trial, as the evidence presented was directed to the areas of disagreement as stated in the schedules of the pre-trial order. We also note that this is an equitable distribution case, where a pre-trial order including stipulations such as those in this case is required by N.C. Gen. Stat. § 50-21(d) and Local Rule 31.9. In equitable distribution cases, because of the requirements of statute and local rules, the stipulations are frequently quite extensive and precise and are specifically intended to limit the issues to be tried, and the same is true in this case. *Accord Wall v. Wall*, 140 N.C. App. 303, 310, 536 S.E.2d 647, 652 (2000) (noting that “[p]laintiff and defendant engaged in years of discovery and negotiation, followed by the execution of a detailed, 38-page pretrial order. Such an order is designed to narrow the issues, save trial time and expense, and lead to a just result.”) Neither party has cited, and we cannot find, any prior opinion by our Court in which a trial court has *ex mero motu* set aside a pre-trial order or a party’s stipulations *after*

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completion of the trial upon the issues which the stipulations addressed. However,

[i]t is generally recognized that it is within the discretion of the court to set aside a stipulation of the parties relating to the conduct of a pending cause, where enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by its being set aside.” 73 Am. Jur. 2d *Stipulations* § 13 (1974). “A stipulation entered into under a mistake as to a material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief.” *Id.*, § 14. Other proper justifications for setting aside a stipulation include: misrepresentations as to material facts, undue influence, collusion, duress, fraud, and inadvertence.

Lowery, 132 N.C. App. at 514, 512 S.E.2d at 479. There is no indication of “misrepresentations of material fact, undue influence, collusion, duress, fraud, or inadvertence” raised in this case as potential reasons for setting aside the stipulations. Plaintiff’s arguments and the trial court’s explanation in the 9 April 2008 order setting aside the pre-trial order seem to be premised upon prevention of “manifest injustice[.]” See N.C. Gen. Stat. § 1A-1, Rule 16(a)(7). Although it may be appropriate for a trial court on its own motion to set aside a parties’ stipulation for one of the reasons stated in *Lowery* or to prevent “manifest injustice[.]” there are limits to the court’s discretion to set aside a stipulation. First, Rule 16(a)(7) itself states that a stipulation may be “modified *at the trial* to prevent manifest injustice.” N.C. Gen. Stat. § 1A-1, Rule 16(a) (emphasis added). Modification of a stipulation *at the trial* gives all parties immediate notice of the modification and allows the parties the opportunity to present additional evidence which may be required based upon the elimination of the stipulation. Here, the modification, or actually elimination, of the stipulations occurred after completion of the trial, *ex mero motu*, and without any notice or opportunity to respond to the modification. Although the trial court did grant portions of some of defendant’s motions filed after entry of the original equitable distribution judgment, the trial court did not set aside or modify its order setting aside the stipulations contained in the pre-trial order.

Due process rights create another limitation upon the trial court’s discretion to set aside a pre-trial order. Courts do not have authority to change provisions of an order which affect the rights of the parties without notice and an opportunity for hearing.

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The courts have always had inherent authority to correct clerical errors in orders and judgments, but they do not have the power to amend or vacate an order or judgment so as to affect the rights of the parties, without giving the parties notice and an opportunity to be heard. *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E. 2d 715 (1975). “No person shall be . . . in any manner deprived of his . . . property, but by the law of the land.” N.C. Const. art. I, § 19. The “law of the land” requires notice and opportunity to be heard. *In re Wilson*, 257 N.C. 593, 126 S.E. 2d 489 (1962); *Eason v. Spence*, 232 N.C. 579, 61 S.E. 2d 717 (1950).

Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 301, 254 S.E.2d 643, 644 (1979). Just as a party requesting to set aside a stipulation would have to give notice to the opposing parties, *see Lowery*, 132 N.C. App. at 513, 512 S.E.2d at 479, and the opposing parties would have an opportunity for hearing upon the request, the trial court cannot own its own motion set aside a pre-trial order containing the parties’ stipulations after the case has been tried in reliance upon that pre-trial order, “without giving the parties notice and an opportunity to be heard.” *See Utica Mut. Ins. Co.*, 41 N.C. App. at 301, 254 S.E.2d at 644. This is especially true in this case, where the parties had tried the case in reliance upon those stipulations, and the trial court waited over 18 months before setting aside the pre-trial order containing the stipulations. The parties received no notice and there was no hearing before the trial court set aside the pre-trial order which included the parties’ stipulations and then entered the equitable distribution order in contravention to those stipulations. As noted above, the local rules required the pre-trial order, and all parties and their counsel were to agree on “any additions, deletions and stipulations” to this pre trial order prior to the trial court signing the order. *See* The Eighteenth Judicial District Local Rules 31.9, 31.13, and 31.14. Although the trial court may have been correct that adherence to the stipulations may have required a large distributive award which defendant would not have been able to pay, and the trial court was surely correct that “these parties have endured long and protracted litigation over all family law claims and shown an inability to agree on major issues between them[,]” the fact remains that the case was tried based upon the pre trial order, and at the very least, the trial court was required to give the parties notice of its intent to set aside the pre-trial order, the opportunity to address the issue, and the opportunity to present additional evidence as necessary based upon the elimination of the stipulations, before entering an equitable distribution judgment. Accordingly, we reverse the 9 April 2008 order setting aside the 19

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October 2006 pre-trial order.⁵ As the trial court's subsequent 14 April 2008 equitable distribution judgment is based on the trial court's order setting aside the pre-trial order, we also reverse that judgment. This ruling also reverses the remaining trial court orders at issue in this case as they were all based upon the trial court's original equitable distribution judgment, which includes the 8 May 2008, 29 June 2008, 30 April 2010, 30 November 2010, and 11 November 2011 orders.

Since it has now been nearly six years since the equitable distribution trial⁶, and the trial court must consider increases and decreases in the values of the parties' marital and divisible property and possible changes in distributional factors since the date of separation, the trial court must on remand conduct a new equitable distribution trial. Because the previous orders noted above are reversed, on remand the trial court should also address *de novo* any issues raised by the parties as to the circumstances surrounding the 2003 and 2006 arson investigations, so we need not address defendant's remaining arguments as to these issues on appeal. Based upon this opinion, the pre-trial order of 19 October 2006 stands, but because of the extraordinary length of time since entry of that pre-trial order, we anticipate that modification of that order will be necessary on remand and this opinion does not in any way prevent modification of the pre-trial order upon motion of either party or as required by the trial court, as long as it is done prior to the equitable distribution trial with proper notice and opportunity for hearing to the parties.

Even though we have reversed the trial court's equitable distribution judgment and order and thus need not make any ruling upon defendant's due process arguments, we cannot ignore the 18 month delay between the equitable distribution trial and entry of the judgment. In *Wall v. Wall*, this Court addressed a 19 month delay from the date of the equitable distribution trial to the entry of judgment:

Defendant argues that his due process rights under both the United States Constitution and the North Carolina Constitution were violated by the delay of 19 months from the date of trial to the entry of judgment in this matter. Defendant argues that an overall goal of our Equitable Distribution Act is "winding up the

5. The cases relied on by plaintiff in support of her argument are not controlling as they do not address a pretrial order or stipulations by the parties.

6. Because of defendant's post-trial motions filed mostly in response to the order setting aside the pre-trial order, the final equitable distribution order was not entered until over four years after the conclusion of the trial.

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marriage and distribut[ing] the marital property fairly with as much certainty and finality as possible.” *Lawing v. Lawing*, 81 N.C. App. 159, 183, 344 S.E.2d 100, 115 (1986).

We recognize there is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment. That is particularly true in a lengthy, complicated matter such as the case before us. Competent counsel for the parties carried out extensive discovery, submitted numerous legal briefs and responded to the briefs filed by their opponents.

In many cases, a delay in the entry of judgment for 30 or 60 days following trial would not be prejudicial because there would be little or no change in the situation of the parties or the values assigned to the items of property. In this case, however, there was a nineteen-month delay between the date of trial and the date of disposition. This was more than a *de minimis* delay, and requires that the trial court enter a new distribution order on remand. Where there is such an extensive delay, even though it be due to factors beyond the trial court’s control, we believe it would be consistent with the goals of the Equitable Distribution Act that the trial court allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property.

Thus, on remand, the trial court must reconsider the evidence of the increase in value of the husband’s profit-sharing plan following separation, treating such increase as a distributional factor, rather than attempting to divide the increase. Further, the trial court must reconsider the evidence offered by the husband on the state of his health, make appropriate findings about the evidence, and give it appropriate weight in making a new distribution decision. Finally, the trial court must give the parties an opportunity to offer evidence on the changes, if any, in value of the marital property since the trial of this matter. The trial court is then to make a new distribution order.

140 N.C. App. 303, 313-14, 536 S.E.2d 647, 654 (2000). Although this Court has also noted “that the **delayed entry** of the equitable distribution order, **standing alone**” does not necessarily entitle an appellant to a new trial as a matter of law, *Britt v. Britt*, 168 N.C. App. 198, 203, 606 S.E.2d 910, 913 (2005) (emphasis in original), we believe that the factual situation presented by this case does demonstrate prejudice to the defendant. As the 18 month delay “was more than a *de*

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minimis delay” and was prejudicial under the facts of this case, it would require a new hearing for the parties to provide additional evidence as to changes in the values of marital and divisible property and distributional factors. However, as we have already remanded for a new trial as to all issues, as determined above, such an order is unnecessary. We only regret that there is no way that we, or the trial court, can repair all of the damage which may have been done by the extensive delay in the completion of this equitable distribution matter. We trust that on remand the equitable distribution judgment will be entered promptly after the trial.

For the foregoing reasons, we reverse the trial court’s 9 April 2008 order and 14 April 2008 judgment, the trial court’s subsequent 8 May 2008, 29 June 2008, 30 April 2010, 30 November 2010, and 11 November 2011 orders, and remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and McCULLOUGH concur.

JAMES W. PROUSE AND CAROL D. PROUSE, PLAINTIFFS v. BITUMINOUS CASUALTY CORPORATION AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANTS

No. COA12-160

(Filed 7 August 2012)

Insurance—uninsured motorist—physical contact between vehicles required

The trial court did not err in an automobile accident, caused by the falling of a tire from a moving vehicle, by granting defendants’ motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). The successful maintenance of a direct claim against an uninsured motorist carrier pursuant to N.C.G.S. § 20-279.21 is conditioned upon a showing that physical contact occurred between the insured and the vehicle operated by the hit-and-run driver, and the allegations of plaintiffs’ complaint, when considered in the light most favorable to plaintiffs, showed that no physical contact between the vehicles occupied by plaintiff and the uninsured driver occurred.

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Judge HUNTER, Robert C., dissenting.

Appeal by plaintiffs from orders entered 2 November 2011 by Judge Richard D. Boner in Stanly County Superior Court. Heard in the Court of Appeals 9 May 2012.

Price, Smith, Hargett, Petho & Anderson, by William Benjamin Smith and Archibald Law Office, by C. Murphy Archibald, for plaintiff-appellants.

Teague Campbell Dennis & Gorham, L.L.P., by J. Matthew Little and Joseph E. Houchin, for defendant-appellee Bituminous Casualty Corporation.

McAngus, Goudelock & Courie, PLLC, by Heather G. Connor and Michael P. Hummel, for defendant-appellee State Farm Mutual Automobile Insurance Company.

ERVIN, Judge.

Plaintiffs James W. Prouse and Carol D. Prouse appeal from orders granting dismissal motions filed by Defendants Bituminous Casualty Corporation and State Farm Mutual Automobile Insurance Company. On appeal, Plaintiffs contend that their complaint did, in fact, state a claim for which relief could be granted. After careful consideration of Plaintiffs' challenge to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

On 27 May 2011, Plaintiffs filed a complaint alleging that, on or about 12 June 2008, Mr. Prouse was a passenger in a truck that was owned by his employer and being operated by a co-worker when the truck was "struck by a moving vehicle tire, which fell from a moving vehicle, . . . causing] [Mr. Prouse's co-worker] to lose control of the vehicle [and] . . . the vehicle to overturn." As a result of the accident, Plaintiffs alleged that (1) Mr. Prouse suffered injuries to his leg and knee; (2) Mr. Prouse suffered a loss of earnings and earning capacity; and (3) Mrs. Prouse suffered a loss of consortium. According to Plaintiffs, Mr. Prouse was insured under a policy sold to his employer by Defendant Bituminous Casualty and a policy sold to him by Defendant State Farm, both of which provided liability insurance, uninsured motorist coverage and underinsured motorist coverage. In light of their assertion that the accident in which Mr. Prouse was

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injured was a “hit and run accident” as defined in N.C. Gen. Stat. § 20-279.21(b)(3) and the Bituminous Casualty and State Farm policies, Plaintiffs claimed that they were entitled to recover damages from Defendants in an amount in excess of \$10,000.00.

On 5 July 2011, Bituminous Casualty filed a motion to dismiss Plaintiffs’ complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) based upon the language of N.C. Gen. Stat. § 20-279.21 and this Court’s decision in *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 664 S.E.2d 326, *aff’d*, 362 N.C. 673, 669 S.E.2d 321 (2008). On 13 July 2011, State Farm filed a motion to dismiss Plaintiffs’ complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the basis of the same logic upon which Bituminous Casualty relied. These dismissal motions came on for hearing before the trial court at the 31 October 2011 civil session of Stanly County Superior Court. On 2 November 2011, the trial court entered orders granting Defendants’ motions and concluding that all claims asserted in Plaintiffs’ complaint should be dismissed with prejudice. Plaintiffs noted an appeal to this Court from the trial court’s orders.

II. Legal Analysis

On appeal, Plaintiffs argue that the trial court erred by granting Defendants’ dismissal motions pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that their complaint did, in fact, state a claim for relief pursuant to N.C. Gen. Stat. §§ 279.21(b)(3) and 20-166. More specifically, Plaintiffs contend that N.C. Gen. Stat. § 279.21(b)(3) should be “narrowly limited to the extent necessary to prevent fraud” and that the present case is distinguishable from *Moore* given that Plaintiffs’ complaint “set[] out a different and recoverable cause of action based upon cargo or equipment on a moving [hit-and-run] vehicle [which] in a continuous act f[ell] from the vehicle striking the . . . vehicle [in which Mr. Prouse was traveling].” Plaintiffs’ arguments lack merit.

A. Standard of Review

“‘On a motion to dismiss pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(6) . . . the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.’” *Stunzi v. Medlin Motors, Inc.*, ___ N.C. App. ___, ___, 714 S.E.2d 770, 773 (2011) (quoting *Nucor Corp. v. Prudential Equity Group, LLC*, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008)). A dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is appro-

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appropriate when: “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). This Court reviews a trial court’s ruling on a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) *de novo*. *Stunzi*, ___ N.C. App. at ___, 714 S.E.2d at 773.

B. Uninsured Motorist Coverage

N.C. Gen. Stat. § 20-279.21(b)(3)(b), provides, in pertinent part, that:

Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of a collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer

“Our courts have interpreted this statute to require physical contact between the vehicle operated by the insured motorist and the vehicle operated by the hit-and-run driver for the uninsured motorist provisions of the statute to apply.” *Moore*, 191 N.C. App. at 109, 664 S.E.2d at 328 (quoting *McNeil v. Hartford Accident and Indemnity Co.*, 84 N.C. App. 438, 442, 352 S.E.2d 915, 917 (1987)). After carefully reviewing the record and the parties’ briefs, we conclude that our decision in *Moore* is, as the trial court concluded, controlling in this case, so that Plaintiffs’ complaint was properly dismissed.

In *Moore*, the plaintiff filed a complaint against his automobile insurance carrier alleging breach of contract, unfair and deceptive trade practices, bad faith, and punitive damages. *Id.* at 107, 664 S.E.2d at 327. In his complaint, the plaintiff alleged that the vehicle that he was driving had hit a log that had fallen off a truck and was lying in the middle of the road and that the defendant had unlawfully refused to honor his claim against his uninsured motorist carrier on the basis that a log did not “fit the definition of an ‘uninsured motor vehicle.’” *Id.* The trial court dismissed the plaintiff’s complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Id.* On appeal, this Court, acting in reliance on *Andersen v. Bacchus*, 335 N.C. 526, 529, 439 S.E.2d 136, 138 (1994) (affirming the Court of Appeal’s interpretation of N.C. Gen. Stat. § 20-279.21 as requiring “physical contact between the insured

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and the hit-and-run driver”), concluded that the “plaintiff’s complaint fail[ed] to satisfy the physical contact requirement” set out in N.C. Gen. Stat. § 20-279.21. *Id.* at 110, 664 S.E.2d at 329. As a result, we affirmed the trial court’s decision to dismiss the plaintiff’s complaint.¹ *Id.* at 110-11, 664 S.E.2d at 329.

The facts at issue in this case are indistinguishable on any material basis from those before us in *Moore*. As in *Moore*, Plaintiffs’ complaint alleged that damages resulted from a collision between a vehicle in which Mr. Prouse was riding and an object that had fallen from an unidentified vehicle rather than from “physical contact between the [vehicle in which Mr. Prouse was a passenger] and the vehicle that allegedly carried the [object] struck by the [truck].” 191 N.C. App. at 110, 664 S.E.2d at 329. Although Plaintiffs attempt to distinguish *Moore* on the grounds that the object that struck the vehicle in which Mr. Prouse was riding fell from a “hit-and-run” vehicle and struck the vehicle in which Mr. Prouse was riding in one continuous motion rather than falling from the “hit-and-run” vehicle and lying in the roadway for some time before the collision, we do not believe that the distinction upon which Plaintiffs rely is a material one. Unfortunately for Plaintiffs, the Supreme Court has expressly “‘decline[d] to change [the] existing judicial interpretation of the uninsured motorist statute . . . ,’” *Id.* (quoting *Andersen*, 335 N.C. at 529, 439 S.E.2d at 138), which requires physical contact between the insured and the hit-and-run driver. Such contact is not alleged to have occurred here. In such circumstances, we are required to adhere “‘to the principle of *stare decisis*[.]’” *Id.* (quoting *Andersen*, 335 N.C. at 529, 439 S.E.2d at 138), and lack the authority to revisit the previous decisions of this Court and the Supreme Court construing N.C. Gen. Stat. § 20-279.21(b)(3)(b).² As a result, given that Plaintiffs’ complaint “on its face reveals that no law supports [their] claim,” *Wood*, 355 N.C. at 166, 558 S.E.2d at 494, the trial court properly granted Defendants’ dismissal motions.

1. As will be discussed in more detail below, the Court in *Moore* actually held that the defendant’s dismissal motion should have been treated as a motion for summary judgment, so that the effect of our decision in *Moore* was to hold that the evidentiary forecast submitted by the parties did not suffice to support the plaintiff’s claim against the defendant in reliance upon N.C. Gen. Stat. § 20-279.21.

2. Although Plaintiffs advocate the adoption of the rationale espoused by the dissenting judge in *Moore*, we believe that the approach adopted in that separate opinion was rejected by the Supreme Court when it upheld our decision in that case. 362 N.C. 673, 669 S.E.2d 321. In addition, we find Plaintiffs’ reliance on numerous decisions from other jurisdictions adopting a “fraud-based” reading of similar statutory language unpersuasive given that this Court and the Supreme Court have adopted a different construction of the relevant statutory language.

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According to our dissenting colleague, the present case is distinguishable from *Moore* in a number of ways, so that we are not bound by its holding. As an initial matter, our dissenting colleague points out that, in *Moore*, we treated “the trial court’s grant of the defendant’s Rule 12(b)(6) motion to dismiss as the grant of a motion for summary judgment” because the trial court considered matters outside the pleadings.³ On the other hand, our dissenting colleague points out that our review of the trial court’s decision to dismiss Plaintiffs’ complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) involves “test[ing] the law of the claim, not the facts which support it.” *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 88, 638 S.E.2d 617, 619 (2007) (quoting *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979)). Although the standard under which orders granting or denying summary judgment motions and the standard under which orders granting or denying dismissal motions are reviewed are not the same and although the existence of differing standards of review might make a difference in some cases depending upon the state of the record, the essential difference between the manner in which the two types of issues are reviewed on appeal stems from the scope of the factual information that a reviewing court is entitled to consider rather than the manner in which the applicable law is applied to the relevant facts. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (stating that the dismissal of a complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is appropriate when “the face of the complaint [shows] an insurmountable bar to appellants’ recovery on any . . . theory”); N.C. Gen. Stat. § 1A-1, Rule 56(c) (stating that 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 judgment as a matter of law”). Put simply, the fundamental purpose of a summary judgment motion, as compared to a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), is to allow a litigant to “test” the extent to which the allegations in which a particular claim has been couched have adequate evidentiary support. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) (stating that “the real purpose of summary judgment is to go beyond or pierce the

3. Although our dissenting colleague appears to believe that the issues before the Court in *Moore* should have been evaluated under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) rather than under N.C. Gen. Stat. § 1A-1, Rule 56, the *Moore* Court did, as our dissenting colleague acknowledges, decide *Moore* in a summary judgment, rather than a pleadings-based, context.

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pleadings and determine whether there is a genuine issue of material fact” (citations omitted)). Given that *Moore* conditions the successful maintenance of a direct claim against an uninsured motorist carrier pursuant to N.C. Gen. Stat. § 20-279.21 upon a showing that physical contact occurred between the insured and the vehicle operated by the hit-and-run driver, *Moore*, 191 N.C. App. at 110, 664 S.E.2d at 329, and given that the allegations of Plaintiffs’ complaint, when considered in the light most favorable to Plaintiffs, show that no physical contact between the vehicles occupied by Plaintiff and the uninsured driver occurred, the face of Plaintiffs’ complaint reveals the presence of an insurmountable bar to their requested relief, rendering Plaintiff’s complaint subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Thus, the fact that *Moore* involved review of an order granting summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 instead of an order dismissing a complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is not relevant to the proper resolution of this case.

Secondly, our dissenting colleague argues that this case and *Moore* are distinguishable because the “pine tree log” in *Moore* was a “natural object” and because the contact between the log and the plaintiff’s vehicle did not implicate the involvement of another vehicle as required by N.C. Gen. Stat. § 20-279.21(b)(3)(b). We do not read *Moore* as implying that the extent to which N.C. Gen. Stat. § 20-279.21 authorizes a direct claim against an uninsured motorist carrier hinges upon whether a “natural object” is left in the roadway as compared to whether such an object fell from a moving vehicle. When taken in context, the statement upon which our dissenting colleague relies simply indicates that the plaintiff had failed to prove that the physical contact between two vehicles required for the successful maintenance of a direct action against an uninsured motorist carrier under *Andersen* had occurred. *Moore*, 191 N.C. App. at 110, 664 S.E.2d at 329. As a result, the fact that *Moore* refers to the plaintiff’s failure to “show from what vehicle, truck, or trailer, if any, the pine tree log fell [], when it fell, or how long it had been lying on the interstate prior to impact,” *Id.*, does not tend to show that the absence of a requirement that a litigant seeking to maintain a direct action against an uninsured motorist carrier pursuant to N.C. Gen. Stat. § 20-279.21 prove physical contact between his own vehicle and that operated by another driver.

Third, our dissenting colleague argues that, properly understood, the decisions of the Supreme Court and this Court provide that, in order to maintain a viable claim against an uninsured motorist carrier

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pursuant to N.C. Gen. Stat. § 20-279.21, all that must be shown is that the plaintiff's injury "implicate the involvement of another vehicle" and that the Supreme Court did not, in affirming our decision in *Moore*, "express[ly] reject[] the rationale espoused by the dissenting judge" in *Moore*.⁴ In view of the Supreme Court's express adoption of a requirement that there be "physical contact between the insured and the hit-and-run driver" in *Andersen* and the fact that the Supreme Court affirmed our opinion in *Moore*, which expressly rejected the approach adopted in the dissenting opinion upon which our dissenting colleague in this case relies, we are unable to conclude that existing precedent leaves open the possibility of holding that the "physical contact" requirement of N.C. Gen. Stat. § 20-279.21 has been satisfied as long as another vehicle is "implicated" or "involved" in the harm that the insured sustained. Thus, we simply do not believe that the prior decisions of the Supreme Court and this Court permit the adoption of the approach espoused by our dissenting colleague and the dissenting judge in *Moore*.

Finally, our dissenting colleague contends that *McNeil*, 84 N.C. App. at 442, 352 S.E.2d at 917 (holding that the "physical contact" needed to support a direct claim against an uninsured motorist carrier pursuant to N.C. Gen. Stat. § 20-279.21 existed "where the physical contact ar[ose] between the hit-and-run vehicle and plaintiff's vehicle through intermediate vehicles involved in an unbroken 'chain collision' which involve[d] the hit-and-run vehicle"), and *Geico Ins. Co. v. Larson*, 542 F. Supp. 2d 441, 447-48 (E.D.N.C. 2008) (utilizing the "chain collision" theory enunciated in *McNeil* in determining that an uninsured motorist carrier was not entitled to summary judgment based upon an alleged failure to satisfy the "physical contact" requirement set forth in N.C. Gen. Stat. § 20-279.21 in a case in which a rock fell from the hit-and-run vehicle and struck the insured's vehicle), support his determination that Plaintiffs had alleged facts that satisfied the "physical contact" requirement under a "chain collision" theory. However, the decisions upon which our dissenting colleague relies undergirded the position that was adopted by the dissenting judge and that was explicitly rejected by the *Moore* majority, which stated that:

4. A careful review of the decisions upon which our dissenting colleague relies in support of his contention that a *per curiam* affirmance of one of our decisions by the Supreme Court does not amount to an affirmance of the reasoning adopted in our opinion reveals that there was no majority opinion in *Collins v. Davis*, 68 N.C. App. 588, 315 S.E.2d 759 (1984), and that *State v. Summers*, 284 N.C. 361, 365, 200 S.E.2d 808, 811 (1973), does not address the impact of a *per curiam* affirmance of our decision by the Supreme Court.

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[t]he dissent's reliance on *McNeil* to extend the physical contact requirement to cover these facts is a wholly unwarranted extension, when our Supreme Court specifically rejected modification of the plain language of N.C. Gen. Stat. § 20-279.21 in *Andersen*. Furthermore, the dissent's reliance on the United States District Court for the Eastern District of North Carolina's holding in *Geico Ins. Co. v. Larson* is misplaced as that opinion is not binding precedent or authority and is contrary to our Supreme Court's interpretation of N.C. Gen. Stat. § 20-279.21 in *Andersen*.

191 N.C. App. at 110, 664 S.E.2d at 329 (citations omitted). As a result, given that the approach adopted by our dissenting colleague in reliance upon *McNeil* and *Geico* was expressly rejected by this Court in *Moore* and given that our decision in *Moore* was affirmed by the Supreme Court,⁵ we conclude that the final argument advanced by our dissenting colleague lacks merit and that *Moore* does, in fact, control the outcome in the present case.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court correctly determined that Plaintiffs' complaint failed to state a claim for which relief could be granted. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

JUDGE STROUD concurs.

JUDGE ROBERT C. HUNTER dissents with a separate opinion.

HUNTER, Robert C., Judge, dissenting.

I conclude the case on which the majority relies, *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 664 S.E.2d 326, *aff'd*

5. Even if our dissenting colleague is correct in asserting, like Plaintiffs, that the Supreme Court did not expressly reject the approach adopted by the dissenting judge in *Moore*, a proposition with which we do not agree, we are still bound by our own decision in *Moore*, which recognizes that N.C. Gen. Stat. § 20-279.21 requires direct or indirect physical contact between the vehicles driven by the insured and the vehicle driven by the hit-and-run driver (as compared to contact between the insured vehicle and some object that falls from or was thrown off of the vehicle driven by the hit-and-run driver). *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "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").

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per curiam, 362 N.C. 673, 669 S.E.2d 321 (2008), is distinguishable from this case, and thus, I respectfully dissent.

The underlying complaint alleged that in June 2008 plaintiff James W. Prouse was a passenger in his employer's vehicle traveling on Interstate 485 when the vehicle was struck by a moving vehicle tire that had fallen from another moving vehicle. The collision caused the driver of the vehicle in which Mr. Prouse was riding to lose control and overturn. Mr. Prouse suffered permanent bodily injuries and, with his wife (collectively "plaintiffs"), filed the underlying suit against his employer's insurer, Bituminous Casualty Corporation, and his personal automobile insurer, State Farm Mutual Automobile Insurance Company (collectively "defendants"). Plaintiffs sought recovery for bodily injuries and loss of consortium, which they alleged were covered by the uninsured motorist provisions of the insurance policies issued by defendants. Defendants filed separate motions to dismiss plaintiffs' complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6); defendants argued plaintiffs' claims were barred by N.C. Gen. Stat. § 20-279.21 and this Court's holding in *Moore*, 191 N.C. App. at 110, 664 S.E.2d at 329. The trial court granted defendants' motions and dismissed plaintiffs' complaint.

I agree with the majority's statement of our standard of review of the trial court's grant of defendants' Rule 12(b)(6) motions to dismiss. In our review, we must determine "whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief can be granted under some legal theory." *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 88, 638 S.E.2d 617, 619 (2007). In so doing, we "accept as true the well-pleaded factual allegations of the complaint and review the case *de novo* . . ." *Id.* However, in light of this standard of review, I conclude the majority's and defendants' reliance on *Moore* is misplaced.

In *Moore*, this Court concluded that the trial court "considered matters 'outside the pleading'" when it heard the defendant's Rule 12(b)(6) motion to dismiss. 191 N.C. App. at 108, 664 S.E.2d at 327 (quoting N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007)). Accordingly, we reviewed the trial court's grant of the defendant's Rule 12(b)(6) motion to dismiss as the grant of a motion for summary judgment. 191 N.C. App. at 108, 664 S.E.2d at 327; *see Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) ("A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court."), *disapproved of on*

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other grounds by Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981). Thus, the defendant in *Moore* was required to show “‘that there [was] no genuine issue as to any material fact and that any party [was] entitled to a judgment as a matter of law.’” 191 N.C. App. at 108, 664 S.E.2d at 328 (quoting *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007)). Once the defendant made this showing, the burden shifted to the plaintiff “‘to produce a forecast of *evidence demonstrating specific facts, as opposed to allegations*, showing he [could] at least establish a prima facie case at trial.’” *Id.* (quoting *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661) (emphasis added)).

Applying this standard in *Moore*, we concluded the plaintiff had not met his burden in that he had produced “[n]o evidence show[ing] from what vehicle, truck or trailer, *if any*, the pine tree log fell from, when it fell, or how long it had been lying on the interstate prior to impact.” 191 N.C. App. at 110, 664 S.E.2d at 329 (emphasis added). Thus, the plaintiff in *Moore* did not produce any evidence to support an essential element of his claim under N.C. Gen. Stat. § 20-279.21(b)(3)(b), the element of physical contact with a hit-and-run vehicle, and we concluded the defendant’s motion to dismiss was properly granted—albeit under a summary judgment standard. *Id.*

Here, in the orders granting defendants’ Rule 12(b)(6) motions to dismiss the trial court stated: “It appearing to the [c]ourt after oral argument and upon review of Plaintiffs’ Complaint and applicable law that the Complaint should be dismissed for failure to state a claim upon which any relief can be granted.” However, oral arguments in support of a motion to dismiss “are not considered matters outside the pleadings.” *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 300, 672 S.E.2d 691, 693 (2009) (citing *King v. Cape Fear Mem’l Hosp., Inc.*, 96 N.C. App. 338, 342, 385 S.E.2d 812, 815 (1989), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990)).

In *Charlotte Motor Speedway*, this Court rejected the appellant’s claim that the trial court converted a 12(b)(6) motion to dismiss into a motion for summary judgment where the trial court’s order stated it had reviewed the pleadings, the briefs, and the oral arguments by counsel in reaching its decision. *Id.* We concluded that “nothing in the record establishe[d] that the trial court considered matters beyond the pleadings[.]” *Id.* Similarly, here, nothing in the record reveals that the trial court considered any matter beyond the pleadings. Accordingly, unlike the Court in *Moore*, we must treat plaintiffs’ allegations as true and review plaintiffs’ complaint only “‘to test the law of the claim, not the facts which support it.’” *Okuma Am. Corp.*, 181

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N.C. App. at 88, 638 S.E.2d at 619 (quoting *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979)).

The majority concludes that the differing standards of review in *Moore* and this case are not relevant to the resolution of plaintiffs' appeal as plaintiffs' complaint presents an insurmountable bar to the requested relief—that the allegations in the complaint do not establish physical contact between Mr. Prouse's vehicle and the hit-and-run driver. In contrast, I interpret plaintiffs' complaint as being consistent with our caselaw in alleging an indirect collision with a hit-and-run vehicle. Thus, I conclude the facts presented in this case are distinguishable from those in *Moore* and the standard of review applied in *Moore* provides a critical difference.¹

“The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality.” *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). As the majority notes, a motion for summary judgment “allows the trial court ‘to pierce the pleadings’ to determine whether any genuine factual controversy exists.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (quoting *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). This inquiry requires the nonmoving party to support his claim with specific facts; he cannot rely upon the mere allegations of his pleading. *Id.* 369-70, 289 S.E.2d at 366. Indeed, Rule 56(e) “precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts.” *Id.* at 370, 289 S.E.2d at 366 (emphasis omitted); N.C. Gen. Stat. § 1A-1, Rule 56(e) (2011).

The plaintiff in *Moore* did not meet this burden when the defendants challenged his claim that N.C. Gen. Stat. § 20-279.21(b)(3)(b) should require coverage for the damage sustained when his vehicle

1. See *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000) (distinguishing a case cited by the defendants where the case cited involved the review of a motion for summary judgment instead of a Rule 12(b)(6) motion to dismiss, which was the subject of the appeal in *Norman*). Although, in *Moore*, this Court reviewed the trial court's order as a grant of a motion for summary judgment, 191 N.C. App. at 108, 664 S.E.2d at 327, the text of the opinion leads me to conclude this Court should have reviewed the trial court's order as a grant of a Rule 12(b)(6) motion to dismiss. In *Moore*, we stated that because the trial court considered “the briefs and oral arguments of counsel” the trial court had considered “matters ‘outside the pleadings’” in reaching its decision. *Id.* However, as stated above, “[r]equests, explanations, and arguments of counsel relating to a motion to dismiss are not considered matters outside the pleadings.” *Charlotte Motor Speedway, Inc.*, 195 N.C. App. at 300, 672 S.E.2d at 693. Nevertheless, *Moore* was decided under a different evidentiary standard, and thus, the present case is distinguishable.

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struck a “pine tree log” that was lying in the interstate. 191 N.C. App. at 107, 664 S.E.2d at 327. A collision with a natural object lying in the road does not require the involvement of a second vehicle, a prerequisite for a claim made pursuant to N.C. Gen. Stat. § 20-279.21(b)(3)(b). A pine tree log can fall onto a road without the involvement of any vehicle, and the Court noted the plaintiff’s lack of any evidence of another vehicle in affirming the dismissal of the claim: “No evidence shows from what vehicle, truck or trailer, *if any*, the pine tree log fell from” *Moore*, 191 N.C. App. at 110, 664 S.E.2d at 329 (emphasis added)).

Here, plaintiffs alleged the vehicle in which Mr. Prouse was a passenger “was struck by a moving vehicle tire, which fell from a moving vehicle.” Thus, as we are required to treat plaintiffs’ allegations as true, *Okuma Am. Corp.*, 181 N.C. App. at 88, 638 S.E.2d at 619, this case—unlike *Moore*—necessarily involves a second vehicle and a collision with a part of that vehicle or its cargo.

Furthermore, I do not agree with the majority that the Supreme Court’s decision affirming *Moore* was an express rejection of the rationale espoused by the dissenting judge at the Court of Appeals. *Moore*, 362 N.C. at 673, 669 S.E.2d at 321; *Moore*, 191 N.C. App. at 111, 664 S.E.2d at 329 (McCullough, J., dissenting). The Supreme Court’s *per curiam* opinion provided no insight into the Court’s reasoning.² *Moore*, 362 N.C. at 673, 669 S.E.2d at 321. Rather, in light of the summary judgment standard of review applied in that case, I interpret the Supreme Court’s ruling as being limited to affirming that the plaintiff in *Moore* failed to meet his burden of forecasting evidence of an essential element of his claim—direct or indirect physical contact with a hit-and-run vehicle.

The requirement for physical contact between the insured and the hit-and-run driver did not originate with *Moore*.³ In *McNeil v.*

2. See *State v. Summers*, 284 N.C. 361, 365, 200 S.E.2d 808, 811 (1973) (noting that a *per curiam* decision by the Supreme Court of the United States “d[id] not specify the legal reasoning which influenced the Court”); *Sellers v. Ochs*, 180 N.C. App. 332, 336 n.2, 638 S.E.2d 1, 3 n.2 (2006) (distinguishing *Collins v. Davis*, 68 N.C. App. 588, 315 S.E.2d 759, *aff’d per curiam*, 312 N.C. 324, 321 S.E.2d 892 (1984), noting that the Supreme Court of North Carolina “summarily affirmed [*Collins*] *per curiam* without adopting the reasoning provided by” the authoring judge in *Collins*), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 449 (2007).

3. See *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 182, 167 S.E.2d 876, 877 (1969) (affirming dismissal of the plaintiff’s uninsured motorist claim due to a lack of physical contact between motorists); *East v. Reserve Ins. Co.*, 18 N.C. App. 452, 455, 197 S.E.2d 225, 226 (1973) (affirming summary judgment against the plaintiff where he

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Hartford Acc. & Indem. Co., 84 N.C. App. 438, 442, 352 S.E.2d 915, 917 (1987), this Court concluded that our caselaw had interpreted the uninsured motorists provision of N.C. Gen. Stat. § 20-279.21(b)(3)(b) to require physical contact between the vehicle operated by the insured and the vehicle operated by the hit-and-run driver. *Id.* Specifically, we held in *McNeil* that this physical contact requirement could be satisfied in an indirect manner, in a “‘chain collision’” that involved a hit-and-run vehicle. *Id.* Subsequently, in *Andersen v. Baccus*, 335 N.C. 526, 529, 439 S.E.2d 136, 138 (1994), our Supreme Court cited *McNeil* and approved this Court’s interpretation of the uninsured motorist provision of N.C. Gen. Stat. § 20-279.21 as requiring a “direct or indirect” collision with the hit-and-run driver’s vehicle. Significantly, *Andersen* was cited as the basis for this Court’s reasoning in *Moore*, 191 N.C. App at 110, 664 S.E.2d at 329. Thus, contrary to the majority’s assertion, I conclude that our caselaw has not expressly rejected the proposition that the direct or indirect physical contact requirement could be satisfied by a collision with a part of a hit-and-run vehicle or its cargo. There is no practical distinction between a direct collision with a hit-and-run vehicle, as recognized in *Andersen*, an indirect collision with a hit-and-run vehicle through an intermediate vehicle, as recognized in *McNeil*, and an indirect collision with a part of a hit-and-run vehicle—such as a spare tire—or its cargo, as in the present case.

The reasoning of *Andersen* and *McNeil* was applied by Judge W. Earl Britt in *Geico Ins. Co. v. Larson*, 542 F. Supp. 2d 441, 447 (E.D.N.C. 2008). While the decision is not binding on this Court, I find it to be a persuasive application of our caselaw. In *Geico*, the uninsured motorist provision of the insured’s automobile insurance policy provided coverage for injuries where a hit-and-run vehicle “‘hits’” the insured, the insured’s vehicle, or the vehicle which the insured was occupying. 542 F. Supp. 2d at 445 (emphasis omitted). The district court concluded that where a rock fell from an unidentified truck and struck the insured’s vehicle in an “unbroken ‘chain collision[,]’” the physical contact requirement of N.C. Gen. Stat. § 20-279.21(b)(3)(b) could be satisfied and allowed the case to proceed with discovery. *Geico*, 542 F. Supp. 2d at 447-48 (citing *McNeil*, 84 N.C. App. at 442, 352 S.E.2d at 917).

drove into a ditch to avoid a collision); *Petteway v. S. Carolina Ins. Co.*, 93 N.C. App. 776, 777, 379 S.E.2d 80, 81 (affirming summary judgment against the plaintiff where his vehicle was forced off the road and did not come into contact with any other vehicle), *disc. review denied*, 325 N.C. 273, 384 S.E.2d 518 (1989).

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In summary, I conclude *Moore*, 191 N.C. App. at 110, 664 S.E.2d at 329, decided under a different evidentiary standard, is not controlling; the plaintiff in *Moore* failed to establish the existence of a hit-and-run vehicle, much less his physical contact with a hit-and-run vehicle. Rather, as did the dissenting judge in *Moore*, 191 N.C. App. at 111, 664 S.E.2d at 329 (McCullough, J., dissenting), I discern no justification for denying that the physical contact requirement of N.C. Gen. Stat. § 20-279.21(b)(3)(b) could be satisfied by an indirect and unbroken chain collision with a part of a hit-and-run vehicle or its cargo. Accordingly, I conclude the dismissal of plaintiffs' complaint was improper, and I would reverse the trial court's orders.

No. COA12-67

(Filed: 7 August 2012)

ANTHONY E. SCOTT, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME
CONTROL AND PUBLIC SAFETY, NORTH CAROLINA HIGHWAY PATROL,
DEFENDANT

No. COA12-67

(Filed 7 August 2012)

**Administrative Law—contested case—petition for judicial
review—jurisdiction—payment of filing fee**

The trial court erred by concluding that plaintiff state trooper's failure to pay the required filing fee on or before 11 March 2010 deprived the Office of Administrative Hearings of jurisdiction to consider plaintiff's challenge to defendant's dismissal decision. Additional proceedings were required to be conducted in the trial court in order to fully resolve the issues raised by defendant's petition for judicial review.

Appeal by plaintiff from judgment entered 22 July 2011 by Judge Marvin K. Blount, III, in Wake County Superior Court. Heard in the Court of Appeals 22 May 2012.

Barry Nakell for Plaintiff-Appellee.

Attorney General Roy Cooper, by Assistant Attorney General Tamara Zmuda for Defendant-Appellant.

ERVIN, Judge.

SCOTT v. N.C. DEP'T OF CRIME CONTROL & PUB. SAFETY

[222 N.C. App. 125 (2012)]

Plaintiff Anthony E. Scott appeals from an order granting a dismissal motion filed by Defendant North Carolina Department of Crime Control and Public Safety predicated on the fact that Plaintiff failed to satisfy a jurisdictional prerequisite for the consideration of his petition for a contested case hearing by the Office of Administrative Hearings given that he did not pay the required filing fee simultaneously with the submission of his petition. On appeal, Plaintiff contends that the trial court erroneously granted Defendant's motion given that payment of the requisite filing fee at the time that a petition is filed with the OAH is not a prerequisite to the invocation of OAH's jurisdiction. 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 reversed and that this case should be remanded to the Wake County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual BackgroundA. Substantive Facts

On 19 August 2009, North Carolina Highway Patrol Internal Affairs Captain P.A. Poole initiated an investigation concerning Plaintiff, who was, at that time, a Master Trooper with the North Carolina State Highway Patrol. At the conclusion of Captain Poole's investigation, Plaintiff was charged with several violations of Highway Patrol policy, including engaging in conduct unbecoming a trooper, failing to activate his in-car video camera during traffic stops, abusing his official position, willfully violating a direct order, and neglecting his duties. In light of the institution of these charges, Colonel W.R. Glover, the commander of the State Highway Patrol, demoted Plaintiff from Master Trooper to Trooper and reduced his salary by 15%. Although Plaintiff initially agreed to accept Colonel Glover's disciplinary decision, he submitted a challenge to that decision for consideration by Secretary Reuben F. Young of the Department of Crime Control and Public Safety on 22 December 2009 following his reassignment to a different location.

Upon receipt of Plaintiff's submission, Secretary Young requested that an Employee Advisory Committee be convened to hear Plaintiff's appeal. Although the Employee Advisory Committee recommended upholding the discipline that had been imposed upon Plaintiff, Secretary Young directed Plaintiff to attend a Pre-Dismissal Conference after concluding that the initial allegations that had been

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made against Plaintiff were valid and that Plaintiff had made false statements both at the time of the initial investigation and on appeal. Although Plaintiff attempted to “involuntarily” resign from his employment with the Highway Patrol based upon alleged “[d]uress, [c]oercion, and [i]ntolerable [c]onditions,” Secretary Young declined to accept Plaintiff’s resignation and rescheduled the Pre-Dismissal Conference. On 9 February 2010, Secretary Young terminated Plaintiff’s employment for the reasons set forth in the notice convening the Pre-Dismissal Conference.

B. Procedural History

On 11 March 2010, Plaintiff electronically filed a Petition for a Contested Case Hearing with the OAH for the purpose of challenging Secretary Young’s decision to terminate his employment.¹ On the same date, Plaintiff mailed two signed copies of the petition to the Clerk of the OAH. Plaintiff did not pay the required filing fee at the time that he filed and mailed the petition. On 17 March 2010, the OAH notified Plaintiff by means of a letter dated 16 March 2010 that “[y]ou must include a filing fee of \$20.00 in order for your petition to be processed.”² On the same date, Plaintiff’s counsel mailed an official check to the Clerk of the OAH; however, the check in question was neither returned nor cashed.³ As a result, Plaintiff’s counsel mailed another official check to the Clerk of the OAH on 22 March 2010. On 23 March 2010, the OAH received Plaintiff’s check and began processing his petition.

On 10 September 2010, Defendant filed a motion seeking the dismissal of Plaintiff’s petition based upon his alleged failure to pay the required filing fee in a timely manner. On 26 October 2010, Senior Administrative Law Judge Fred G. Morrison Jr., denied Defendant’s

1. According to 26 N.C.A.C. 03.0101(d), OAH “permit[s] the filing of contested case documents and other pleadings by facsimile (fax) or electronic mail,” with “[t]he faxed or electronic documents [to] be deemed a filing” as long as “the original signed document, one copy and the appropriate filing fee (if a fee is required by [N.C. Gen. Stat. §] 150B-23.2) is received by the OAH within seven business days following the faxed or electronic transmission.”

2. The amount of the required filing fee is specified in 26 N.C.A.C. 03.0103 and in N.C. Gen. Stat. § 150B-23.2(a).

3. The permissible methods for paying the required filing fee are cash, money order, certified check, or a “check drawn on an attorney’s trust account or operating account.” 26 N.C.A.C. 03.0103(g).

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dismissal motion,⁴ granted summary judgment in favor of Plaintiff, and ordered that Plaintiff be reinstated at the rank and salary that he held in the immediate aftermath of his demotion. Although Defendant challenged Judge Morrison's decision before the State Personnel Commission, the Commission upheld Judge Morrison's order.

On 3 February 2011, Defendant filed a Petition for Judicial Review in the Wake County Superior Court for the purpose of obtaining review of the State Personnel Commission's final decision. On 30 June 2011, Defendant filed a motion to dismiss the petition that Plaintiff had filed with the OAH on the grounds that Plaintiff's failure to pay the required filing fee at the time that he filed the petition deprived the OAH of jurisdiction over Plaintiff's challenge to Secretary Young's dismissal decision. Defendant's motion to dismiss came on for hearing before the trial court at the 19 July 2011 civil session of Wake County Superior Court. On 22 July 2011, the trial court entered an order concluding that Plaintiff's failure to pay the required filing fee on or before 11 March 2010 deprived both the OAH and the State Personnel Commission of jurisdiction over Plaintiff's challenge to Secretary Young's dismissal decision, necessitating the entry of an order dismissing Plaintiff's petition. On 8 August 2010, Plaintiff filed a motion seeking relief from the trial court's order pursuant to N.C. Gen. Stat § 1A-1, Rules 59 and 60. After further filings by both parties, the trial court entered an order denying Plaintiff's motion on 6 September 2011. Plaintiff noted an appeal to this Court from the 22 July 2011 and 6 September 2011 orders.

II. Legal Analysis

A. Standard of Review

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). Without jurisdiction over the subject matter of a particular proceeding, a tribunal lacks the authority to address the merits of the matter which has come before it for decision. *Id.* "In order for the OAH to have jurisdiction over [a] petitioner's appeal . . . petitioner is required to follow the statutory requirements outlined in Chapter 126 [of the

4. Judge Morrison reached this conclusion because Defendant "did not give [Plaintiff] notice of the filing fee requirement[;]" because Plaintiff "timely mailed the filing fee to the [OAH], though it was not received[;]" because Plaintiff subsequently "mailed the filing fee to the [OAH] and it was received[;]" and because "the filing fee requirement, being waivable, is not jurisdictional[.]"

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General Statutes] for commencing a contested case.” *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995). “Whether a trial court has subject matter jurisdiction is a question of law, reviewed *de novo* on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

B. Timing of Filing Fee

As we have already noted, the trial court dismissed Plaintiff’s OAH petition because he failed to pay the required filing fee at the time that he filed his petition for a contested case hearing. In essence, the trial court concluded that Plaintiff’s failure to pay the filing fee on or before the date upon which his petition was due raised “an issue of jurisdiction, which is dispositive.”⁵ Plaintiff, on the other hand, contends that the extent to which he paid the required filing fee simultaneously with the filing of his petition for a contested case does not have jurisdictional implications, so that any failure on his part to make the required payment on 11 March 2010 does not necessitate the dismissal of Plaintiff’s OAH petition. Plaintiff’s argument has merit.

A proper resolution of the issue before the Court in this case hinges upon an interpretation of the Administrative Procedure Act’s provisions governing the time within which a contested case must be commenced. “The principal goal of statutory construction is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). “The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish.” *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). “The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.” *Frye Reg’l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing

5. Although Defendant notes that the trial court also referenced the doctrine of sovereign immunity in dismissing Plaintiff’s OAH petition and argues that Plaintiff’s failure to challenge this determination on appeal requires us to uphold the trial court’s order regardless of our decision with respect to the impact of Plaintiff’s failure to pay the required filing fee on or before 11 March 2011, it is clear from a careful reading of the trial court’s order that the existence of a sovereign immunity bar stemmed solely from “[Plaintiff’s] fail[ure] to comply with the statutorily prescribed requirements for timely commencing his contested case.” As a result, by challenging the trial court’s decision that Plaintiff’s failure to pay the required filing fee on or before 11 March 2010 necessitated the dismissal of his OAH petition, Plaintiff clearly attacked the trial court’s resolution of the sovereign immunity issue as well.

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High Rock Lake Assoc. v. Environmental Management Comm., 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981)).

According to N.C. Gen. Stat. § 150B-23(a), “[a] contested case shall be commenced by paying a fee in an amount established in [N.C. Gen. Stat. §] 150B-23.2 and by filing a petition with the Office of Administrative Hearings” Although “the general limitation for the filing of a petition in a contested case is 60 days” from the date “when notice is given of the agency decision to all persons aggrieved,” N.C. Gen. Stat. § 150B-23(f), “[a]n employee appealing any decision or action [involving issues arising under the State Personnel Act] shall file a petition for a contested case with the [OAH] . . . no later than 30 days after receipt of the notice of the decision or action which triggers the right of appeal.” N.C. Gen. Stat. § 126-38. “All fees that are required to be assessed, collected, and remitted under [N.C. Gen. Stat. § 150B-23(a)] shall be collected by the [OAH] at the time of commencement of the contested case (except in suits *in forma pauperis*).” N.C. Gen. Stat. § 150B-23.2(b).

An analysis of the plain language in which the relevant statutory provisions are couched indicates that the 30 day time limit specified in N.C. Gen. Stat. § 126-38 only applies to the filing of the petition and not to the payment of the required fee. On the contrary, N.C. Gen. Stat. § 126-38 indicates that the applicable temporal requirement is satisfied if the petition for a contested case hearing is filed within 30 days of the date upon which the employee receives “notice of the decision or action which triggers the right of appeal.”⁶ Although N.C. Gen. Stat. § 150B-23(a) treats both the filing of the petition and the payment of the required fee as necessary to permit the commencement of a contested case and although N.C. Gen. Stat. § 150B-23.2(b) requires the OAH to collect any required fees “at the time of the commencement of the contested case,” nothing in the relevant statutory language requires the payment of the required fee simultaneously with the filing of the petition as a precondition for the invocation of the OAH’s jurisdiction. Simply put, the relevant statutory provisions treat the filing of a petition and the payment of the required fee as two distinct acts, the first of which must occur as of the date specified in N.C. Gen. Stat. § 150B-23(f), or some other applicable statutory provision, such as N.C. Gen. Stat. § 126-38, and the second of which

6. The same is true of N.C. Gen. Stat. § 150B-23(f), which indicates that the temporal requirement set out in that statutory subsection is satisfied in the event that the petition is filed within 60 days of the date upon which the aggrieved party receives notice of the challenged agency action.

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involves efforts by the OAH to collect any required fee “at the time of the commencement of the contested case.” N.C. Gen. Stat. § 150B-23.2(b). According to the procedures set out in 26 N.C.A.C. 03.0103, to which we are required to give deference, *Frye Reg'l*, 350 N.C. at 45, 510 S.E.2d at 163, given their consistency with our understanding of the applicable statutory provisions, the OAH commences its efforts to collect the required fee simultaneously with the filing of a petition seeking to initiate a contested case and affords the litigant a reasonable time within which to make the required payment. The relevant statutory provisions do not, as we understand them, require more. As a result, the trial court erred by concluding that Plaintiff’s failure to pay the required filing fee on or before 11 March 2010 deprived the OAH of jurisdiction⁷ to consider Plaintiff’s challenge to Defendant’s dismissal decision.⁸

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by granting Defendant’s motion to dismiss Plaintiff’s petition for a contested case on jurisdictional grounds. In light of its decision to dismiss Plaintiff’s OAH petition on jurisdictional grounds, the trial court refrained from addressing Defendant’s remaining challenge to the State Personnel Commission’s decision to uphold Judge Morrison’s order granting summary judgment in favor of Plaintiff. For that reason, additional proceedings must be conducted in the trial court in order to fully resolve the issues raised by Defendant’s petition for judicial review. *Star Auto. Co. v. Jaguar Cars, Inc.*, 95 N.C. App. 103, 109-10, 382 S.E.2d 226, 230 (holding that, since the trial

7. The OAH does not, of course, lack authority to dismiss a petition based upon a litigant’s failure to pay the required filing fee in a timely manner in appropriate circumstances. According to N.C. Gen. Stat. § 1A-1, Rule 41(b), which applies in contested case proceedings pursuant to 26 N.C.A.C. 03.0101(b), the OAH retains the authority to involuntarily dismiss a contested case in the event that the litigant fails “to comply with these rules or any order of court.” However, given that Defendant has not challenged the validity of Judge Morrison’s discretionary decision to refrain from dismissing Plaintiff’s petition for a contested case hearing based upon Plaintiff’s failure to pay the required filing fee within the time specified in 26 N.C.A.C. 03.0101(d), we need not address this issue in order to decide the present case.

8. The parties engaged in an extensive discussion of decisions from other jurisdictions concerning the extent, if any, to which a litigant’s failure to pay a required filing fee at the time that that litigant filed a complaint or a petition constituted a jurisdictional defect. However, given our conclusion that the relevant statutory provisions applicable to this case clearly establish that a litigant’s failure to pay the required filing fee on or before the date specified for the filing of the petition seeking to initiate a contested case proceeding does not deprive the OAH of jurisdiction, we need not analyze those decisions in any detail for purposes of deciding this case.

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court erred by concluding that the plaintiff failed to comply with the applicable statutory notice requirement, “we remand the cause to the superior court for consideration on the merits the issues of the adequacy of the good cause alleged for nonrenewal and Jaguar’s good faith”), *disc. review denied*, 325 N.C. 710, 388 S.E.2d 463 (1989). As a result, the trial court’s order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Wake County Superior Court for consideration of the remaining issues raised in Plaintiff’s petition for judicial review.

REVERSED AND REMANDED.

Judges MCGEE and STEELMAN concur.

LYNDA SPRINGS, PLAINTIFF V. CITY OF CHARLOTTE, TRANSIT MANAGEMENT OF
CHARLOTTE, INC., AND DENNIS WAYNE NAPIER, DEFENDANTS

No. COA12-107

(Filed 7 August 2012)

1. Trials—jurisdiction—substitute judge can reconsider order of retired judge—punitive damages

The trial court did not err in a negligence and negligent entrustment case by denying defendants’ motion to dismiss plaintiff’s claim for punitive damages. Judge Caldwell had jurisdiction to render the Section 1D-50 opinion on remand. The language of N.C.G.S. § 1A-1, Rule 63 statutorily authorizes a substitute judge to reconsider an order entered by a judge who has since retired.

2. Damages and Remedies—punitive damages—motion for directed verdict—motion for JNOV—motion for new trial

The trial court did not err in a negligence and negligent entrustment case by denying defendants’ motion for a directed verdict, JNOV, and a new trial on punitive damages. The evidence taken in the light most favorable to plaintiff, as the non-moving party, was sufficient as a matter of law to get the issue of punitive damages to the jury.

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3. Costs—expert witness fees—complied with appellate court mandate

The trial court did not abuse its discretion in a negligence and negligent entrustment case by awarding costs to plaintiff. N.C.G.S. § 7A-305(d) must be read in conjunction with N.C.G.S. § 7A-314, and thus, defendants' argument about expert witness fees was without merit. Further, the trial court complied with the mandate issued by the Court of Appeals in *Springs I* and properly assessed costs.

Appeal by Defendants from orders entered 22 August 2011 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2012.

The Odom Firm, PLLC, by T. LaFontine Odom, Sr., Thomas L. Odom, Jr. and David W. Murray, for Plaintiff-Appellee.

Robert D. McDonnell, for Defendants-Appellants.

BEASLEY, Judge.

The City of Charlotte and Transit Management of Charlotte, Inc. (Defendants)¹ appeal from orders entered 22 August 2011 by the Honorable Jesse B. Caldwell, III in Mecklenburg County Superior Court. For the following reasons, we affirm each order.

On 14 July 2007, Lynda Springs (Plaintiff) and her husband Earl Springs filed a complaint against Defendants and Dennis Wayne Napier (Napier), asserting claims of negligence and negligent entrustment, and asking for punitive damages, from a 16 June 2004 accident in which Plaintiff was injured. By verdict entered 8 August 2008, a Mecklenburg County jury found that Plaintiff was injured by the negligence of Defendants and awarded \$800,000 in compensatory damages and \$250,000 in punitive damages. On 17 August 2008, the trial court entered judgment reflecting this verdict. Defendants moved for judgment notwithstanding the verdict (JNOV) and for a new trial on 21 August 2008. Plaintiff filed an amended motion to tax costs against Defendants on 25 August 2008. Plaintiff's motion was granted and Defendants' motion for JNOV was denied by orders entered 6 November 2008. Defendants appealed to this Court, and we affirmed the denial of Defendants' motions but reversed and remanded (i) for reconsideration of the award of costs for expert witness fees and (ii) the punitive damages award to allow the trial court to enter a written

1. Original Defendant Dennis Wayne Napier is not a party to this appeal.

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opinion in compliance with N.C. Gen. Stat. § 1D-50. *Springs v. City of Charlotte*, ___ N.C. App. ___, 704 S.E.2d 319 (2011) (*Springs I*).

On remand from this Court, the Honorable Jesse B. Caldwell, III entered orders on 22 August 2011 that (i) reconsidered the award of costs and reduced the amount granted to Plaintiff and (ii) entered written reasons for the denial of Defendants' motion for JNOV and a new trial on the issue of punitive damages in compliance with § 1D-50. Defendants argued that the trial court lacked jurisdiction to enter the written reasons due to the retirement of the judge who originally heard the issue, the Honorable Timothy Patti, and thus must dismiss the claim for punitive damages. The trial court denied Defendants' motion to dismiss on those grounds by order filed 22 August 2011. Defendants filed notice of appeal to this Court from all three orders entered 22 August 2011 on 19 September 2011.

I.

[1] For an outline of the facts, *see Springs I*. Defendants first argue that the trial court erred in denying their motion to dismiss Plaintiff's claim for punitive damages on the grounds that Judge Caldwell lacked jurisdiction to render Section 1D-50 opinion on remand. We disagree.

Pursuant to N.C. Gen. Stat. § 1D-50 (2011), “[w]hen reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages . . . or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award.” Judge Patti presided during the trial in this action, entering judgment and the orders denying JNOV and a new trial. However, Judge Patti failed to enter the required Section 1D-50 opinion, an issue upon which this Court remanded. Judge Patti retired from the bench prior to our remand of this case. Judge Caldwell presided over this action on remand, and Judge Caldwell entered the order denying Defendants' motion to dismiss the punitive damage claim for lack of jurisdiction, an order granting costs, and the Section 1D-50 opinion reciting the reasons for upholding the punitive damages award.

Defendant argues that only Judge Patti had jurisdiction to enter the Section 1D-50 opinion. Plaintiff counters, and we agree, that N.C. Gen. Stat. § 1A-1, Rule 63 (2011) authorizes another judge, such as Judge Caldwell, to enter the Section 1D-50 opinion. Rule 63 states, in pertinent part,

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[i]f by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:

(1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district.

This Court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider an order entered by a judge who has since retired. See *In re Expungement for Kearney*, 174 N.C. App. 213, 214-15, 620 S.E.2d 276, 277 (2005) (holding that a judge erred in denying a motion to reconsider a retired judge's expungement order for lack of jurisdiction because the judge "is statutorily authorized" to address the motion under Rule 63). Defendants point to this Court's opinion *Girard Trust Bank v. F.E. Easton*, 12 N.C. App. 153, 182 S.E.2d 645 (1971) as support for their proposition that their motion to dismiss for lack of jurisdiction was improperly denied. However, as Rule 63 was amended in 2001, the language on which Defendants rely in *Girard* has been removed in favor of the language cited *supra*. Accordingly, we hold that this Court's recent ruling in *Kearney* is controlling and that Judge Caldwell had jurisdiction to enter the Section 1D-50 opinion.

II.

[2] Defendants next argue that the trial court erred in denying their motion for a directed verdict, JNOV, and a new trial on punitive damages. We disagree.

"The propriety of granting JNOV is determined by the same considerations as that of the movant's prior motion for directed verdict—whether the evidence, taken in the light most favorable to the non-movant, is insufficient, as a matter of law, to support a verdict for the non-moving party." *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, ___ N.C. App. ___, ___, 713 S.E.2d 670, 675 (2011). We review a trial court's denial of JNOV *de novo*, so we "consider[] the matter anew and freely substitute[] [our] judgment for that of the trial court." *Id.* at ___, 713 S.E.2d at 676. In contrast, a motion for a new trial "is addressed to the sound discretion of the trial judge, whose ruling, absent abuse of discretion, shall not be disturbed on

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appeal.” *W.W. Yeargin v. Harvey Spurr, Jr.*, 78 N.C. App. 243, 246, 336 S.E.2d 680, 681 (1985).

Pursuant to N.C. Gen. Stat. § 1D-1 (2011), punitive damages may be awarded “to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.” To justify an award of punitive damages, the claimant must prove that the defendant is liable for compensatory damages and that an aggravating factor— either fraud, malice, or willful or wanton conduct—“was present and was related to the injury[.]” Section 1D-15(a). The existence of an aggravating factor must be proven by clear and convincing evidence. Section 1D-15(b). In the case *sub judice*, the aggravating factor named was willful or wanton conduct, which is defined in the statute as “the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.” Section 1D-5(7).

In support of the punitive damages award, Plaintiff argues that Napier was involved in four accidents classified as “preventable” in the time period from 6 January 2002 through 6 April 2004 prior to the accident that injured Plaintiff. Further, Napier was involved in two additional accidents on 30 January 2002 and 1 July 2002 while driving an airport shuttle bus for Defendant City of Charlotte. Although Defendant Transit Management of Charlotte, Inc. (TMOC) argues that it was unaware of the two accidents that occurred while Napier was driving the airport shuttle bus, Napier testified that Defendant City of Charlotte was aware that he was employed by Defendant TMOC and he was told that the accidents were reported to Defendant TMOC.

Plaintiff also presented the testimony of Carmen Daecher, an accident reconstructionist and loss control specialist for commercial vehicle operations, who was offered as an expert in safety as it relates to mass transportation and commercial vehicle operation, particularly with respect to the employment and retention of bus drivers. Daecher testified that from 2002 until the accident in which Plaintiff was injured, Napier was involved in multiple preventable accidents, and that other than counseling or an interview with Napier, there was no intervention on the part of Defendants “in terms of assessing what the problems were or trying to correct behavioral deficiencies that seemed apparent” because all the accidents were preventable. Daecher also opined, based on his training and experience, that due to Napier’s history of preventable accidents, there was a higher risk and a higher probability that he would be involved in additional acci-

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dents and so it was foreseeable that Napier would be involved in another collision.

The aforementioned evidence, taken in the light most favorable to Plaintiff as the non-moving party, cannot be said to be insufficient as a matter of law to get the issue of punitive damages to the jury. Therefore, the trial court complied with this Court's mandate in *Springs I*, made a written opinion inclusive of the above stated evidence, and did not err in denying Defendants' motions for directed verdict and JNOV nor did the trial court abuse its discretion in failing to award a new trial.

III.

[3] Finally, Defendants argue that the trial court abused its discretion in awarding costs to Plaintiff. Again, we disagree.

Defendants argue that under N.C. Gen. Stat. § 7A-305(d), they can only be made liable for the time experts spend actually testifying, and that trial courts cannot authorize any other compensation for expert witnesses despite Section 7A-314(d) which states that “[a]n expert witness . . . shall receive such compensation and allowances as the court . . . in its discretion, may authorize.” Defendants made the same argument to this Court in *Springs I*, and there we held that Section 7A-305(d) must be read in conjunction with Section 7A-314 and thus Defendants' argument is without merit. *Springs I*, ___ N.C. App. at ___, 704 S.E.2d at 327. It is well-settled that “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.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Further, in awarding costs to Plaintiff, the trial court complied with the mandate issued by this Court in *Springs I* and properly assessed costs.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

STATE v. ANDERSON

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STATE OF NORTH CAROLINA v. JIMRECO ROCHELL ANDERSON

No. COA12-6

(Filed 7 August 2012)

1. Constitutional Law—right to confrontation—absence from court—insufficient evidence to explain absence—waiver

The trial court did not err in a felony assault with a deadly weapon inflicting serious injury case by concluding that defendant's absence from court on the second day of trial was insufficient to sustain a motion to dismiss on constitutional grounds even though defendant contended that he was deprived of his right to confront his accusers. The evidence was insufficient to satisfy defendant's burden to explain his absence. Thus, defendant waived his right to confrontation.

2. Evidence—prior crimes or bad acts—domestic violence incident—showing location and not conformity

The trial court did not commit plain error in a felony assault with a deadly weapon inflicting serious injury case by allowing an officer to testify that police searched for defendant at a particular location because he was involved in a previous domestic incident there. The testimony was not admitted to prove conformity, but instead for the sole purpose of explaining why officers searched for defendant at a particular location.

3. Assault—deadly weapon inflicting serious injury—addition to pattern jury instruction—three gunshot wounds to leg a serious injury

The trial court did not commit plain error in a felony assault with a deadly weapon inflicting serious injury case when it added to the pattern jury instructions that three gunshot wounds to the leg was a serious injury. It was unlikely that reasonable minds could differ as to whether the injuries suffered by the victim were serious in nature. Further, defendant made no argument on appeal, beyond mere speculation, to support his assertion that it was likely that the jury would have reached a different conclusion absent this instruction.

4. Damages and Remedies—restitution—insufficient evidence of amount

The trial court erred in a felony assault with a deadly weapon inflicting serious injury case by ordering defendant to pay resti-

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tution because the State failed to present any evidence to support the restitution order. This issue was reversed and remanded for additional proceedings.

Appeal by defendant from judgment entered upon a jury conviction by Judge Marvin P. Pope, Jr., in Lincoln County Superior Court. Heard in the Court of Appeals 5 June 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General M. A. Kelly Chambers, for the State.

Assistant Appellate Defender Staples S. Hughes and Assistant Appellate Defender Kristen L. Todd, for defendant.

ELMORE, Judge.

Jimreco Rochell Anderson (defendant) appeals from a judgment entered upon a jury conviction of felony assault with a deadly weapon inflicting serious injury. The judgment (1) sentenced him to 23 to 37 months imprisonment, suspended upon completion of 48 months of supervised probation and (2) ordered him to pay \$4,327.43 in restitution. After careful consideration, we find no error in part and remand in part.

At trial, the State's evidence showed that defendant began living in the home of his second cousin, James Johnson in November or December 2009. At that time, defendant told Johnson that he had nowhere else to live. At some point between then and February 2010, defendant's two friends, "Tone" and "Red Man", also moved into Johnson's home. The relationship between defendant and Johnson then began to deteriorate. Johnson was bothered that defendant had other guests in the home, claiming, "[i]t was just like he was taking over."

Johnson asked defendant and his friends to move out several times, but the men did not leave. On 7 February 2010, Johnson was arguing with "Tone" when defendant arrived home and joined the argument. The argument further escalated until defendant retrieved a revolver from his room and said to Johnson, "You didn't know I had this, did you?" Defendant then shot Johnson once below the knee, causing Johnson to fall back into a recliner. Defendant then shot him again, directly in the knee. At this time, Johnson tried to stand up from the recliner, but defendant shot him a third time, just above the knee. Johnson then again tried to stand up and to retrieve a phone from his bedroom to call for help, but defendant told him that if he left the recliner he would shoot him again. At this time, Tone and Red

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Man began collecting their belongings, and after approximately ten minutes they, along with defendant, left the residence. As defendant was leaving, he tossed a phone to Johnson, who was still in the recliner.

Johnson called 911, and he was transported to Lincoln Medical Center in Lincolnton. He was then later transported from Lincolnton to Carolinas Medical Center in Charlotte to undergo surgery to remove a bone fragment from his knee. He remained in the hospital for two days, after which he was released with medication to manage the pain from his injuries and surgery.

While still at the first medical center, Johnson told detectives that defendant had shot him. He then gave the detectives defendant's name and phone number. One of the detectives tried calling this phone number several times, but he was unsuccessful in reaching defendant. Police officers searched for defendant that evening at several locations, including one where they had previously received "domestic calls" from a girl defendant had dated. But the officers were unable to locate him. A warrant for defendant's arrest was issued the following day, 8 February 2010.

Officers continued to search for defendant for the next month at several different locations, but they were unsuccessful in their attempts to locate him. On 8 March 2012, defendant surrendered. He was charged with assault with a deadly weapon inflicting serious injury.

Defendant's jury trial began on 19 July 2011. Defendant was present for the first day of trial. At the end of the first day, the trial court announced that the proceedings would resume at 9:30 AM the next morning. Defendant agreed to meet his attorney at 9:00 AM. However, defendant never arrived the next day. The trial court gave defendant's attorney time to locate him, but when defendant could not be located, the trial proceeded without him.

During the second day of trial, the State called Sergeant Lee Keller of the Lincoln County Sheriff's Department to testify regarding the early stages of the investigation. Keller testified as to the various locations where officers looked for defendant on the night of the shooting. In explaining the search, Keller noted that officers had checked "one location off of Campground Road that they knew he had—one point in time dated a girl 'cause they answered domestic calls out there.' We went over there and attempted to locate him there." Defendant's attorney did not object to this statement.

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Following the close of the State's evidence on the second day of trial, defendant's attorney moved to continue the proceedings. He argued that the trial should be delayed so that defendant "could exercise his constitutional rights to testify[]." The trial court denied the motion. Defendant's attorney then moved to dismiss the case for insufficiency of the evidence. The trial court again denied the motion. Next, the trial court asked "[e]vidence for [] defendant?" and defendant's attorney replied "[n]o, Sir."

Shortly after jury deliberations began, defendant's attorney received a note from his associate, indicating that a friend of defendant's, Stacie Wilson, had called to inform the trial court that defendant had been in the hospital that day suffering from stomach pains. The trial court then asked defendant's attorney "do you know who Stacie Wilson is[?]" and defendant's attorney replied "I don't. . . . I'm assuming it's a family member." The trial court then allowed the information into the record, but noted that "that there was no documentation, no information as to who Stacie Wilson is, or what hospital the defendant was in, or is in, or any other information." The jury then returned, and rendered a guilt verdict.

The proceedings then resumed the following day for sentencing. Defendant was present on the third day. Prior to sentencing, defendant's attorney again made a motion to dismiss, arguing that defendant was "overcome with what he says has been a recurring abdominal gastrological pains" causing him to miss trial and proceed to the hospital on the day prior. Defendant's attorney then presented the trial court with documentation of defendant's hospital visit. This documentation was a note reading, "Thank you for visiting the Presbyterian Hospital at Huntersville Emergency Department and he was evaluated by (phonetic) Franklin Tremirus, P.A. for abdominal pain, gastritis, abnormal creatin." However, the trial court noted that "there is not a date or time of admission on this." The trial court then concluded that "assuming that [defendant] was sick yesterday, . . . [t]his case went to the jury approximately 12:15 and there is not sufficient evidence to indicate to the Court that the defendant lacked the ability to reach he [sic] attorney or to reach the clerk to advise them of his medical condition." The trial court then denied the motion to dismiss.

Defendant was then sentenced to 23 to 37 months imprisonment, suspended upon completion of 48 months probation. He was also ordered to pay \$4,327.43 in restitution. Defendant now appeals.

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II. Arguments**A. Motion to dismiss**

[1] Defendant first argues that his absence from court on the second day of trial was sufficient to sustain a motion to dismiss on constitutional grounds, because he was deprived of his right to confront his accusers. Defendant specifically argues that he satisfied his burden of explaining his absence, and that he did not waive his right to confrontation. We disagree.

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), appeal dismissed and *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (“[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.” (citations omitted)).

In noncapital felony trials, [the] right to confrontation is purely personal in nature and may be waived by a defendant. A defendant’s voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver. Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred.

State v. Richardson, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (citations and quotations omitted).

In *Richardson*, our Supreme Court upheld the trial court’s determination that the defendant failed to satisfy his burden to explain his absence from trial. There, the trial had begun before the defendant went missing. *Id.* at 179, 410 S.E.2d at 63-64. “[A] friend of [the] defendant’s telephoned the Clerk to inform the court that [the] defendant was absent due to back problems.” *Id.* at 179, 410 S.E.2d at 64. However, “[t]he trial court found that such contact . . . did not suffice as an explanation[.]” *Id.* The defendant then later appeared at the trial and “presented records showing that he had been treated at Halifax Memorial Hospital for head injuries resulting from a fall, but the time of treatment was not noted.” *Id.* at 177, 410 S.E.2d at 62. Again, the trial court found that the defendant proved “no satisfactory explanation” for his absence. *Id.* at 180, 410 S.E.2d at 64.

Here, defendant was missing from the courtroom after the trial had commenced on the second day. Thus, like the defendant in *Richardson*, defendant here carried the burden of explaining his

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absence. Defendant attempted to explain his absence by offering the following evidence: (1) a phone call from Stacie Wilson, a person who failed to provide any information as to who she was or what hospital defendant was in and (2) a note from Presbyterian Hospital indicating that defendant had been treated there at some point, but which lacked any indication of the date or time of treatment. Thus, under the precedent established by *Richardson*, we conclude that this evidence was insufficient to satisfy defendant's burden to explain his absence. Accordingly, we conclude that defendant waived his right to confrontation.

Further, we note that here defendant has only chosen to appeal the denial of his motion to dismiss and not the denial of his motion to continue. "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) (citation omitted). When ruling on a motion to dismiss, the court only addresses "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) (citation omitted). "'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate to support a particular conclusion." *State v. Royal*, 723 S.E.2d 583 (N.C. Ct. App. 2012). The essential elements of assault with a deadly weapon inflicting serious injury are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Ryder*, 196 N.C. App. 56, 66, 674 S.E.2d 805, 812 (2009) (citation omitted). "Assault is an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007) (quotation and citation omitted). "A pistol or a revolver is a deadly weapon *per se*." *Id* (citation omitted). "Serious injury is 'physical or bodily injury resulting from an assault with a deadly weapon[.]'" *Id* (citation omitted).

Here, the State presented evidence showing that (1) defendant assaulted Johnson by shooting him three times in the leg with a revolver and (2) that Johnson suffered injuries requiring hospitalization and surgery. We conclude that this evidence is sufficient to overcome a motion to dismiss. Accordingly, we conclude that the trial court did not err with regards to this issue.

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B. Character evidence

[2] Defendant next argues that the trial court committed plain error by allowing a witness for the State, Sergeant Lee Keller, to testify that police searched for defendant at a particular location because he was involved in a previous domestic incident there. We disagree.

First, we note that defendant's attorney did not object to Sergeant Keller's statement at trial.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Here, defendant has specifically alleged plain error in his brief. Thus, we will review accordingly.

Plain error arises when the error is “‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]’” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (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) (citation omitted).

Here, Sergeant Keller testified that while searching for defendant following the shooting, officers checked an address off of Campground Road because at one point the police “answered domestic calls out there” involving defendant and a girl he was dating. Defendant contends that he was prejudiced by this testimony because it implied that he was involved in some prior act of violence. Defendant classifies this statement to be inadmissible character evidence, and he further alleges that if the testimony had been excluded, the jury would have reached a different verdict. We disagree.

With regard to defendant's first contention, our General Statutes provide that “[e]vidence 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[.]” N.C. Gen. Stat. § 8C-1, Rule 404 (2011). But “[w]here evidence is relevant for some

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purpose other than proving character, it is not inadmissible because it incidentally reflects upon character.” *State v. Barnett*, 41 N.C. App. 171, 174, 254 S.E.2d 199, 201 (1979) (citation omitted).

Here, it is clear from the record that the testimony at issue was not admitted to prove conformity. Rather, the record shows that the statement was only admitted for the sole purpose of explaining why officers searched for defendant at a particular location.

Further, we are not persuaded by defendant’s argument that he would not have been convicted by the jury had this testimony been excluded. The State presented overwhelming evidence of defendant’s guilt, including detailed testimony from Johnson regarding how and when defendant shot him. Defendant did not present any evidence or any witnesses to suggest an alternate theory of events. Thus, we conclude that the trial court did not err with regards to this issue.

C. Jury Instructions

[3] Defendant next argues that the trial court committed plain error when it added to the pattern jury instructions that three gunshot wounds to the leg was a serious injury. Specifically, defendant contends that whether three gunshot wounds was a serious injury was an issue for the jury to decide. We disagree.

This Court has held that

the trial court may remove the element of serious injury from consideration by the jury by peremptorily declaring the injury to be serious. However, such a declaration is appropriate only when the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted.

State v. Bagley, 183 N.C. App. 514, 527, 644 S.E.2d 615, 623-24 (2007) (quotations and citations omitted). “Factors our courts consider in determining if an injury is serious include pain, loss of blood, hospitalization[,] and time lost from work.” *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983) (citation omitted).

Here, Johnson testified that (1) he was shot three times, (2) he was hospitalized for two days, (3) he had surgery to remove a bone fragment from his leg, and (4) he continued to experience pain from the injuries up through the time of the trial. From this evidence, we conclude that it is unlikely that reasonable minds could differ as to whether the injuries suffered by Johnson were serious in nature.

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Further, defendant makes no argument on appeal, beyond mere speculation, to support his assertion that it is likely that the jury would have reached a different conclusion if not for the part of the jury instructions to which he takes issue. Thus, we are not persuaded by defendant that the inclusion of this language in the jury instructions rises to the level of plain error. We conclude that the trial court did not err with regard to this issue.

D. Restitution

[4] Finally, defendant argues that the trial court erred in ordering him to pay restitution, because the State failed to present any evidence to support the restitution order. We agree.

This court has previously held that “[t]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing” and that “the unsworn statements of the prosecutor . . . [do] not constitute evidence and cannot support the amount of restitution recommended.” *State v. Reptogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (citations and quotations omitted).

Here, the State admits in its brief that “there was no evidence submitted during the trial of the actual medical expenses incurred by [] Johnson.” Likewise, upon a review of the record we are unable to find any evidence indicating the precise amount of these expenses. Accordingly, we reverse and remand this issue to the trial court for further proceedings.

No error in part, reversed and remanded in part.

Chief Judge MARTIN and Judge HUNTER, JR., Robert N., concur.

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[222 N.C. App. 147 (2012)]

STATE OF NORTH CAROLINA v. DEWAYNE AVENT, DEFENDANT

No. COA11-1506

(Filed 7 August 2012)

1. Indictment and Information—first-degree murder—motion to amend granted—date not an essential element of murder

The trial court did not err in a first-degree murder case by granting the State's motion to amend the date of the indictment from December 28 to December 27. The date was not an essential element of murder and defendant failed to show surprise or prejudice when he presented his alibi defense for the correct date.

2. Discovery—refusal to compel disclosure of confidential informant—failure to show necessity

The trial court did not err in a first-degree murder case by refusing to compel disclosure of a confidential informant. Defendant did not make a sufficient showing that the particular circumstances of his case mandated disclosure of a confidential informant who merely provided defendant's phone number to law enforcement.

3. Evidence—prior inconsistent statements—credibility—failure to show probative value outweighed unfair prejudice

The trial court did not abuse its discretion in a first-degree murder case by allowing evidence of two witnesses' prior inconsistent statements. The trial court specifically instructed the jury not to consider the statements substantively, but only for purposes of determining their credibility. Defendant failed to demonstrate that the probative value of the statements was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

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

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. Viewing the evidence in the light most favorable to the State, there was substantial evidence to support the jury's determination that defendant had committed a premeditated and deliberate act in shooting the victim.

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Appeal by defendant from judgment entered on or about 4 May 2011 by Judge Walter H. Godwin, Jr. in Superior Court, Nash County. Heard in the Court of Appeals 24 May 2012.

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

Thomas R. Sallenger, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of first degree murder and appeals. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that around 5:00 p.m. on 27 December 2009, Ms. Jessie Lynch and her boyfriend, Mr. Tronyale Daniel, were riding in a vehicle in Rocky Mount. Mr. Daniel got out of the vehicle to speak with some people and defendant walked up and shot him. Later, Ms. Lynch identified defendant as the shooter to the police through photographs. Mr. Daniel died from "a gunshot wound to the chest." On or about 3 May 2010, defendant was indicted for first degree murder. After a trial by jury, defendant was found guilty of first degree murder and sentenced to life imprisonment without parole. Defendant appeals.

II. Motion to Amend Indictment

[1] Defendant first contends that

the trial court erred when it granted the State's motion to amend the date of the indictment from December 28 to December 27 when time was of the essence where the defendant relied on an alibi defense and such error deprived the defendant of an opportunity to adequately present his defense[.]

(Original in all caps.) We review the trial court's granting of the State's motion to amend the indictment *de novo*. *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596 (2010).

In *State v. Price*, our Supreme Court considered a similar argument as to an amendment to an indictment which also changed the date on the indictment. 310 N.C. 596, 598-600, 313 S.E.2d 556, 558-59 (1984). The Court determined that where time is not of the essence as to the offense charged, an amendment of the date on the indictment is not prohibited by N.C. Gen. Stat. § 15A-923(e) as this change does

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“not substantially alter the charge set forth in the indictment.” *Id.* at 599-600, 313 S.E.2d at 558-59 (quotation marks omitted). The Court noted that although N.C. Gen. Stat. § 15A-923(e)

provides that [a] bill of indictment may not be amended[, t]his statute fails to include a definition of the word amendment. The North Carolina Court of Appeals has ruled upon the interpretation of this subsection in *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475, *cert. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978). That court defined the term amendment to be any change in the indictment which would substantially alter the charge set forth in the indictment. We believe the Court of Appeals, in its diligent effort to avoid illogical consequences, correctly interpreted this statute’s subsection.

This change of the date of the offense, as permitted by the trial court, did not amount to an amendment prohibited by N.C. Gen. Stat. § 15A-923(e), because the change did not substantially alter the charge set forth in the indictment. The change merely related to time, which in this particular case was not an essential element of the charge.

Generally, when time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed . . .

. . . .

The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. Thus, pursuant to section 15-155, it was not necessary for the district attorney in the case *sub judice* to move to change the indictment date. Although not necessary, the correction was proper.

Id. at 598-99, 313 S.E.2d at 558-59 (citations, quotation marks, and ellipses omitted).

Here, the date of the murder was not an essential element of the charge and thus could be amended under N.C. Gen. Stat. § 15A-923(e). *See id.* at 598, 313 S.E.2d at 559. Defendant argues that because he raised an alibi defense, the date of the offense was essential to his defense. As the Court also noted in *Price*, “[a] variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.” *Id.* at 599, 313 S.E.2d at 559. In *Price*, the defendant did not rely upon an

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alibi defense nor did he contest his presence near the scene of the murder on the date of the crime. *Id.* The Court also noted that

prior to his indictment for murder, defendant had been indicted for armed robbery of Miller's Grocery, which was the transaction out of which the fatal shooting of Milton Ferrell occurred. Defendant cannot claim surprise and resulting prejudice from the change of dates. In this case, the date on the indictment for murder, if erroneous, was not an essential element of the offense.

310 N.C. at 599, 313 S.E.2d at 559. Unlike the defendant in *Price*, defendant here did rely on an alibi defense. *See id.* We must therefore determine whether the change of the offense date "deprive[d] . . . defendant of an opportunity to adequately present his defense." *Id.*

During trial, defendant's alibi witness, Mr. Quincy Johnson, testified that he picked up defendant on 27 December 2009 at approximately 3:00 or 3:30 p.m. in Rocky Mount. Mr. Johnson and defendant arrived in Tarboro around 4:00 p.m., and Mr. Johnson "waited until [defendant] was settled. . . . [They] smoked a little[,] and . . . [Mr. Johnson] waited until [defendant] was settled and got in the house. Until somebody came to the door and then [Mr. Johnson] had to leave to take [his] girl to work." The next morning, when Mr. Johnson came back to the house, defendant was still there in his pajamas. The State's evidence tended to show that Mr. Daniel was shot around 5:00 p.m. on 27 December 2009 in Rocky Mount. Thus, defendant presented his alibi defense and was not deprived "of an opportunity to adequately present his defense." *Id.*

Though defendant argues that "[a]s a result of the amendment granted by the trial [c]ourt, the [d]efendant was then faced at trial with defending himself on not one date but then two dates[,]" in actuality, the State amended the indictment to only the date of 27 December 2009. Thus, defendant only needed a defense for 27 December 2009, and he provided this through the testimony of Mr. Johnson. Defendant also contends that "only one witness for the defense was presented" but fails to make any arguments regarding what other witnesses he would have presented had the indictment not been amended. Furthermore, the State's evidence included two eyewitness statements and Mr. Daniel's autopsy report which all noted the date of the murder as 27 December 2009; defendant makes no argument that he was not aware of this evidence well before the date of trial. Accordingly, also as in *Price*, "[d]efendant cannot claim surprise and resulting prejudice from the change of dates." *Id.* at

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599-600, 313 S.E.2d at 559. As the date is not an essential element for murder, and defendant has not shown surprise or prejudice but instead did present his alibi defense for the correct date, we find no error in the trial court's granting of the State's motion to amend the indictment. *See id.* at 598-600, 313 S.E.2d at 559. This argument is overruled.

III. Motion to Compel

[2] Defendant next contends that

the trial court erred in denying the defendant's motion to compel disclosure of the identity of a confidential informant utilized by law enforcement to identify the alleged cellular phone number location of the defendant on the grounds that the failure to do so violated North Carolina law, the defendant's right to due process as provided to him by the Fifth Amendment and the defendant's Sixth Amendment right to cross examine and confront the witnesses against him.

(Original in all caps.) "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2009).

Defendant directs this Court's attention to *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639 (1957) arguing for disclosure of the confidential informant. However, in *Roviaro*, the United States Supreme Court stated that

no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

353 U.S. at 62, 1 L.Ed. 2d at 646. In interpreting *Roviaro* this Court has stated,

The state is privileged to withhold from a defendant the identity of a confidential informant, with certain exceptions. *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639 (1957), sets forth the applicable test when disclosure is requested. The trial court must

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balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. However, *before the courts should even begin the balancing of competing interests which Roviario envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure.*

Two factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify. Factors which weigh against disclosure include whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt.

State v. Dark, 204 N.C. App. 591, 593, 694 S.E.2d 502, 504 (emphasis added) (citations, quotation marks, and brackets omitted), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 928 (2010).

As to the two factors which would favor disclosure, defendant has shown neither. Defendant has neither shown nor even alleged that "the informer was an actual participant in the crime[.]" *Id.* Furthermore, the State's evidence and defendant's evidence do not appear to contradict as to any "material facts" save that the State claimed defendant was the shooter and defendant claimed he was not at the scene of the crime at the time in question, but defendant has not shown how the identity of the person who provided his phone number would be relevant to these facts. One of the three factors which may weigh against disclosure does exist, as "the evidence independent of the informer's testimony establishes the accused's guilt." *Id.* Ms. Lynch's eyewitness testimony that she saw defendant shoot Mr. Daniel "establishes the accused's guilt." *Id.* While we acknowledge that defendant did not "admit[] culpability" and has offered an alibi witness as a defense, we conclude that defendant has not "ma[d]e a sufficient showing that the particular circumstances of his case mandate . . . disclosure" of a confidential informant who merely provided defendant's phone number to law enforcement, and thus the trial court did not err by refusing to compel this disclosure. This argument is overruled.

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IV. Inconsistent Statements

[3] During defendant's trial, Mr. Xavier Hicks testified that he was at the scene of the crime but did not see defendant. The State then introduced a statement Mr. Hicks had written for the police the day after the incident which stated, "Then DeWayne came up smoking a cigarette and walked up to the dude in the black hoodie and said what are you trying to say, pulled out a handgun and shot the boy and ran[.]" Mr. Jamal Porter also testified that he was at the scene of the crime but did not see defendant. The State then introduced a statement Mr. Porter had written for the police the day after the incident which stated,

[T]hat's when the victim was walking back towards his car and began to pass a few words with DeWayne and then the victim's girlfriend was telling the victim to come on let's go and then I seen the victim trying to smack the gun out of DeWayne's hand and that's when I heard the shot being fired.

Defendant argues

the trial court erred by admitting the prior unsworn written inconsistent statements of witness Hicks and witness Porter into evidence and by publishing it to the jury where Hicks and Porter testified on the stand that each lied in that unsworn statement thereby allowing the State to impeach its own witness and allowing the State to get that statement into evidence and before the jury in violation of N.C.G.S. 8C-1, Rule 607[.]

and

the trial court erred in allowing into evidence and by publishing to the jury prior written inconsistent statements of witness Hicks and witness Porter whose probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and did mislead the jury in violation of N.C.G.S. 8C-1, Rule 403 of the Rules of Evidence.¹

(Original in all caps.)

Our standard of review as to North Carolina Rules of Evidence 403 and 607 is abuse of discretion. *State v. Banks*, ___ N.C. App. ___, ___, 706 S.E.2d 807, 814 (2011).

1. In one of defendant's headings he also argues that "the due process clause of the Fifth Amendment of the United States Constitution" was violated. (Original in all caps.) However, defendant does not actually make any substantive constitutional arguments in his brief; therefore, we will address only defendant's arguments as to North Carolina Rules of Evidence 607 and 403. *See* N.C.R. App. P. 28(a).

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Our review of the trial court's decision to admit or exclude evidence pursuant to N.C.R. Evid. 403 is for abuse of discretion. Rulings by the trial court concerning whether a party may attack the credibility of its own witness are reviewed for an abuse of discretion.

Similarly, our standard of review for rulings made by the trial court pursuant to Rule 607 of the North Carolina Rules of Evidence is abuse of discretion.

Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

Id. (citations and quotation marks omitted).

A. Rule 607

North Carolina Rule of Evidence 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2009). In *State v. Riccard*, this Court thoroughly analyzed the applicability of Rule 607 in a situation similar to the one presented in this case:

On appeal, defendant contends that the trial court committed reversible error by allowing the State to impeach Barnes and Reid on a collateral matter with extrinsic evidence. We are not persuaded.

Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony. Such statements are admissible under North Carolina Rule of Evidence 607 for the purpose of shedding light on a witness's credibility. In *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988), our Supreme Court set out the basic principle of this area of evidence:

A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

Thus, under *Williams*, it is clear a prior inconsistent statement may not be used to impeach a witness if the questions concern matters which are only collateral to the central issues. What is sometimes unclear, however, is what is material and what is col-

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lateral. Generally speaking, material facts involve those matters which are pertinent and material to the pending inquiry, while collateral matters are those which are irrelevant or immaterial to the issues before the court.

Here, defendant relies upon *State v. Williams*, *State v. Hunt* and *State v. Jerrells* to support his argument that Barnes and Reid were improperly impeached on collateral matters with extrinsic evidence. In each of the three cases relied upon by defendant our courts held that once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement. The rationale behind these holdings is that once the witness denies having made a prior inconsistent statement the prior statement concerns only a collateral matter, *i.e.*, whether the statement was ever made. Here, unlike the situations presented in *Williams*, *Hunt* and *Jerrells*, both Barnes and Reid admitted making statements to Wilson on 7 July. Accordingly, these cases are inapposite.

Where the witness admits having made the prior statement, impeachment by that statement has been held to be permissible. In *State v. Wilson*, 135 N.C. App. 504, 521 S.E.2d 263 (1999) two witnesses testified as to the events of the night of 22 February 1997 when defendant was involved in an assault. Both witnesses also admitted making statements to the police regarding the assault. Over defendant's objection, the State was permitted to examine these witnesses about their prior inconsistent statements to the police. On appeal we held that since neither witness denied making the prior statements, their introduction was not collateral and therefore the trial court properly allowed the State to use these witnesses' prior statements for impeachment purposes.

Likewise, where there is testimony that a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, our courts have allowed the witness to be impeached with the prior inconsistent statement. In *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984) the witness testified that she did not remember making specific statements to the police which tended to inculcate defendant, and then denied having made those specific statements. Our Supreme Court held that because the prior statement with which the witness was impeached was inconsistent in part with her testimony and material in that it related to events immediately lead-

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ing to the shooting, the witness could be impeached concerning the inconsistencies in her prior statement. Moreover, in *State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (1993) where the witness denied making certain statements before the grand jury and also claimed that some statements he made to the grand jury were false, we held it permissible for the State to impeach the witness with his prior inconsistent statements.

At trial both Barnes and Reid admitted making statements to Wilson in which they discussed details of the robbery and assault of the victim and implicated defendant. Barnes, however, testified that certain parts of his statement were inaccurate, and that he did not remember making certain parts of his statement. Reid also testified that certain parts of his statement were inaccurate. Thus, we conclude that under *Whitley*, *Wilson* and *Minter* the trial court did not err in allowing Barnes and Reid to be impeached concerning the inconsistencies in their prior statements.

Finally, we note that while North Carolina Rule of Evidence 607 allows a party to impeach its own witness on a material matter with a prior inconsistent statement, impeachment is impermissible where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible. Circumstances indicating good faith and the absence of subterfuge have included the facts that the witness's testimony was extensive and vital to the government's case; that the party calling the witness was genuinely surprised by his reversal; or that the trial court followed the introduction of the statement with an effective limiting instruction.

Here, the facts indicate good faith and an absence of subterfuge. The testimony of Barnes and Reid was extensive and vital to the State's case. Both witnesses testified to the events of 4 July 1998 leading up to the robbery and assault of the victim. Both witnesses testified that they watched a fireworks display and attended a party, and later went riding in a Ford Escort. Both Barnes and Reid testified that they stopped at the car wash on Bessemer City Road to use the pay phone around 11:00 p.m., and that defendant was out of their sight for a sufficient time to have committed these crimes. Moreover, there is no indication that the State anticipated that Barnes and Reid would contradict the statements they had given to Wilson on 7 July. Finally, upon defendant's request, the trial court gave an effective limiting instruction to the jury before Wilson's testimony was elicited. Under the cir-

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cumstances here, we cannot conclude that the impeachment of Barnes and Reid was used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible. Accordingly, this assignment of error fails.

142 N.C. App. 298, 302-04, 542 S.E.2d 320, 322-24 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted), *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001).

During defendant's trial, Mr. Hicks testified that he did not see defendant at the scene of the crime. The State presented Mr. Hicks with his 28 December 2009 written statement he had provided to the police, and Mr. Hicks acknowledged that it was his statement but claimed it was a "lie." Mr. Hicks statement said that defendant "walked up to the dude in the black hoodie and said what are you trying to say, pulled out a handgun and shot the boy and ran[.]" Mr. Porter testified that he did not see defendant at the scene of the crime. The State presented Mr. Porter with his 28 December 2009 written statement he had provided to the police, and Mr. Porter acknowledged it was his statement and said "I didn't really write a lie, but that's -- that's what [the police] wanted me to put, yeah." Mr. Porter's statement provided that "the victim [tried] to smack the gun out of [defendant's] hand and that's when I heard the shot being fired." Thus, both witnesses admitted having made prior statements to the police, and those statements differed greatly from their trial testimony.

First, both Mr. Hicks' and Mr. Porter's statements to the police were material as the statements are concerning the credibility of two individuals who claimed they did not see defendant at the scene of the crime. *See id.* at 302, 542 S.E.2d at 322-23. Both Mr. Hicks' and Mr. Porter's testimonies were certainly regarding "facts involv[ing] those matters which are pertinent and material to the pending inquiry[.]" *Id.* at 302 542 S.E.2d at 323. Second, as both witnesses admitted having made the prior statements "impeachment by th[ose] statement[s] has been held to be permissible." *Id.* at 303, 542 S.E.2d at 323. Third, we do not believe "mere subterfuge" took place on the part of the State: the credibility of the eyewitnesses' testimony was certainly "vital to the government's case[;]" although defendant contends "the State knew that witness Hicks and witness Porter were going to testify that any previous statement given by each was not the truth[,]" defendant has not directed this Court's attention to any indication in the record that the State was not "genuinely surprised" by the witnesses' denial of portion of their statements at trial; lastly, the trial court also "fol-

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lowed the introduction of the statement[s] with an effective limiting instruction.” *Id.* at 304, 542 S.E.d at 324. Accordingly, we conclude that the trial court did not abuse its discretion in allowing evidence of the witnesses’ prior inconsistent statements.

B. Rule 403

Defendant also argues that even if the witnesses’ prior inconsistent statements were admissible under Rule 607, they should have been excluded under Rule 403 as their “probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues and did mislead the jury[.]” (Original in all caps.) North Carolina Rule of Evidence 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2009).

Before Mr. Hicks’ statement was read to the jury the trial court stated,

Ladies and gentlemen, I would like for y’all to listen to me and I want you to listen to me carefully. When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at the earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing on the witness’s truthfulness in deciding whether or not to believe or disbelieve the witness’s testimony at this trial.

The trial court also gave a similar instruction before Mr. Porter’s statement was read to the jury. Due to the instruction provided by the trial court which specifically instructed the jury not to consider Mr. Hicks’ or Mr. Porter’s prior inconsistent statements substantively but only for purposes of determining their credibility, defendant has not demonstrated that the “probative value [of the statements was] . . . substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” *Id.* This argument is overruled.

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V. Motion to Dismiss

[4] Lastly, defendant contends that

the trial court erred in denying the defendant's motion to dismiss the charge of first degree murder when the evidence viewed in the light most favorable to the State was insufficient to permit a reasonable juror to find beyond a reasonable doubt that the defendant committed premeditated and deliberate murder.

(Original in all caps.)

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). "The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000).

Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. Premeditation and deliberation can be inferred from many circumstances, some of which include:

(1) absence of provocation on the part of deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased

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has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Wiggins, ___ N.C. App. ___, ___, 707 S.E.2d 664, 673 (citations and quotation marks omitted), *disc. review denied*, 365 N.C. 189, 707 S.E.2d 242 (2011). The evidence does not demonstrate any “provocation on the part of” Mr. Daniel, and Ms. Lynch testified that defendant simply walked up to Mr. Daniel, shot him, and then ran. *See id.* Viewing “the evidence in the light most favorable to the State[,]” there was substantial evidence to support the jury’s determination that defendant had committed a premeditated and deliberate act in shooting Mr. Daniel. *Johnson* at 724, 693 S.E.2d at 148; *see Wiggins*, ___ N.C. App. at ___, 707 S.E.2d at 673.

VI. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. BRYANT LAMONT BOYD

No. COA10-1072-2

(Filed 7 August 2012)

Kidnapping—second-degree—improper jury instruction—no evidence of removal

The trial court committed plain error by instructing the jury on a theory of second-degree kidnapping that was not charged in the indictment or supported by the evidence. In the absence of any evidence of removal, the presence of the removal instruction provided the jury an illegitimate mode of conviction and constituted error. Defendant’s kidnapping conviction was vacated and defendant was granted a new trial.

Judge STROUD dissenting.

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Appeal by Defendant from judgment entered 14 April 2010 by Judge Abraham P. Jones in Orange County Superior Court. The case was originally heard before this Court on 10 March 2011. *See State v. Boyd*, ___ N.C. App. ___, ___, 714 S.E.2d 466, 468 (2011). Upon remand by order of the North Carolina Supreme Court, filed 19 June 2012. *See State v. Boyd*, ___ N.C. ___, ___ S.E.2d ___ (2012).

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliot and Agency Legal Specialist Brian C. Tarr, for the State.

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

HUNTER, JR., Robert N., Judge.

Bryant Lamont Boyd (“Defendant”) appealed from his convictions for first degree burglary, second degree kidnapping, sexual battery, and attaining habitual felon status. The case was originally heard before this Court on 10 March 2011. *See State v. Boyd*, ___ N.C. App. ___, ___, 714 S.E.2d 466, 468 (2011). Defendant alleged the trial court erred by (1) instructing the jury on a theory of second degree kidnapping that was not charged in the indictment or supported by evidence; (2) instructing the jury on a theory of sexual battery Defendant claims was unsupported by evidence; (3) deviating from the pattern jury instructions on the first degree burglary charge; (4) overruling Defendant’s objection to, and failing to intervene *ex mero motu* during, the State’s closing argument; (5) allowing Defendant to be shackled in view of the jury during the habitual felon stage of the trial; and (6) permitting the introduction of evidence in the habitual felon phase that Defendant claims was irrelevant and impermissibly prejudicial.

This Court found no error in part, granted a new trial in part, vacated in part, and remanded. *Id.* at ___, 714 S.E.2d at 476. We found no error on issues two through five above but found error with the trial court’s jury instructions on second degree kidnapping (though we did not apply plain error review). *Id.* at ___, 714 S.E.2d at 469. Accordingly, we vacated Defendant’s conviction for kidnapping and remanded for a new trial. *Id.* Because the kidnapping conviction was one of the predicate felonies for Defendant’s habitual felon conviction, this Court also vacated and remanded that judgment. *Id.* Accordingly, we did not reach Defendant’s last argument on the habitual felon conviction. *Id.*

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The State petitioned our Supreme Court for discretionary review, and, on 19 June 2012, our Supreme Court allowed the State's petition only "for the limited purpose of remanding to the Court of Appeals for the application of plain error review pursuant to *State v. Lawrence*, ___ N.C. ___, 723 S.E.2d 326 (2012)," which clarifies the appropriate standard for plain error. Therefore, as per our Supreme Court's order, we conduct a new analysis under plain error review on issue one: whether the trial court erred by instructing the jury on a theory of second degree kidnapping that was not charged in the indictment or supported by evidence. After review, we vacate Defendant's kidnapping conviction and grant Defendant a new trial. We further note that, except as herein modified, the remainder of the opinion we filed on 2 August 2011 remains in full force and effect.

I. Facts and Procedural Background

We adopt the facts and procedural background provided in *Boyd*, ___ N.C. App. at ___, 714 S.E.2d at 469—70.

II. Standard of Review

Because Defendant did not object to the instructional issue at trial and pursuant to our Supreme Court's direction on remand, Defendant is limited to plain error review. *See* N.C. R. App. P. 10(a)(2) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires. . . ."); *see also State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (Our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence.") 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." Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Lawrence, ___ N.C. at ___, 723 S.E.2d at 334 (internal citations omitted) (alteration in original).

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III. Analysis

Defendant argues the trial court erroneously instructed the jury with respect to the second degree kidnapping charge. Defendant specifically contends the trial court erred by instructing the jury on a theory of second degree kidnapping (removal) that was unsupported by the evidence presented at trial and not charged in the indictment. “[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo*, by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

Before applying plain error analysis to jury instructions, “it is necessary to determine whether the instruction complained of constitutes error.” *State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007), *cert. denied*, 552 U.S. 1319 (2008). “The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905 (1974). “[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.” *Id.*

Here, the indictment charged Defendant with second degree kidnapping “by unlawfully confining and restraining her without her consent and for the purpose of terrorizing her.” The trial court defined second degree kidnapping in its jury charge as “unlawfully confining a person and/or restraining a person and that person did not consent to this confinement and/or restraint and that this was for the purpose of terrorizing that person.” However, in charging the jury on the specifics of second degree kidnapping as they applied to the case at hand, the trial court instructed the jury as follows, including “removal” as a theory on which to convict Defendant:

For you to find the defendant guilty of [second degree kidnapping], the State must prove three things beyond a reasonable doubt: First, that the defendant unlawfully confined the person—that is, imprisoned her within a given area; restrained a person, that is, restricted her freedom of movement; *or removed a person from one place to another*—second, that the person did not consent—and, as instructed, consent obtained by fraud or fear is not actual consent; and third, that the defendant did so for the purpose of terrorizing that person.

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(Emphasis added).

The State argues the inclusion of “removal” as a theory on which to convict Defendant is not error because this theory is supported by the evidence. We disagree and adopt our analysis in *Boyd* on this issue:

In support of this assertion, the State points to two portions of [the victim’s] testimony in which she describes Defendant forcing her to sit on his lap in a nearby chair. The State argues this constitutes sufficient evidence of removal, and therefore Defendant’s argument is factually deficient. We find the State’s argument unpersuasive. It is unclear how Defendant “forced” [the victim] to accompany him to the chair. And even assuming there is sufficient evidence of actual or constructive force, we conclude the asportation in this case was insufficient to constitute removal.

We acknowledge that there is no particular requirement that a defendant move a victim a certain distance in order to support a charge of kidnapping under a theory of removal, and our Supreme Court has specifically rejected the notion that removal must be “substantial.” See *State v. Fulcher*, 294 N.C. 503, 522–23, 243 S.E.2d 338, 351 (1978) (“[I]t was clearly the intent of the Legislature to make resort to a tape measure . . . unnecessary in determining whether the crime of kidnapping has been committed.”). Therefore, the State is correct in citing *State v. Owen*, 24 N.C. App. 598, 211 S.E.2d 830 (1975), for the proposition that moving a victim a short distance *could* constitute kidnapping in a proper case. This, however, is not such a case.

We do not discount the notion that evidence of removal could be present in a case where a victim was moved a distance equivalent to the space between where [the victim] was standing and the chair. However, we cannot conclude that the evidence presented at trial, or any fair inference stemming therefrom, suggests [the victim] was “removed” in this case. According to her own testimony, the entirety of [the victim’s] encounter with Defendant occurred within the confines of her living room, and certainly evidence was presented as to Defendant confining and restraining her. Defendant attempted to talk [the victim] into accompanying him to the bedroom, but she refused. Interpreting [the victim’s] testimony as supporting the assertion Defendant “removed” her is not plausible.

This conclusion is consistent with this Court’s recent decisions in the home invasion context. We have recently held that a kidnap-

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ping victim may be “removed” from one area of their home to another. *See, e.g., State v. Mangum*, 158 N.C. App. 187, 195, 580 S.E.2d 750, 755 (2003) (evidence tending to show a rape victim was forced down a hallway from one room to another was sufficient asportation to support a conviction for second-degree kidnapping); *see also State v. Blizzard*, 169 N.C. App. 285, 291, 610 S.E.2d 245, 250 (2005) (“[D]efendant’s forcible movement of the victim from the front of her home to the bedroom was a sufficient asportation to support kidnapping . . .”). But these cases are distinguishable from the matter at bar. Both *Mangum* and *Blizzard* involved a victim being “removed” from one section of their home to another. Here, however, [the victim] testified Defendant made her sit on his lap in a chair in the same room, merely a few feet from where she was standing. We hold that, under these facts, where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not “removed” within the meaning of our kidnapping statute.

Boyd, ___ N.C. App. at ___, 714 S.E.2d at 471-72 (alteration within quotation marks in original). In the absence of any evidence of removal, we hold the presence of the instruction regarding removal provided the jury an illegitimate mode of conviction and constitutes error.

We next consider whether the trial court’s error in instructing the jury on a theory not supported by the evidence rises to the level of plain error where the instruction also included alternate theories, which Defendant does not assert were unsupported by the evidence.

Looking only to *Lawrence* for guidance in this case, the dissent would hold Defendant has not shown plain error. Although *Lawrence* analyzes well the application of plain error review to jury instructions, it does not address the situation at hand: where several alternative theories are submitted to a jury but one of those theories is not supported by the evidence. In *Lawrence*, the defendant was charged with two counts of attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon, amongst other charges. ___ N.C. App. at ___, 723 S.E.2d at 329. The trial court correctly instructed the jury on the elements of attempted robbery with a dangerous weapon, including the elements that the defendant possessed a firearm and intended to use it to “‘endanger or threaten the life of [the victim].’” *Id.* (alteration in original). However, the trial court, in its charge on conspiracy to commit robbery with a dangerous weapon, erroneously omitted the element that the weapon “must have been used to endanger or threaten the life of the victim.” *Id.* Our

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Supreme Court held this failure to constitute error but not plain error because the trial court had properly instructed the jury on the elements of attempted robbery with a dangerous weapon and the jury convicted the defendant of that offense. *Id.* at ____, 723 S.E.2d at 334. Therefore, the only additional element required to convict the defendant of conspiracy to commit robbery with a dangerous weapon was that the defendant “entered into an agreement to do so.” *Id.* The Court held that because there was “overwhelming and uncontroverted evidence” that the defendant committed the conspiracy, the defendant could not show that, absent the error, the jury probably would have returned a different verdict. *Id.* at ____, 723 S.E.2d at 335.

Here, the trial court erred by instructing the jury on the theory of removal for Defendant’s second degree kidnapping charge. However, this case is distinct from *Lawrence* because there is zero evidence (much less “overwhelming and uncontroverted evidence”) that Defendant “removed” the victim. Therefore, although we apply the plain error standard set forth by our Supreme Court in *Lawrence*, we look to other more analogous precedent to determine if plain error has occurred in this case.

“It is a well-established rule in [North Carolina] that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.” *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986) (finding plain error where the State’s evidence supported the trial court’s jury instruction but the indictment did not) (quotation marks and citation omitted). Going one step beyond *Tucker*, our Supreme Court held in *Porter* that “[w]here jury instructions are given without supporting evidence, a new trial is required.” *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). Moreover, when the trial court instructs the jury on alternate theories for conviction, one that is supported by the evidence and one that is not, such an error requires a new trial because “it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict[.]” *State v. Johnson*, 183 N.C. App. 576, 583, 646 S.E.2d 123, 128 (2007) (finding plain error and granting the defendant a new trial for second degree kidnapping because the trial court instructed the jury on alternative theories, one that was supported by the evidence and one that was not) (quoting *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79, *disc. rev. denied*, 337 N.C. 697, 448 S.E.2d 536 (1994)).

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Here, the removal theory for second degree kidnapping was not supported by the bill of indictment. Moreover, the trial court's jury instruction on the removal theory was given without supporting evidence and constitutes error. Although there is supporting evidence for the theories of confinement and restraint to convict Defendant of second degree kidnapping, we cannot discern from the record whether all twelve jurors convicted Defendant on these instructed theories. Accordingly, similar to our holding in *Johnson*, we cannot allow a conviction based on an erroneous, disjunctive jury instruction to stand because to do so would seriously affect the fairness, integrity, and public reputation of judicial proceedings. Therefore, we hold the trial court's jury instruction on second degree kidnapping including a theory not supported by the evidence constitutes plain error. Defendant is entitled to a new trial on the charge of second degree kidnapping.

IV. Conclusion

For the foregoing reasons, Defendant is entitled to a

New trial.

Judge THIGPEN concurs.

Judge STROUD dissents in a separate opinion.

STROUD, Judge dissenting.

I must respectfully dissent, as I believe that the Supreme Court's mandate to this Court requires us to find no plain error as to defendant's conviction for second-degree kidnapping.

As noted by the majority opinion, this case is on remand from the North Carolina Supreme Court solely for this Court to re-examine the issue of the propriety of the jury instructions as to the "removal" element of second-degree kidnapping under plain error review in accord with *State v. Lawrence*, ___ N.C. ___, 723 S.E.2d 326 (2012) and to consider defendant's additional remaining issues which must be addressed if defendant's second-degree kidnapping conviction were upheld.

I. Plain error review of second-degree kidnapping instructions

I believe that the instructional error as to "removal" does not rise to the level of plain error. The Supreme Court directed us to

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review this case in light of State v. Lawrence, which discussed the application of plain error review to jury instructions in detail, as follows:

We now reaffirm our holding in [*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)] 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)[.] . . . 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 (quoting [*States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)]).

Having described the potential paths preserved and unpreserved errors can take on appeal and discussed the federal and North Carolina plain error standards of review, we turn to the present case. The State alleges that the Court of Appeals applied an incorrect standard of plain error review by examining whether the erroneous jury instruction was likely to mislead the jury. The State further contends that if the Court of Appeals had applied the correct standard, defendant would not have met his burden of showing that the erroneous jury instruction amounted to plain error.

It is uncontested that the trial court’s charge on conspiracy to commit robbery with a dangerous weapon was erroneous under *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 [(1981)]. Because defendant did not object at trial, we review for plain error. To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict. In its reliance on *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245 [(2005)], the Court of Appeals applied an incorrect formulation of the plain error standard of review.

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Defendant cannot meet his burden of showing that the error amounted to plain error. The trial court correctly instructed the jury on the elements of attempted robbery with a dangerous weapon. The jury convicted defendant of that offense. Therefore, the only additional element necessary to convict defendant of conspiracy to commit robbery with a dangerous weapon was that he entered into an agreement to do so. The evidence against defendant is overwhelming. The record contains testimony by multiple witnesses describing the efforts of the group, which included defendant, to kidnap, threaten, and rob Ms. Curtis. Two of those witnesses were co-conspirators. Those co-conspirators testified that defendant “knew what was going on.” Defendant knew that the group was attempting to rob the homes of purported drug dealers. He knew that the group planned to use zip ties to restrain Ms. Curtis. He knew that the group planned to threaten Ms. Curtis with their firearms to force her to reveal where the money was located. He knew that they would douse her with gasoline and threaten to ignite her if that did not work. In sum, defendant knew the details of the plan, including what being “the muscle” entailed. After all, upon learning of the plan, he volunteered that he already had a gun. Through his interactions with the group, defendant conspired to commit robbery with a dangerous weapon. The evidence, including the testimony of two co-conspirators, clearly establishes that defendant and the rest of the group attempted to carry out their plan to rob Ms. Curtis over a two-day period.

In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings.

___ N.C. at ___, 723 S.E.2d at 334-35.

Here, defendant challenges the references to “removal” in the instructions as to kidnapping, which were as follows:

I turn now to second degree kidnapping. The defendant has been charged with second degree kidnapping. For you

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to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that the defendant unlawfully confined the person—that is, imprisoned her within a given area; restrained a person, that is, restricted her freedom of movement; or *removed a person from one place to another*—second, that the person did not consent—and, as instructed, consent obtained by fraud or fear is not actual consent; and third, that the defendant did so for the purpose of terrorizing that person. Terrorizing means more than just putting another in fear. It means putting that person into some high degree of fear or intense fright or apprehension.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully confined or restrained or *removed* a person from one place to another and that person did not consent to this confinement, restraint, or *removal* and this was for the purpose of terrorizing that person, it would be your duty to return a verdict of guilty. If you do not so find or you have a reasonable doubt as to any one of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added.)

The evidence against defendant was “overwhelming” and much was uncontroverted. *See id.* In fact, defendant’s theory of the case did not dispute that he was in Ms. Shah’s apartment that night or that he had sexual contact with Ms. Shah essentially as she described; instead, his sole defense was that she consented to his presence and activities and she had claimed that he broke into her apartment and assaulted her only because she did not want to tell her husband the truth. He gave a statement to the police that he had met Ms. Shah prior to the night of the alleged crimes, that she wanted to leave her boyfriend, and that he knocked on the front door of her apartment at about 11:30 pm, she let him in, and they talked for about 2 ½ to 3 hours, after which she initiated physical contact with him. But the State’s evidence which showed that Ms. Shah did not consent to defendant’s actions is compelling. The record shows that Ms. Shah was five feet two inches tall and weighed 105 pounds, while defendant was six feet two inches tall and weighed 250-280 pounds. Ms. Shah testified that after she discovered the defendant sitting in her living room, in the dark, at about 3:00 a.m., he told her

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“I’m not here to hurt you. I just—I have noticed you around, and I’m attracted to you. I really like you, and I just want to sleep with you this one time. Can we go to the bedroom and talk?”

And I was like, “No, please. Please, can we just talk over here?”

And he kept insisting, “No, let’s go to the bedroom.”

And I talked and I said, “Please, you don’t have to do this. Please don’t do this. I am so scared. You are frightening me. Can we just talk in the living room? Can we just be right here and talk?”

. . . .

And he was like—he was like, “If you don’t want me to rape you, you will do this.”

Ms. Shah continued to try to convince defendant to leave her alone and to protect herself using “passive defense tactics” she had learned as a flight attendant in dealing with hijackers or disruptive or unruly passengers:

Since you are in a confined space, there is nowhere to run. There’s nowhere to hide. All you have got to do is apply passive defense tactics, become composed and collected. What you can do is negotiate with them; negotiate for the elderly and the children on board the aircraft. At all times never be aggressive; never threaten them; never use body language or your hands too much. That alarms them and that provokes them or could make them aggressive and threaten them. And that was the only thing that came to my mind that night because I was in the same kind of situation where I had nowhere to hide and nowhere to run and no arms or anything to protect myself or defend myself.

Ms. Shah knew that she could not fight the defendant:

And I just thought, “I’m not as strong to fight him. How am I going to—how am I going to—how am I going to protect myself if I get him angry?” And the only one thing that came to my mind was passive defense. And I was just—I just tried to keep delaying it by pleading him and begging him.

And he says, “No. Now that I’m here, I’m going to get something out of you.”

And I said, “Please don’t make me do this. My husband is home. He is going to come home any minute,” and try to scare

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him by saying that. “But you got to leave. Please don’t make me do this. I don’t want to do this.”

He said, “If you don’t want me to rape you, you will do this.”

I didn’t know what to do because every time I was trying to maneuver myself to get to even the door to see if I could run out, he was so big and strong and just wouldn’t—he kept pushing me back. And I thought to myself there was just no way I would be able to fight him.

Defendant remained in Ms. Shah’s apartment for quite a long time, as she continued to attempt to convince him to leave without harming her. During much of this time, her testimony indicates that she attempting to make her way to the door to escape, but defendant ultimately insisted that she sit on his lap.

[The State]: When you say you were trying to maneuver towards the door, do you mean the entrance to the apartment?

[Ms. Shah:] The entrance door.

Q. And during your conversation with him, was he standing—keeping himself between you and the door or was he—

A. Between me and the door.

Q. Do you have any concept or recollection of what—about what time it was when you found him in the apartment?

A. Around 3:00 o’clock in the morning; 2:00 or 3:00.

Q. And how long was he there in the apartment?

A. It seemed the longest. Had to be—had to be an hour or more.

Q. Did he—where was—did he stay in the same place the whole time?

A. No, because I was trying to maneuver. He was constantly, you know, trying to make sure I wouldn’t get to the door. So he was moving along every time I made a move.

Q. And what were you—while you were moving around, what are you saying to him?

A. Just begging him and pleading him, telling him he doesn’t need to do this. “I don’t want to do this. Please, for God’s sakes, don’t do this. Please, I’m not the kind of girl you think I am.

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Please, you are scaring me. I'm so frightened. You have got to leave. Please leave.

Of course, defendant did ultimately sexually assault Ms. Shah and was convicted of sexual battery, and this conviction is not at issue in this remand.

In the light of this evidence, I do not believe that defendant has shown “that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *See Lawrence*, ___ N.C. at ___, 723 S.E.2d at 335. The omission of approximately ten words relating to “removal” from the above jury instructions would, under the facts of this particular case, make no difference at all in the result. Therefore, I would find no plain error as to the trial court’s instructions as to second-degree kidnapping.

II. Additional issues

Defendant has raised two other issues which the majority did not address because it was unnecessary based upon its decision to grant a new trial as to second-degree kidnapping. I will address these briefly, as I would find no merit to defendant’s remaining arguments.

A. Shackling during habitual felony phase of trial

I would find that the trial court did not abuse its discretion in ordering defendant to remain in shackles during the habitual felon phase of his trial. In *State v. Billups*, our Supreme Court stated that

a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. However, . . . the general rule does not lead to the conclusion that every trial in shackles is fundamentally unfair. Rather, the rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial.

301 N.C. 607, 611, 272 S.E.2d 842, 846 (1981) (citations and quotation marks omitted). “In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.” *State v. Boddien*, 190 N.C. App. 505, 511, 661 S.E.2d 23, 27

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(2008) (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 363 N.C. 131, 675 S.E.2d 660 (2009).

As the trial court noted to defense counsel in making its ruling, “[t]he jury knows your client has been convicted. They . . . are the ones who convicted him. . . . [H]is status has changed from yesterday. . . . I am going to follow the sheriff department’s rules since they are in charge of security.” Defendant had just been convicted of three serious crimes, was facing a habitual felony charge, and knew that he faced the possibility of very long prison sentences. I cannot say that the trial court’s action was not “the result of a reasoned decision.” *See Bodden*, 190 N.C. App. at 511, 661 S.E.2d at 27.

B. Introduction of evidence in habitual felon phase of trial

I would also find that the trial court did not commit plain error in permitting the State to introduce evidence that defendant had, in addition to the three predicate felonies, four other felony convictions, two revocations of probation, 19 prior record points, and was a prior record level VI. First, defendant did not object to the State’s introduction of records as to the defendant’s criminal record, which included all of this information.

Defendant argues that the additional information, beyond the three predicate felonies, was irrelevant to the issue which the jury was to decide. Defendant also claims that it was “highly prejudicial. . . because it painted him as a hardened criminal who had repeatedly violated the terms of his probationary sentences and thus required heightened punishment.” Although I agree that the additional information was irrelevant, I do not agree that defendant has demonstrated that the admission rises to the level of plain error. Although defendant raises some potential questions as to dates of birth and spelling of his name (such as “Bryan” instead of “Bryant” on an order for assignment of counsel as to a probation violation) defendant does not present any credible argument that the three predicate convictions were not in fact his convictions. In fact, based upon the jury’s questions, it would appear that the extraneous evidence introduced by the State may have actually helped defendant, as the jurors were confused by some of it.¹ If they had been asked to consider only

1. As the third predicate felony, the jury submitted a question, “What does prior record points of 19 mean?” and “What does Record Level VI mean?” The trial court instructed the jury, without objection from defendant that “I have to refer you back to my instructions on habitual felon and tell you that your only function in this case is to find from the evidence one way or the other, if you find yea or nay, the standard being beyond a reasonable doubt as to the validity of the three convictions that I gave you. The rest of it is beyond the scope of what you need to do.”

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the judgments for the three predicate felonies, they probably would have reached their guilty verdict more quickly. Thus, defendant has not demonstrated how the introduction of the documents relating to felonies other than the predicate felonies prejudiced him. This Court addressed a similar issue in *State v. Ross*, where the trial court admitted several extraneous documents as part of the defendant's criminal record, including "the magistrate's order (form AOC-CR-116), the indictment (form AOC-CR-122), an order for arrest (form AOC-CR-217), and the 'transcript of plea' (form AOC-CR-300) from Forsyth County file No. 01 CRS 54630." ____ N.C. App. ____, ____, 700 S.E.2d 412, 425 (2010), *disc. review denied*, 365 N.C. 346, 717 S.E.2d 377 (2011). The transcript of plea included defendant's responses to questions regarding his use of drugs: "'4.(a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants?', to which defendant answered 'yes' and question 4.(b) 'When was the last time you used or consumed any such substances?', to which defendant answered, 'today[.]'" *Id.* at ____, 700 S.E.2d at 425-26. In *Ross*, defendant did object to the trial court's failure to redact this information, but this Court still found that although the information was irrelevant, he failed to show prejudice:

Given the overwhelming and uncontradicted evidence of the three felony convictions, there is essentially no likelihood that a "different result . . . would have ensued[.]" *see [State v. Moses, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999), cert. denied, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000).]*, if the trial court had redacted "transcript of plea" questions 4(a) and (b) and/or defendant's answers to those questions. Defendant's argument is therefore without merit. Although other documents, such as a transcript of plea, could be used to prove a conviction, we agree that, as our Supreme Court stated, the "*preferred method* for proving a prior conviction includes the introduction of the judgment itself into evidence." [*State v. Maynard, 311 N.C. 1, 26, 316 S.E.2d 197, 211, cert. denied, 469 U.S. 963, 83 L. Ed. 2d 299 (1984)*] (emphasis added).

Id. at ____, 700 S.E.2d at 426; *See also Lawrence, ____ N.C. at ____, 723 S.E.2d at 334-35.*

Thus, although it would have been preferable for the State to admit only the prior judgments as to the three predicate felonies, defendant has not demonstrated that the admission of the additional, irrelevant information rises to the level of plain error.

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Thus, for the foregoing reasons, I would find that the trial court committed no plain error as to the instructions as to second-degree kidnapping, no abuse of discretion as to shackling defendant during the habitual felon phase, and no plain error as to introduction of the challenged evidence as to defendant's criminal record in the habitual felon phase. I therefore respectfully dissent.

STATE OF NORTH CAROLINA v. CHAD ETHMOND BRASWELL

No. COA11-1366

(Filed 7 August 2012)

1. Confessions and Incriminating Statements—motion to suppress statements—Miranda warnings inapplicable for traffic stops

The trial court did not commit prejudicial error by denying defendant's motion to suppress the statements made by defendant and the results of his field sobriety tests performed before being advised of his *Miranda* rights. *Miranda* warnings are not required for traffic stops.

2. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of evidence—Miranda safeguards inapplicable to traffic stop

The trial court did not commit prejudicial error by failing to grant defendant's motion to dismiss the charge of driving while impaired at the close of the State's case and at the close of all the evidence. *Miranda* safeguards did not apply to this traffic stop, and thus, the statements and field sobriety tests were a proper basis for determining whether defendant was under the influence of an impairing substance.

3. Motor Vehicles—failure to stop immediately after crash—motion to dismiss—sufficiency of evidence

The trial court did not commit prejudicial error by failing to grant defendant's motion to dismiss the charge of failure to stop immediately after a crash involving property damage in violation of N.C.G.S. § 20-166(c) at the close of the State's case and at the close of all the evidence in light of the testimony of a witness and two officers.

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4. Motor Vehicles—driving while impaired—jury instruction—impairment—ingestion of controlled substances

The trial court did not commit prejudicial error in a driving while impaired case by allegedly failing to properly instruct the jury on the State's duty to prove that defendant's impairment was due to ingestion of controlled substances. The record showed sufficient evidence that defendant was in fact impaired, and thus, defendant failed to carry his burden of showing that the verdict was affected by the instruction.

Appeal by Defendant from judgment entered 13 July 2011 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 2 April 2012.

Attorney General Roy Cooper by Assistant Attorney General Carrie D. Randa, for the State.

C. Gary Triggs, P.A., for Defendant.

BEASLEY, Judge.

Chad Ethmond Braswell (Defendant) appeals from his conviction of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and leaving the scene of the accident or collision resulting in property damage in violation of N.C. Gen. Stat. § 20-166(c). For the reasons stated below, we find no error.

Between 10:30 and 11:00 a.m. on 15 October 2008, the Boone Police Department was advised of a motor vehicle accident on Highway 105 in Watauga County. Brian Patrick Lankford was driving on Highway 105. Upon entering the left lane, the back of his vehicle was struck, causing him to jump a curb and strike several vehicles at the Chrysler dealership parking lot that was near the intersection. Mr. Lankford informed police that the vehicle that struck him was a large white GMC with front end damage, and that the driver continued down Highway 105 without stopping after the collision.

Less than five minutes after hearing the description of the vehicle that struck Mr. Lankford, Officer Josh Watson (Officer Watson) of the Boone Police Department noticed a white GMC travelling on Highway 105 that matched the vehicle described by Mr. Lankford. Officer Watson activated his blue lights, stopped Defendant, and informed him that he was being stopped because of a reported car crash. Officer Watson also asked for Defendant's driver's license and asked

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Defendant to step out of the car, although he did not restrain Defendant with handcuffs.

Officer Toby Regan (Officer Regan) of the Boone Police Department arrived shortly after Defendant was stopped. Officer Regan asked Defendant if he was aware that he had been involved in a car crash, to which Defendant responded that he did not think he had damaged the other vehicle, and therefore did not stop. Neither Officer Watson nor Officer Regan had advised Defendant of his *Miranda* rights at this point.

Upon questioning, Defendant admitted to taking prescription medication the morning of the accident. Officer Regan then requested that Defendant complete standardized field sobriety tests. Defendant complied, but failed both the “one leg stand test” and the “walk and turn test.” Defendant also exhibited all six clues on the Horizontal Gaze Nystagmus test (HGN). Officer Regan then asked Defendant to submit to an alka sensor test, which was negative. Defendant still had not been given a *Miranda* warning at this time.

After the various tests had been administered and Officer Regan had determined that Defendant had consumed an impairing substance, Defendant was restrained with handcuffs and placed under arrest. After he placed Defendant under arrest, Officer Regan looked into Defendant’s vehicle and noticed various prescription medication bottles. Defendant was then taken to Watauga Medical Center for a blood test. At this point, Defendant was informed of his constitutional rights concerning the blood test, and Defendant consented to take the blood test. The results of the blood test showed the presence of Carisoprodol, Meprobamate, Diazepam, Nordiazepam, and Methadone.

Defendant was charged with one count of driving while impaired and failure to stop at the scene of an accident. On 10 February 2011 in district court, Defendant pled guilty to driving while impaired in exchange for a dismissal of the charge of failure to stop at the scene of a crash in Watauga County District Court. The trial court found that Defendant was a Level II offender and sentenced him to 12 months suspended, 18 months of supervised probation, a 7 day active sentence, costs and fines. Defendant gave notice of appeal. On 13 July 2011, after a jury trial in superior court, Defendant was found guilty of driving while impaired and leaving the scene of an accident.¹ On 22 July 2011, Defendant gave notice of appeal to this Court.

1. Although the verdict sheet and the transcript show that Defendant was found guilty of leaving the scene of an accident, the judgment form as to this offense states

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[1] Defendant first argues that the trial court committed prejudicial error by denying Defendant’s motion to suppress (1) the statements made by Defendant prior to being advised of his *Miranda* rights and (2) the results of Defendant’s field sobriety tests performed by Defendant before being advised of his *Miranda* rights. We disagree.

Our review of a denial of a motion to suppress by the trial court is “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. Barden, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). A trial court’s findings of fact “are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994). “At a suppression hearing, conflicts in the evidence are to be resolved by the trial court.” *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003). The trial court’s conclusions of law are fully reviewable on appeal. *Id.*

Defendant argues that the trial court was required to give written findings of fact to support its denial of the motion to suppress. Pursuant to N.C. Gen. Stat. §15A-977(f) (2011), “[t]he [trial] judge must set forth in the record his findings of facts and conclusions of law.” “This statute has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing.” *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009) (citation omitted). The trial court made the following findings from the bench,

I find that on October 15, 2008 in response to dispatch heard by [Officer] Watson concerning a hit and run. [Officer] Watson was traveling South on Highway 105 and was looking for a vehicle described by the dispatch, a vehicle being a full size white GM pickup truck. He spotted a—[vehicle] with front end damage. . . . [Officer] Watson saw such a vehicle traveling North on Highway 105. He turned on [Highway 105] and came up behind

that Defendant was found not guilty, but imposed a monetary fine. This seems to be a clerical error that does not interfere with our analysis of this charge.

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[the vehicle] and turned his blue lights on. . . . The Defendant was driving the vehicle at the time [Officer] Watson stopped the vehicle, he was investigating a hit and run accident involving perhaps the automobile. [Officer] Watson testified the Defendant was not free to leave this was an investigation and not under arrest. Therefore [I] find that these statements made by the Defendant are admissible and although *Miranda* warnings were not given they were not required at this point.

Defendant contends that the trial court was required to make written findings of fact because there were material conflicts of evidence presented at the suppression hearing. Defendant fails to draw this Court's attention to any specific conflicting evidence presented at the suppression hearing. However, Defendant does argue that *Miranda* warnings were in fact applicable which is contrary to the trial court's holding. Here, Defendant challenges the trial court's application of the law and not the evidence presented during the suppression hearing.

Defendant argues that his statements and the results of the field sobriety test were elicited as a result of officer's questioning while he was in custody. "This Court has consistently held that the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation." *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997). The issue is whether Defendant was in custody within the meaning of *Miranda*.

The United States Supreme Court has stated,

[p]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the . . . questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody.

Oregon v. Mathiason, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (internal quotation marks omitted). "The test for determining if a person is in custody is whether, considering all the circumstances, a reasonable person would not have thought that he was free to leave because he had been formally arrested or had [] his freedom of movement restrained to the degree associated with a formal arrest." *In re W.R.*, 363 N.C. 244, 248, 675 S.E.2d 342, 344 (2009) (citation omitted). However, "the fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*." *State v.*

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Benjamin, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996). “Neither *Miranda* warnings nor waiver of counsel is required when police activity is limited to general on-the-scene investigation.” *State v. Kincaid*, 147 N.C. App. 94, 102, 555 S.E.2d 294, 300 (2001) (internal quotation marks and citations omitted). Similarly, prior decisions have repeatedly held that traffic stops are not “custodial interrogations” and thus not subject to the mandates of *Miranda*. See *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317 (1984) (holding that a single police officer asking respondent a modest number of questions and requesting him to perform a simple balancing test at a location visible to passing motorists cannot fairly be characterized as the functional equivalent of formal arrest); see also *State v. Beasley*, 104 N.C. App. 529, 532, 410 S.E.2d 236, 238 (1991) (holding that even when a defendant is questioned about his alcohol consumption in the back of a patrol car, defendant is not in custody for purposes of *Miranda*).

In *Berkemer*, 468 U.S. at 339-440, 83 L. Ed. 2d at 334-35, the United States Supreme Court provided a rationale for not applying *Miranda* warnings to traffic stops,

the usual traffic stop is more analogous to a so-called “Terry stop,” . . . than to a formal arrest. . . . Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. But the detainee is not obliged to respond. And, unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not “in custody” for the purposes of *Miranda*.

Defendant’s argument is meritless.

[2] Next, Defendant argues that the trial court committed prejudicial error by failing to grant his Motion to Dismiss at the close of the State’s case and at the close of all of the evidence. We disagree.

The standard of review for a motion to dismiss is whether there is substantial evidence of each essential element of the crime and whether the defendant was the perpetrator of the crime. *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). “Substantial evidence is such relevant evidence as a reasonable mind might accept as

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adequate to support a conclusion.” *Id.* “In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *State v. Bowden*, ___ N.C. App. ___, ___, 717 S.E.2d 230, 232 (2011).

In order to prove beyond a reasonable doubt that Defendant was driving while impaired, the State must show that the defendant was driving any vehicle on a highway, street, or public vehicular area within this State, while under the influence of an impairing substance. N.C. Gen. Stat. §20-138.1 (2011). In his brief, however, Defendant only contends that the State could not prove that Defendant was under the influence of an impairing substance without the use of inadmissible statements and field sobriety tests given prior to a *Miranda* warning. We held above that the *Miranda* safeguards did not apply to this stop, and thus the statements and field sobriety tests are a proper basis for determining whether Defendant was under the influence of an impairing substance.

Our legislature has defined an impairing substance as “[a]lcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person’s physical or mental faculties, or any combination of these substances.” N.C. Gen. Stat. § 20-4.01(14a) (2011). In the present case, the SBI lab report of Defendant’s blood sample indicated that three of the drugs found in defendant’s blood were listed in Chapter 90 of the General Statutes as Schedule II controlled substances. Further, Defendant did not sufficiently perform the standardized field sobriety tests he was asked to perform. In viewing this evidence in the light most favorable to the State, we find that there was substantial evidence of each element of the crime of driving while impaired.

[3] With regard to the charge of failure to stop immediately after a crash involving property damage in violation of N.C. Gen. Stat. § 20-166(c), the State must show (i) that Defendant was driving a vehicle, (ii) which was involved in a crash, (iii) that Defendant knew or reasonably should have known the car was in a crash, (iv) where property was damaged, (v) that Defendant failed to immediately stop at the scene of the crash, and (vi) that Defendant’s failure to stop was intentional or willful. *See* N.C. Gen. Stat. § 20-166(c) (2011). Mr. Lankford testified that his car was struck from behind by a white truck, and that the collision caused his truck to jump a curb and strike four cars in a parking lot, totaling two of them. Mr. Lankford’s

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car was also totaled. Mr. Lankford further testified that after the white truck struck his car, it continued on without stopping.

Officer Watson testified that he spotted a truck matching the description of the one that struck Mr. Lankford in the vicinity of the collision, and that the truck had front end damage. Officer Watson stopped the truck and saw Defendant operating the vehicle. Finally, Officer Regan testified that when he questioned Defendant about the accident “[h]e stated he didn’t think he had damaged the other vehicle and that is why he did not stop.” In the light most favorable to the State, the testimony of Mr. Lankford and Officers Watson and Regan constitutes sufficient evidence from which the jury could have found Defendant guilty of the crime of failure to stop immediately after an accident involving property damage.

[4] Finally, Defendant argues that the trial court committed prejudicial error by failing to properly instruct the jury on the State’s duty to prove that the Defendant’s impairment was due to ingestion of controlled substances. We disagree.

The State contends that Defendant failed to object to the jury instructions at trial, and thus did not preserve the issue for review. In the present case, it appears that although Defendant requested instructions at the charge conference, the Defendant was given the opportunity to object to the planned jury instructions and failed to do so. However, we have held that when a defendant does not object to jury instructions at trial, the standard of review is plain error. *State v. Cole*, 199 N.C. App. 151, 161, 681 S.E.2d 423, 430 (2009). In reviewing jury instructions under the plain error doctrine, we consider the instructions

“contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.”

State v. Hall, 187 N.C. App. 308, 316, 653 S.E.2d 200, 207 (2007) (quoting *State v. Blizzard*, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005)).

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Defendant argues that the instructions constituted plain error because the trial court stated that the substances in the toxicology report were impairing substances which could have caused the jury to believe that the Defendant was in fact impaired. However, the record shows sufficient evidence that Defendant was in fact impaired. Thus, Defendant has not carried his burden of showing that the verdict was affected by the instruction. Defendant's final argument is overruled.

Affirmed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. JORGE PETER CORNELL

No. COA11-1415

(Filed 7 August 2012)

1. Arrest—resisting, obstructing, or delaying—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of resisting, obstructing, or delaying a police officer in violation of N.C.G.S. §14-223. There was sufficient evidence for the jury to conclude that defendant obstructed and delayed the officers in the performance of their duties. Further, a jury could reasonably have found that defendant did willfully delay and obstruct the officers' investigation.

2. Appeal and Error—preservation of issues—failure to make constitutional argument at trial

Although defendant contended that the trial court erred by denying his motion to dismiss the charge of resisting, obstructing, or delaying a police officer since the conduct for which he was prosecuted was protected by the First Amendment of the United States Constitution, this constitutional argument was not preserved since it was not raised at trial.

3. Arrest—resisting, obstructing, or delaying—denial of requested jury instruction—defense of remonstrations

The trial court did not err in a resisting, obstructing, or delaying a police officer case by denying defendant's request for a jury

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instruction on the defense of remonstrating with an officer. Defendant's conduct went beyond mere remonstrating.

Appeal by defendant from judgment entered 11 May 2011 by Judge Anna Mills Wagoner in Guilford County Superior Court. Heard in the Court of Appeals 26 April 2012.

Roy Cooper, Attorney General, by Terence D. Friedman, Assistant Attorney General, for the State.

Anita S. Earls for the defendant.

THIGPEN, Judge.

Jorge Peter Cornell ("Defendant") appeals from a judgment entered on his 11 May 2011 conviction for resisting, obstructing or delaying a police officer in violation of N.C. Gen. Stat. §14-223. For the reasons stated herein, we find no error.

On 1 August 2009, Defendant attended a bluegrass festival ("the festival") in Greensboro, North Carolina with his girlfriend, children, a friend, and his campaign manager, as Defendant was running for a position on the Greensboro City Council at the time. Defendant is also the admitted leader of the "Latin Kings" street gang in North Carolina. Around 8 p.m. that evening, Greensboro police officer Romaine Watkins ("Officer Watkins") overheard some yelling coming from outside the festival gates. Officer Watkins turned towards the disturbance and noticed what he believed to be members of the Latin Kings yelling and signaling gang signs towards another group of individuals Officer Watkins believed to be members of a rival street gang. Based upon the colors they wore, the signals they displayed, and his extensive experience as part of the Greensboro Police Department's Gang Unit, Officer Watkins determined both groups were gang-affiliated.

Officer Watkins approached the group of Latin Kings and asked that they stop interacting with the other gang members, in an effort to avoid a disturbance at the festival. While Officer Watkins was talking with the Latin Kings, Defendant approached Officer Watkins from behind and stepped between Officer Watkins and the group of Latin Kings. Once between Officer Watkins and the other Latin Kings, Defendant told the officer that they were signaling to him, and that there would be no trouble. Officer Watkins repeatedly told Defendant to move out of the way and stated that he did not wish to talk to Defendant but wanted to finish his conversation with the other Latin

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Kings. Defendant did not move after Officer Watkins repeatedly told him to do so, and Officer Watkins arrested Defendant for resisting, obstructing, or delaying a police officer in violation of N.C. Gen. Stat. §14-223. In all, the exchange between Officer Watkins and Defendant lasted between 10-15 seconds before Defendant was arrested.

Defendant received a trial by jury and on 11 May 2011 was found guilty of resisting, obstructing, or delaying a police officer in violation of N.C. Gen. Stat. §14-223. Defendant was sentenced to 45 days in jail, which was suspended; Defendant was placed on 12 months of probation. Defendant filed his notice of appeal the following day on 12 May 2011.

I.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence to support the charge. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quotation omitted). “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 making its determination, the trial court must consider all evidence admitted . . . 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). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Defendant argues that there is insufficient evidence that he resisted, obstructed, or delayed a police officer pursuant to N.C. Gen. Stat. §14-223 (2012). In order to be convicted of a violation of §14-223, the State must prove:

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- 1) that the victim was a public officer;
- 2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- 3) that the victim was discharging or attempting to discharge a duty of his office;
- 4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
- 5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (citing N.C. Gen. Stat. § 14–223). There is no dispute that Defendant knew that Officer Watkins was a public officer or that Officer Watkins was attempting to discharge a duty of his office. Defendant contends, however, that the State did not introduce substantial evidence to establish the fourth and fifth elements of the crime charged. We disagree.

With regard to the fourth element, *State v. Leigh*, 278 N.C. 243, 179 S.E.2d 708 (1971), “establishes the right to be free from arrest for violating N.C. Gen. Stat. § 14–223 when merely remonstrating with an officer . . . or criticizing or questioning an officer while he is performing his duty when done in an orderly manner.” *Bostic v. Rodriguez*, 667 F.Supp.2d 591, 610 (E.D.N.C., 2009) (citation and quotation omitted). “The touchstone of the inquiry is orderliness,” even where “no actual violence or force was used by [defendant].” *Id.* In *Leigh*, an officer responding to a report of an assault on the main street in town attempted to speak with a suspect, who was seated in the defendant’s car. *See Leigh*, 278 N.C. at 245, 179 S.E.2d at 709. As the officer questioned the suspect, the defendant repeatedly yelled and told the suspect “[y]ou don’t have to go with that Gestapo Pig. You don’t have to go with that Pig.” *Id.* at 245, 179 S.E.2d at 709. The officer could not communicate with the suspect over the defendant’s yelling so he asked the suspect to get out of the car. *See id.* The suspect complied with the officer’s request but the defendant followed and continued to yell. *See id.* As the officer and the suspect neared the officer’s patrol car, the defendant stood between the officer and the suspect. *See id.* at 245, 179 S.E.2d at 709-10. The encounter lasted more than five minutes and the officer had to leave the scene in order to interview the suspect. *See id.* at 246, 179 S.E.2d at 710. The Supreme Court of North Carolina concluded “that there was plenary

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evidence to support a jury finding that defendant did by his actions and language delay and obstruct the officer in the performance of his duties.” *Id.* at 246, 179 S.E.2d at 711.

Similarly, in *State v. Bell*, 164 N.C. App. 83, 594 S.E.2d 824 (2004), this Court found that the evidence presented by the State was sufficient to allow a jury to conclude that the defendant obstructed and delayed a school safety officer in the performance of his duties. In *Bell*, the State’s evidence showed that as the officer struggled to put a high school student suspected of fighting on school property into his patrol car, the “defendant parked her car immediately in front of the patrol car[,] . . . rushed to its rear door[,] . . . [and] began screaming, ‘[h]e didn’t do anything wrong. Let him go.’ ” *Id.* at 85, 594 S.E.2d at 826. The officer then told the defendant that “he was conducting an investigation and asked her to step back.” *Id.* Defendant continued to advance and shouted to the student, “I am going to call your mother. What is your phone number?” *Id.* at 86, 594 S.E.2d at 826. After a second warning from the officer to step back, the defendant “leaned inside the patrol car . . . and prevented [the officer] from closing the door.” *Id.* The defendant repeatedly ignored the officer’s instructions to step away and attempted to incite the gathering crowd to interfere. *See id.*

The evidence in this case, specifically that Defendant obstructed and delayed the officers’ investigation, mirrors that in both *Leigh* and *Bell*. *See Leigh*, 278 N.C. at 249, 179 S.E.2d at 711; *see also Bell*, 164 N.C. App. at 85-86, 594 S.E.2d at 826. The officers, members of the Greensboro Police Department’s Gang Unit, observed individuals they identified as members of the Latin Kings yelling gang slogans and signaling gang signs to a group of rival gang members. In an attempt to prevent any potential conflict during the festival, the officers approached the Latin Kings. Defendant came from behind Officer Watkins and stepped between Officer Watkins and the Latin Kings saying, “[t]hey was (sic) waving at me[,]” and “you wanna arrest me ‘cuz I’m running for City Council.” Officer Watkins admonished Defendant’s intervention, saying, “[n]o, don’t get in my face[,]” and “[g]et away. You get away from me.” Officer Watkins further warned Defendant, “I’m talking to them, not talking to you” to which Defendant responded, “[y]ou don’t gotta talk to them! They (sic) fine!” Defendant refused Officer Watkins’ instructions to step away. Accordingly, we find that there was sufficient evidence for the jury to conclude that Defendant obstructed and delayed the officers in the performance of their duties.

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As to the fifth element, we conclude that based upon the evidence, a jury could reasonably find that Defendant did willfully delay and obstruct the officers' investigation. *See State v. Davis*, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987). (defining willfulness as "a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case") (citation omitted). Here, Defendant approached the officers from behind and stepped between the officers and the Latin Kings. When Officer Watkins told Defendant, "I'm talking to them; I'm not talking to you[.]" Defendant replied, "[y]ou don't gotta talk to them; [t]hey (sic) fine." Defendant did not move from his position between the officers and the Latin Kings until he was arrested. We believe this evidence is sufficient to allow the question of whether Defendant acted with willfulness to go to the jury.

Defendant further contends, however, that his conduct was justified because he was acting out of concern for Williams, a minor in his care. We find no precedent under North Carolina law, nor does Defendant cite any case, to suggest that an individual's willful delay or obstruction of an officer's lawful investigation is justified because the subject of the investigation is a minor. In fact, the defendant in *Bell* obstructed and delayed the officer's questioning of a high school student, a minor. For these reasons, Defendant's motion to dismiss the charge was properly denied.

II.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss because the conduct for which he was prosecuted was protected by the First Amendment of the United States Constitution.

It is well settled that appellate courts "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955). Defendant first moved to dismiss the case at the close of the State's evidence, arguing that "[t]he law is clear on this that merely speaking with an officer is not against the law." No mention was made of the First Amendment. Defendant renewed the motion after the defense rested, when the trial court asked if he was renewing on the same grounds as before he stated "I would like to elaborate some[.]" As part of this elaboration, Defendant made a reference to the First Amendment:

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Okay. Your Honor, as you know, the second motion to dismiss is a higher standard for the evidence to come in. It's not, however, in the light most favorable to the State. And we still have heard no evidence—like I say, if we're looking back at *Burton* and *Singletary*, there was a repeated, constant, and a long duration of action that happened in which the defendant's conviction was upheld on. Here the officer testified himself he—there was no cursing, no pushing, no shoving, no threat of violence, and the conversation only lasted 10 to 15 seconds, if that much. Counsel made a statement about it was not done in an orderly or peaceful—or peaceable manner, but we have no evidence to show that this was unruly, when he said—in fact said that there was no cursing, there was no pushing or shoving, and that this was done as—on a public property while he was campaigning, *which would infringe upon his First Amendment speech rights*. We just want to renew our motion and ask that you dismiss this case because there is lack of sufficient evidence that there was unlawful action and on the same grounds that there was actually no—I'm sorry—official duty that Officer Watkins was performing when he was speaking with Jorge Cornell.

(emphasis added). This passing reference, standing on its own, does not give the affirmative appearance that this constitutional issue was raised and passed upon in the court below. *See State v. Bell*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2012) (No. COA11-864) (holding that the defendant had not preserved, for appeal, the argument that the officer's search of his person exceeded the consent given and was therefore a violation of his constitutional right where the record reflected only that defendant argued he did not give consent); *see also State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985) (stating the defendant's Fourth Amendment argument was not properly before the Supreme Court where “no constitutional issues were presented, argued, or decided in the trial court[]” and counsel made only a mention to a case on-point). Therefore, we decline to review this issue.

III.

[3] In Defendant's final argument, he argues the trial court erred in denying his request for a jury instruction on the defense of remonstrating with an officer. We disagree.

The standard of review for appeals regarding jury instructions to which a defendant has properly requested at trial is the following:

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This Court reviews jury instructions . . . contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

Barr, ___ N.C. App. at ___, 721 S.E.2d at 404 (citations omitted).

In the instant case, Defendant asked the trial court to add to the jury instructions language from *Leigh*, 278 N.C. at 251, 179 S.E.2d at 713, that “merely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstruction or delaying an officer in the performance of his duties.” *Id.* While it is true that “merely remonstrating with an officer” does not amount to obstructing or delaying an officer, Defendant’s conduct in this case went beyond mere remonstrating. See *Bostic*, 667 F.Supp.2d 591, 610 (interpreting *Leigh* to allow “merely remonstrating with an officer . . . when done in an orderly manner”); see also *Bell*, 164 N.C. App. at 94-95, 594 S.E.2d at 831 (stating that the evidence showed the defendant inserted herself between officer and student, physically blocked officer from his patrol car, repeatedly ignored the officer’s instructions to step away, and otherwise hindered the investigation, and as such defendant’s conduct amounted to more than remonstrating). Here, the evidence showed that Defendant stepped between the officers and the Latin Kings, inches from Officer Watkins’ face, told the officers not to speak to the Latin Kings directly and refused Officer Watkins’ repeated instructions to step aside. We do not believe this evidence supports a jury instruction on mere remonstrating. Accordingly, the trial court did not err in refusing to give the instruction at Defendant’s request. We conclude there was no prejudicial error.

NO ERROR.

Judges ELMORE and GEER concur.

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STATE OF NORTH CAROLINA v. RONALD PRINCEGERALD COX

No. COA11-609-2

(Filed 7 August 2012)

1. Firearms and Other Weapons—possession of firearm by felon—constructive possession—extrajudicial confession alone not enough

The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a felon based on insufficient evidence. The mere fact that defendant was in a car next to where a gun was found was not enough to establish constructive possession. Further, defendant's extrajudicial confession alone was not sufficient to support the charge.

2. Evidence—police testimony—green vegetable matter was marijuana—observation—training—experience

The trial court did not err in a possession of marijuana case by allowing two police officers to testify that the green vegetable matter found in defendant's lap was marijuana based on their observation, training, and experience.

On remand by order of the North Carolina Supreme Court to reconsider the unanimous decision of the Court of Appeals, *State v. Cox*, ___ N.C. App. ___, 721 S.E.2d 346 (2012), in light of the decision of the North Carolina Supreme Court in *State v. Sweat*. *State v. Sweat*, 2012 N.C. LEXIS 416 (N.C. June 14, 2012). Originally heard in the Court of Appeals 9 November 2011.

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

Irving Joyner for defendant.

ELMORE, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration in light of the decision in *State v. Sweat*, 2012 N.C. LEXIS 416 (N.C. June 14, 2012). This opinion supercedes our earlier opinion. Upon reconsideration, we affirm our original decision. We find error as to defendant's conviction for possession of a firearm by a felon and no error as to his conviction for possession of marijuana. We reverse in part, find no error in part, and remand for resentencing.

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Ronald Princegerald Cox (defendant) was found guilty by a jury of possession of a firearm by a felon and possession of marijuana (greater than 0.5 ounces to 1.5 ounces). He now appeals.

The Goldsboro Police Department conducted a DWI checkpoint from 11:00 p.m. on 30 October 2009 until 3:00 a.m. on 31 October 2009. The checkpoint was at the intersection of Central Heights and Highway 13 North; the validity of the checkpoint is not at issue in this case. At approximately 1:35 a.m. on 31 October 2009, Officer William VanLenten saw a white Chevrolet Impala traveling north on Highway 13; the car then slowed and pulled into the driveway of a residence. Officer VanLenten knew that the car did not belong to the residence's owner, so he followed the car into the driveway. As he approached the car, he saw the driver, a black male, jump out of the car and travel by foot towards the back of the residence. The driver left the car door open. Officer VanLenten saw three passengers sitting in the car. Two were in the back seat, and defendant was sitting in the front passenger seat. Officer VanLenten saw that defendant had a sheet of white paper in his lap, with a cigar wrapper and some green vegetable matter that Officer VanLenten later identified as marijuana. Officer VanLenten observed defendant rolling the green vegetable matter into the cigar wrapper to form "some type of cigar or cigarette." When a second officer, Officer McNeil, arrived on the scene, he also observed the green vegetable matter on defendant's lap.

When Officer VanLenten examined the "flight path" of the car's driver, Brian White, he found a clear plastic bag containing other clear plastic bags, which each contained green leafy vegetable matter, later identified by Officer VanLenten as marijuana. He also found a .45 Taurus revolver. The revolver was lying in the grass about ten or twelve feet from the open driver's side door. The bag of marijuana was about three feet away from the revolver. Officer VanLenten observed that the gun was dry and warm to the touch, while the grass was wet with condensation. The outside temperature was "cool" and "most people were wearing long sleeves." Officer VanLenten did not observe defendant or the other three passengers throw anything out of the car windows.

Officer VanLenten found a second .45 Taurus revolver in the car at the feet of one of the passengers, James Darden; Darden claimed ownership of that revolver. However, nobody claimed ownership of either the baggies of marijuana or the other revolver. A national database search showed that the revolver that Officer VanLenten found in the grass did not belong to defendant or the other vehicle occupants;

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it had been stolen from Sumter, Georgia. Officer VanLenten took defendant, White, and the third passenger, Deangelo Cox, into custody for possession of a stolen firearm and possession of marijuana. Officer McNeil took Darden into custody. Officer VanLenten also seized the paper, cigar wrapper, and green vegetable matter that he found on defendant's lap.

After Officer VanLenten took defendant, White, and Deangelo Cox to the police station, he informed them that if nobody took ownership of the revolver and the baggies of marijuana, they would all be charged. According to Officer VanLenten, defendant and White asked whether Deangelo Cox (defendant's younger brother) would be charged if they took ownership of the revolver and the drugs. At that point, Officer VanLenten read them their *Miranda* warnings and had them sign a form showing that they had been given their *Miranda* warnings. Officer VanLenten testified that, at 3:07 a.m., White "stated that the weed belonged to him," and, at 3:08 a.m., defendant "stated that the revolver belonged to him." He asked both White and defendant to write and sign statements, but both refused. He testified, "They said that that was enough, that that was all they were going to say."

After running defendant's record and learning that he had a felony conviction, Officer VanLenten charged defendant with possession of a firearm by a felon. He testified that, while he was completing the paperwork, he overheard defendant say that "he continued to roll his weed up because he knew they were about to be going to jail."

Defendant was sentenced as a Level II offender to a term of twelve to fifteen months' imprisonment for the felony firearm charge and the misdemeanor drug charge. He now appeals.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the firearm charge for insufficient evidence. We agree.

When a defendant moves for dismissal based on insufficiency of the evidence, the trial court must determine

whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. If substantial evidence of each element is presented, the motion for dismissal is properly denied. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

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State v. Cross, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (quotations and citations omitted). “In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State.” *State v. Anderson*, 181 N.C. App. 655, 659, 640 S.E.2d 797, 801 (2007) (citation omitted).

Under N.C. Gen. Stat. § 14-415.1, “[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]” N.C. Gen. Stat. § 14-415.1(a) (2011). Here, there is no question that defendant has been convicted of a felony. The only element at issue is whether defendant owned or possessed the revolver.

Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Alston, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted). Here, because the gun was not found on defendant’s person, the State was required to offer evidence that defendant constructively possessed the revolver.

“When, as here, the defendant did not have exclusive control of the location where contraband is found, ‘constructive possession of the contraband materials may not be inferred without other incriminating circumstances.’” *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)). “[T]he mere fact that [a] defendant was in a car where a gun was found is insufficient standing alone to establish constructive possession.” *Id.* (citing *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318). Thus, the mere fact that defendant was in a car *next to* where a gun was found is not enough to establish constructive possession.

Here, defendant allegedly confessed to Officer VanLenten that the gun belonged to him. However, defendant asserts that this confession was the only evidence that the State offered to establish possession or ownership, which was not sufficient because “the State may not rely solely on the extrajudicial confession of a defendant to prove his or her guilt; other corroborating evidence is needed to convict for a criminal offense.” *State v. Smith*, 362 N.C. 583, 592, 669 S.E.2d 299,

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305 (2008) (citation omitted). This is the “traditional” *corpus delicti* rule, and it is applicable in “cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred.” *State v. Trexler*, 316 N.C. 528, 532, 342 S.E.2d 878, 880 (1986).

The rule does not require that the *evidence aliunde* the confession prove any element of the crime. The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. . . . The independent evidence must touch or be concerned with the *corpus delicti*.

Id. at 532, 342 S.E.2d at 880-81. In *Smith*, our Supreme Court explained the current bounds of the *corpus delicti* rule, particularly as it expanded the rule in *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985):

In *Parker*, North Carolina joined the national trend expanding the *corpus delicti* rule to allow a defendant’s extrajudicial confession to sustain a conviction when the trustworthiness of the confession is substantiated by *evidence aliunde*. 315 N.C. 222, 337 S.E.2d 487. *Parker* held that in noncapital cases, a conviction can stand if “the accused’s confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.” *Id.* at 236, 337 S.E.2d at 495. Furthermore, *Parker* emphasizes “that when independent proof of loss or injury is lacking, there must be strong corroboration of essential facts and circumstances embraced in the defendant’s confession.” *Id.*

Smith, 362 N.C. at 592, 669 S.E.2d at 306. “The expanded rule enunciated in *Parker* applies in cases in which such independent proof is lacking but where there is substantial independent evidence tending to furnish strong corroboration of essential facts contained in defendant’s confession so as to establish trustworthiness of the confession.” *Trexler*, 316 N.C. at 532, 342 S.E.2d at 881 (citations omitted); *see, e.g., Parker*, 315 N.C. at 237, 337 S.E.2d at 495-96 (finding substantial corroborating evidence of the defendant’s extrajudicial confession to two murders when the victims’ bodies were found in the same condition described by the defendant in his confession, the murder weapon and bloody clothing were as described by the defendant, and one victim’s wallet was recovered from a neighbor of the defendant’s girlfriend). “Applying the more traditional definition of *corpus delicti*,

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the requirement for 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 the defendant's confession." *Parker*, 315 N.C. at 232, 337 S.E.2d at 493.

In *State v. Sweat*, the Supreme Court held that defendant's confession provided substantial evidence such that the trial court did not err in denying defendant's motion to dismiss. *State v. Sweat*, 2012 N.C. LEXIS 416, at 6 (N.C. June 14, 2012). Defendant in *Sweat* confessed to engaging in sexual misconduct with Tammy, his then ten-year-old niece.¹ ____ N.C. App. at ____, 718 S.E.2d at 657. He also provided a written statement in which he confessed to having oral and anal sex with Tammy. *Id.* Defendant's verbal and written confessions contained details of oral and anal sex. While defendant's confession alone established substantial evidence of sexual offenses based on fellatio, the State must satisfy the additional requirements imposed by the *corpus delicti* rule by showing that "the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness." *Parker*, 315 N.C. 236, 337 S.E.2d at 495. The State offered evidence that Tammy related incidents of fellatio to multiple witnesses and Tammy's aunt testified at trial that defendant had the opportunity to commit the crime. *State v. Sweat*, 2012 N.C. LEXIS 416, at 13 (N.C. June 14, 2012). Given the totality of the circumstances, the Supreme Court found that defendant's confession was supported by substantial independent evidence and a strong corroboration of essential facts and circumstances, and thus the State properly relied on the confession and met the additional requirements of the *corpus delicti* rule. *State v. Sweat*, 2012 N.C. LEXIS 416, at 13 (N.C. June 14, 2012).

The instant case can be distinguished from *Sweat* on the issue of whether the State properly met the requirements of the *corpus delicti* rule when relying solely upon a defendant's confession as evidence. Here the alleged confession contained no details; the entirety of the confession, as conveyed by Officer VanLenten, was that defendant owned the gun. Thus, any corroborative evidence under either test would have to tend to establish that defendant owned or possessed the gun. The State did not present such evidence. The State's evidence did tend to show that the gun came from inside the car, but defendant was not the only person in the car; indeed, there were three other people inside the car. The gun was found on the driver's

1. A pseudonym will be used to protect the identity of the minor.

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side of the car, not the passenger's side where defendant was sitting, and the gun was ten or twelve feet away from the car. Officer VanLenten did not see any of the passengers throw anything out of the windows following White's departure from the driver's seat. When Officer VanLenten approached the car, defendant was still sitting in his seat, rolling a marijuana cigarette; nothing about his demeanor or appearance suggested that he had just thrown a firearm through the body of the car and out the open car door and into the grass ten or twelve feet away. Thus, the only evidence that defendant possessed the gun was the extrajudicial confession, which alone is not sufficient to support the charge of possession of a firearm by a felon. Accordingly, the trial court erred by denying defendant's motion to dismiss.

[2] Defendant next argues that the trial court improperly allowed the State's witnesses to testify that the green vegetable matter found in defendant's lap was marijuana. We disagree.

Both Officer VanLenten and Officer McNeil testified that the green vegetable matter in defendant's lap was marijuana. Defendant argues that this was improper because neither officer was tendered as an expert witness and neither testified that he had conducted a chemical analysis of the substance. Instead, they testified that the substance was marijuana based on observation, training, and experience.

"[T]his Court has previously held that a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana[.]" *State v. Garnett*, ____ N.C. App. ____, ____, 706 S.E.2d 280, 286, *disc. review denied*, 365 N.C. 200, 710 S.E.2d 31 (2011). Although we have acknowledged that in such circumstances "it would have been better for the State to have introduced admissible evidence of chemical analysis of the substance," failing to introduce such evidence is not fatal. *Id.* (quoting *State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 686 (1988)). Accordingly, we hold that the trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience.

After reconsideration, we uphold our original decision. We reverse defendant's conviction for possession of a firearm by a felon and find no error as to his conviction for possession of marijuana.

Reversed in part; no error in part; remanded for resentencing.

Judges BRYANT and STEPHENS concur.

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STATE OF NORTH CAROLINA v. HAROLD W. FOSTER, DEFENDANT

No. COA11-1227

(Filed 7 August 2012)

Evidence—hearsay—prosecutor’s trial outline—summary of defendant’s anticipated testimony—motion for DNA testing—harmless error

The trial court committed harmless error in a first-degree murder case when ruling on defendant’s motion for DNA testing by admitting into evidence and considering a prosecutor’s trial outline summarizing defendant’s anticipated testimony in a prosecution of a codefendant. The outline constituted inadmissible hearsay, but defendant did not meet his burden of showing materiality under N.C.G.S. § 15A-269(a)(1) since he was being tried as an aider and abettor.

Appeal by defendant from order entered 30 September 2010 by Judge Richard L. Doughton in Rowan County Superior Court. Heard in the Court of Appeals 20 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O’Brien, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

GEER, Judge.

Defendant Harold W. Foster appeals from an order denying his motion for post-conviction DNA testing. On appeal, defendant argues that the trial court erred in admitting into evidence and considering a prosecutor’s trial outline summarizing defendant’s anticipated testimony in a prosecution of a co-defendant. We agree with defendant that the outline constituted inadmissible hearsay, but hold that any error was harmless because defendant did not meet his burden of showing materiality under N.C. Gen. Stat. § 15A-269(a)(1) (2011). We, therefore, affirm.

Facts

Defendant was indicted for first degree murder on 29 September 1997. On or about 25 September 1998, defendant entered an Alford plea of guilty to second degree murder. Defendant was sentenced on 2 October 1998 in the presumptive range to a minimum of 216 months and a maximum of 269 months imprisonment. No transcript is avail-

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able for the hearing at which the trial court accepted defendant's guilty plea.

On 24 September 2009, defendant filed a motion for DNA testing pursuant to N.C. Gen. Stat. § 15A-269. Defendant's motion was a pre-printed form with blanks and check boxes. Defendant indicated on the form that the following items were collected during the State's investigation of the crime: (1) blood samples from the victim; (2) a bloodstain on a cloth from the victim; (3) blood and hair samples from all of the defendants; and (4) hair collected from the bar of the residence where the murder took place and where the main defendant in the case, Philip Carter, resided. Defendant checked the boxes on the "fill in the blank" motion stating that these items were not subjected to DNA testing and could now be subjected to newer and more accurate testing.

As required by N.C. Gen. Stat. § 15A-269(b)(3), defendant accompanied his motion with an affidavit of innocence. In further support of his motion, defendant submitted two laboratory reports from the State Bureau of Investigation regarding requested blood and hair analysis.

The first report itemized pieces of evidence and samples taken from various locations connected with the murder on which the lab had found no blood. The report also noted that a bloodstain on cloth from the victim and liquid blood samples from the victim and four suspects were not analyzed.

The second report, detailing the results of requested hair analysis, found no transfer of hair on samples taken from locations where the body of the victim might have been. The report also noted that an "examination was conducted on" tapings "from the back of the victim's shirt," "from the back of the victim's pants," and "from the front of the victim's shirt," along with the victim's pants and T-shirt. The report did not indicate the results of that examination, but stated that standards should be resubmitted "[i]f any further analysis is required."

On 6 August 2010, Judge John L. Holshouser, Jr. ordered the District Attorney's Office to file a response to defendant's motion by 8 October 2010. A response was filed by the prosecutor who had entered into the plea agreement with defendant. The State opposed defendant's motion, arguing that the "legal basis of defendant's charge and conviction was that he aided and abetted Phillip Carter in the murder" and that defendant had not shown how any DNA testing would be material to his defense.

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The State attached to the response five SBI laboratory reports and the prosecutor's trial outline for the trial of Phillip Carter, including defendant's anticipated testimony and the testimony of other witnesses. The response described the outline as follows:

8. Attached as Exhibit F is the trial outline prepared by the District Attorney. This outline includes anticipated testimony by the defendant, based upon interviews of the defendant by law enforcement and the District Attorney. It is anticipated that defendant's testimony would have shown his culpability as an aider and abettor.

The State contended that because defendant was an aider and abettor, it was unlikely that there would have been any transfer of biological evidence, and, therefore, DNA testing would not produce material evidence.

In an order filed 30 September 2010, Judge Richard L. Doughton denied defendant's motion for DNA testing on the following grounds:¹

- (7) In this case based upon the file in this matter and particularly the response filed by the District Attorney that the defendant participated in this homicide as an aider and abettor which would not have resulted in the transfer of biological evidence between the Defendant and the victim and therefore there has been no showing as to how the granting of this motion would be material to the investigation, prosecution or defense of the Defendant in this case.
- (8) Furthermore, the Defendant has failed to allege or offer evidence regarding the manner in which the requested DNA testing of the designated biological evidence is material to the Defendant's defense.
- (9) The Defendant has failed to offer any evidence or explanation regarding the manner in which the requested DNA testing is related to the investigation or prosecution that led to the Defendant's conviction herein.

The trial court then set out a conclusion of law that the requested DNA testing was not material in that there was no showing that any DNA evidence could change the outcome of the case. Defendant timely appealed to this Court.

1. While the trial court denominated these grounds as findings of fact, they appear to be more properly characterized as conclusions of law.

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Discussion

Defendant contends that because the prosecutor's trial outline for the Carter trial constituted inadmissible hearsay, the trial court erred in using it as a basis for the court's ruling. The State, however, argues that the Rules of Evidence do not apply to motions for post-conviction DNA testing.

Rule 101 of the North Carolina Rules of Evidence provides: "These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101." The State urges that a motion does not constitute a proceeding. We cannot agree. If we were to adopt the State's position, then the Rules of Evidence would not apply to motions to suppress or motions for appropriate relief in criminal cases or motions for summary judgment in civil cases. Obviously, that cannot be the law.

Indeed, *Black's Law Dictionary* 1324 (9th ed. 2009), defines "[p]roceeding" as "2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing." A quotation included immediately after the definition specifically indicates that a "proceeding" has historically included pre-trial testimony and motions. *Id.* A motion for post-conviction DNA testing is certainly a procedural means for obtaining relief, and the trial court conducted a hearing on that motion. Defendant's motion resulted in a proceeding.

That conclusion does not, however, complete the inquiry regarding the applicability of the Rules of Evidence. Under Rule 101, the question remains whether a motion for DNA testing falls within any of the exceptions set out in Rule 1101 of the North Carolina Rules of Evidence. Rule 1101(a) provides: "Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State."

Rule 1101(b) in turn specifies that the Rules are not applicable to preliminary questions of fact to determine admissibility; proceedings before grand juries; proceedings for extradition or rendition; first appearances before district court judges or probable cause hearings in criminal cases; sentencing or the granting or revoking of probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; and contempt proceedings. Motions for post-conviction DNA testing do not fall within any of these exceptions.

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It is well established that “[u]nder the doctrine of *expressio unius est exclusio alterius*, a statute’s expression of specific exceptions implies the exclusion of other exceptions.” *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). Applying the doctrine here, since motions for post-conviction DNA testing are not listed as an exception while the Rules of Evidence specifically list other exceptions, the Rules of Evidence apply to post-conviction DNA testing motions or proceedings.

As a result, we must decide whether the trial outline for the Carter trial submitted by the State and relied upon by the trial court was admissible under the Rules of Evidence. The State submitted the Carter trial outline in order to prove the nature of defendant’s involvement in the murder and to show that his involvement as an aider and abettor would not likely have produced biological material that could be subjected to DNA testing. The State’s response explained that defendant’s plea agreement was conditioned upon his providing truthful testimony in the Carter case and that the legal basis of defendant’s charge and conviction was that he aided and abetted Phillip Carter in the murder. The State was unable to rely upon the description of defendant’s involvement set out during his plea hearing because no transcript exists of that hearing.

The Carter trial outline is an out-of-court statement offered for the truth of the matter asserted: that defendant was an aider and abettor. Therefore, the trial outline is hearsay. N.C.R. Evid. 801(c) (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”). Defendant did not stipulate or otherwise admit any of the information contained in the outline and, therefore, the outline is not admissible as an admission of a party opponent. Nor has the State identified any applicable exceptions to the hearsay rule.

The prosecutor’s unverified response and the attached outline amount to nothing more than an unsworn statement of counsel. As our Supreme Court has noted, “it is axiomatic that the arguments of counsel are not evidence.” *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). *See also State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (holding that arguments of counsel in prior case were not evidence and, therefore, were inadmissible); *State v. Bare*, 197 N.C. App. 461, 475, 677 S.E.2d 518, 529 (2009) (holding that defendant failed to present evidence that satellite based monitoring

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device interfered with his ability to obtain employment when defendant relied solely on arguments of counsel).

The trial court erred in admitting and relying upon the trial outline. Nevertheless, we hold that defendant was not harmed by this error since the trial court also properly concluded that defendant had failed to show materiality as required by N.C. Gen. Stat. § 15A-269.

N.C. Gen. Stat. § 15A-269 provides in pertinent part:

(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) The court shall grant the motion for DNA testing . . . upon its determination that:

- (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
- (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
- (3) The defendant has signed a sworn affidavit of innocence.

While not controlling, we find two unpublished cases persuasive. In *State v. Barts*, 204 N.C. App. 596, 696 S.E.2d 923, 2010 N.C. App. LEXIS 979, at *4-5, 2010 WL 2367302, at *2 (2010) (unpublished), this Court held, based on the language of N.C. Gen. Stat. § 15A-269(b)(1), that “a condition precedent to a trial court’s statutory authority to grant a motion under N.C.G.S. § 15A-269 is that the conditions of subsection (a)” be met. This Court then concluded that the trial court did not err in denying the defendant’s motion for DNA testing because the

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defendant “made no showing, as he concedes, relating to how the requested DNA testing would have been material to his defense as required by the condition set forth under N.C.G.S. § 15A-269(a)(1).” *Id.*, 2010 N.C. App. LEXIS 979, at *6, 2010 WL 2367302, at *2.

In *State v. Moore*, ___ N.C. App. ___, 714 S.E.2d 529, 2011 N.C. App. LEXIS 1651, at *6-7, 2011 WL 3276748, at *3 (2011) (unpublished), the defendant’s motion stated as to the materiality prong of N.C. Gen. Stat. § 15A-269 only: “ ‘The ability to conduct the requested DNA testing is material to Defendant’s defense.’ ” After adopting the reasoning of *Barts*, this Court concluded that because “Defendant’s motion in no manner indicated how or why DNA testing would be material to his defense,” that motion “failed the requirements of N.C.G.S. § 15A-269 on this issue, and Defendant’s ‘filing was insufficient to allow his request seeking postconviction DNA testing[.]’ ” *Id.*, 2011 N.C. App. LEXIS 1651, at *8-9, 2011 WL 3276748, at *3 (quoting *Barts*, 204 N.C. App. 596, 696 S.E.2d 923, 2010 N.C. App. LEXIS 979, at *7, 2010 WL 2367302, at *3).

We specifically adopt the reasoning of *Barts* and *Moore*. The burden is on defendant to make the materiality showing required in N.C. Gen. Stat. § 15A-269(a)(1). Here, with respect to materiality, defendant made only the same conclusory statement found insufficient in *Moore*—his motion stated only that “[t]he ability to conduct the requested DNA testing is material to the Defendant’s defense.” Defendant has provided no other explanation of why DNA testing would be material to his defense.

As defendant failed to establish the condition precedent to the trial court’s granting his motion, the trial court properly denied the motion. We need not, therefore, address the State’s alternative argument, pursuant to N.C.R. App. P. 10(c), that defendant was not entitled to seek post-conviction DNA testing because he pled guilty.

Affirmed.

Judges McGEE and McCULLOUGH concur.

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STATE OF NORTH CAROLINA v. ROBERT LEE EARL JOE

No. COA10-1037-2

(Filed 7 August 2012)

1. Arrest—law of case—lack of probable cause—resist, delay, or obstruct charge

It was the law of this possession of cocaine case that the police officer lacked probable cause to arrest defendant. Thus, the portion of the order dismissing the resist, delay, or obstruct charge was affirmed.

2. Search and Seizure—motion to suppress cocaine—not investigatory stop—res judicata—result of arrest

The trial court erred by granting defendant's motion to suppress the cocaine found following his arrest. The evidence defendant sought to suppress was not obtained as the result of an investigatory stop, but instead was discovered following his arrest. It was *res judicata* that the police officer lacked probable cause to arrest defendant, and thus, any evidence found during a search incident to that invalid arrest must be suppressed.

Appeal by the State from order entered 19 May 2010 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 22 February 2011. An opinion was filed by this Court on 5 July 2011, affirming the trial court's 19 May 2010 order. *See State v. Joe*, ___ N.C. App. ___, 711 S.E.2d 842 (2011). By opinion filed 13 April 2012, the North Carolina Supreme Court vacated our opinion in part, dismissed its allowance of discretionary review as improvidently allowed in part, and remanded for consideration of Defendant's remaining issue on appeal, not addressed in our original opinion. *See State v. Joe*, ___ N.C. ___, ___ S.E.2d ___ (2012).

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant.

STEPHENS, Judge.

Procedural Background and Evidence

The essential procedural and factual background was recapped in this Court's prior opinion:

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On 24 October 2008, the State charged Defendant Robert Lee Earl Joe with resisting, delaying, and obstructing Winston-Salem Police Officer J.E. Swaim and possession with the intent to sell and deliver cocaine. Defendant was subsequently indicted by a grand jury on these charges, as well as having attained habitual felon status.

On 31 March 2009, Defendant filed a motion to suppress all evidence seized in a search of Defendant after his arrest on 24 October 2008. Defendant alleged that Swaim was “without probable cause and/or lacked reasonable suspicion to order [] Defendant to stop/detain him.” Defendant also filed a motion to dismiss the charge of resist, delay, or obstruct (“RDO”).

The State called the matter for trial on 18 May 2010 before the Honorable Patrice A. Hinnant. Before the jury was impaneled, an evidentiary hearing was held on Defendant’s motions. The trial court orally granted Defendant’s motions on that date, whereupon the State dismissed the possession of cocaine charge and the habitual felon indictment. By written order entered 19 May 2010, the trial court dismissed the RDO charge, suppressed all evidence obtained as a result of Swaim’s stop or arrest of Defendant, and ordered that “all charges, inclusive of the habitual felon indictment[,] are hereby dismissed.”

....

At the hearing on the motions to suppress and dismiss, the State offered the following evidence: Swaim testified that on the date of the incident at issue, he was a police officer on the street crimes unit of the Winston-Salem Police Department. That unit patrolled high crime areas and attempted to address prostitution, alcohol, and drug violations. Swaim had personally investigated more than 200 drug-related crimes and made over 100 drug-related arrests in the previous year. Swaim had also assisted other officers with narcotics investigations and been involved in surveillance operations for narcotics investigations.

On the afternoon of 24 October 2008, Swaim was patrolling the Greenway Avenue Homes apartment complex, located at the intersection of Gilmer Avenue and Inverness Street. He had personally made “no less than 10 drug arrests” in that area, including one that month, and had assisted with “no less than 50 of those same type[s] of investigations in that area.” Swaim was aware of citizen complaints “mainly [for] illegal drugs” in the apartment complex.

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Swaim and other officers were riding in an unmarked Ford van, commonly known as “the jump-out van.” Swaim was dressed in a black t-shirt with the word “Police” written in yellow, bold letters on the front and back, and was wearing his duty belt, pistol, radio, handcuffs, and badge.

At approximately 2:00 p.m., as the van drove down Inverness Street, Swaim saw a black male, later identified as Defendant, wearing a red shirt and a navy blue jacket with the hood over his head, standing alone at the corner of the apartment building on Inverness Street. The weather was cloudy, “chilly, and it was raining.”

When the van was approximately 50 feet from Defendant, Defendant “looked up.” His eyes “got big when he seen [sic] the van, and he immediately turned and walked behind the apartment building[.]” Swaim got out of the van and “walked behind the apartment building to, you know, engage in a consensual conversation” with Defendant. When Swaim got behind the building, he saw Defendant running away. Swaim yelled “police” several times in a loud voice to get Defendant to stop. However, Defendant kept running so Swaim began to chase him.

Swaim chased Defendant for about two or three city blocks and continued to yell “[p]olice, stop[.]” Swaim lost sight of Defendant for a short while, but when Swaim reached 30th Street, he saw Defendant sitting “with his back against a house beside the air conditioning unit, like he was trying to hide.” Defendant appeared to be “manipulating something to the left with his hand[.]” Swaim walked toward Defendant and ordered him to put his hands up, but Defendant did not comply. Swaim grabbed Defendant’s arm, put him “on his chest on the ground and handcuffed him[.]” and placed him under arrest for resisting a public officer. Swaim then checked the area around where Defendant had been seated and found a clear, plastic bag containing an off-white, rock-like substance that was consistent with crack cocaine.

State v. Joe, __ N.C. App. __, __, 711 S.E.2d 842, 843-44 (2011).

By order dated 19 May 2010, the trial court decreed Defendant’s arrest for RDO illegal and dismissed that charge, suppressed the evidence obtained as a result of the illegal arrest, and as a result, dismissed the remaining charges against Defendant.

In our original opinion, we held that “the trial court did not err in granting Defendant’s motion to dismiss the charge of resisting a pub-

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lic officer.” *Id.* at ____, 711 S.E.2d at 847-48. In addition, we affirmed the trial court’s dismissal of the felony possession of cocaine charge and habitual felon indictment on the basis that the prosecutor’s remarks to the trial court had amounted to a voluntary dismissal in open court. *Id.* at ____, 711 S.E.2d at 848. Having upheld the State’s dismissal of the possession charge and habitual felon indictment, there no longer existed any case to which the evidence suppressed by the trial court’s 19 May 2010 order was relevant, and accordingly, we concluded that we lacked jurisdiction to address the State’s contentions of error in that suppression order. *See id.* at ____, 711 S.E.2d at 849.

Effect of the Supreme Court’s Per Curiam Opinion

In a *per curiam* opinion filed 13 April 2012, the North Carolina Supreme Court vacated and remanded in part this Court’s opinion in *State v. Joe*, __ N.C. App. ____, 711 S.E.2d 842 (2011), *vacated and remanded in part, disc. review improvidently allowed in part*, __ N.C. ____, __ S.E.2d __ (2012).

In vacating our decision “to the extent it may be read as affirming the trial court’s dismissal of charges on its own motion[,]” the Supreme Court also held that discretionary review had been improvidently allowed as to “all other issues” and remanded for consideration of the State’s argument regarding Defendant’s motion to suppress. *Id.*

[1] We note that the Supreme Court’s *per curiam* opinion leaves unchanged our resolution of the State’s argument that the trial court erred in granting Defendant’s motion to dismiss the charge of resisting a public officer because “there was probable cause to support that [D]efendant ignored [Swaim’s] lawful command to stop.” In rejecting the State’s argument, we concluded that,

[c]onsidering all the circumstances surrounding the encounter prior to Defendant’s flight, we conclude that a reasonable person would have felt at liberty to ignore Swaim’s presence and go about his business. At the time Defendant turned and walked behind the apartment building, Swaim was still inside the van, and a reasonable person would not have felt compelled to wait on the street corner in the rain to determine if an officer inside the van desired to talk with him. Furthermore, the State acknowledged that Swaim exited the van and rounded the corner of the apartment building not with the intent to effectuate an investiga-

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tory stop but, rather, to “engage in a consensual conversation” with Defendant.

Id. at ___, 711 S.E.2d at 847 (citation omitted). Thus, it is the law of this case that Swaim lacked probable cause to arrest Defendant. *Id.*

Motion to Suppress

[2] The State argues that the trial court erred in granting Defendant’s motion to suppress the cocaine found following Defendant’s arrest. We disagree.

The trial court’s findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This Court determines if the trial court’s findings of fact support its conclusions of law. Our review of a trial court’s conclusions of law on a motion to suppress is *de novo*.

State v. Edwards, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

Here, the State has not challenged any of the findings of fact in the trial court’s order as unsupported by competent evidence, and as a result, they are binding on appeal. *See State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted). Rather, the State contends that suppression of the cocaine was erroneous on two bases: (1) that Swaim had reasonable suspicion for an investigatory stop of Defendant, making his seizure legal, and (2) that in the event Defendant’s seizure was illegal, the cocaine was not found as a result of the unlawful conduct.

Constitutional protections against unreasonable searches arise when a person is “seized” in the form of either a “stop” or an “arrest.” *Terry v. Ohio*, 392 U.S. 1, 16, 20 L. Ed. 2d 889, 903 (1968). Under our Fourth Amendment jurisprudence, these two types of seizures require different levels of justification, commensurate with the invasiveness of the search each seizure permits. *See, e.g., id.* at 19 n. 15, 20 L. Ed. 2d at 904 n. 15 (“[T]he sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.”).

An investigatory stop is a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo

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momentarily while obtaining more information. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

Joe, ___ N.C. App. at ___, 711 S.E.2d at 846 (citations, quotation marks, and brackets omitted). In contrast, “[t]he constitutional validity of [a] search [incident to arrest]. . . must depend upon the constitutional validity of the . . . arrest.” *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964). “Under the Constitution, an arrest is valid when the officer has probable cause to make it.” *State v. Mangum*, 30 N.C. App. 311, 314, 226 S.E.2d 852, 854 (1976). In turn, probable cause is defined as “those facts and circumstances within an officer’s knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.” *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted).

Here, the trial court found:

8. Officer [] Swaim testified that he then proceeded to arrest [] Defendant for the charge of Resist, Delay or Obstruct due to [] Defendant fleeing from the officer.

9. *Subsequent to [D]efendant’s arrest*, a baggie with an off[-] white colored substance was located in the area where [] Defendant was found.

(Emphasis added). Thus, the evidence Defendant sought to suppress was not obtained as the result of an investigatory stop, but instead was discovered following Defendant’s arrest. As noted *supra*, it is *res judicata* that Swaim lacked probable cause to arrest Defendant, and thus, any evidence found during a search incident to that invalid arrest must be suppressed.

However, the State contends the cocaine was not found as a result of the illegal seizure, but rather was abandoned by Defendant. Specifically, the State notes that the cocaine was discovered not on Defendant’s person, but instead “was located in the area where [] Defendant was found [following his arrest].” After careful review, we disagree.

Evidence obtained as the result of an illegal search or seizure must be suppressed. *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). An individual’s right to be free from unreasonable searches and seizures, protected under the Fourth Amendment, is

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based on a defendant's "reasonable expectation of freedom from government intrusion." *State v. Cooke*, 54 N.C. App. 33, 41, 282 S.E.2d 800, 806 (1981), *affirmed*, 306 N.C. 132, 291 S.E.2d 618 (1982) (citation omitted). One loses his reasonable expectation of privacy when he voluntarily abandons his property. *Id.*

Because one no longer has an expectation of privacy in abandoned property, "the property [] abandoned may be seized without probable cause." *State v. Johnson*, 98 N.C. App. 290, 297, 390 S.E.2d 707, 711 (1990) (citations omitted). Abandonment occurs only "[w]hen one voluntarily puts property under the control of another[.]" *Cooke*, 54 N.C. App. at 42, 282 S.E.2d at 807 (emphasis added). However, when a suspect "discards property as the product of [] illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it." *State v. Cromartie*, 55 N.C. App. 221, 225, 284 S.E.2d 728, 731 (1981) (citation omitted).

While not binding precedent, we find persuasive the analysis of a recent unpublished opinion from a case with virtually indistinguishable facts:

At the time [the] defendant abandoned the contraband, he was being arrested [illegally]. After securing him, the police found the contraband on the ground where [the] defendant was handcuffed. Because his abandonment of the contraband was the product of his illegal arrest, it cannot be said to have been voluntarily abandoned. Therefore, the trial court was correct in granting [the] defendant's motion to suppress the contraband.

State v. Springs, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____ (2012) (unpublished).¹

Here, as in *Springs*, the unchallenged findings of fact reveal that the officers discovered the bag of cocaine near where Defendant had been found and seized it only *after* Defendant was unlawfully arrested and handcuffed. "Because his abandonment of the contra-

1. This holding is consistent with the analysis employed and results reached on similar facts in other jurisdictions. See *U.S. v. Wilson*, 953 F.2d 116, 127 (4th Cir. 1991) (holding that the officers' discovery of contraband was "clearly the direct result of the illegal seizure" of the defendant and reversing an order denying the defendant's motion to suppress); *U.S. v. Beck*, 602 F.2d 726, 730 (5th Cir. 1979) (holding that when the defendant threw contraband from his car after being illegally stopped, the relinquishment was not voluntary, and it would be "sheer fiction to presume [it was] caused by anything other than the illegal stop.").

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band was the product of his illegal arrest, it cannot be said to have been voluntarily abandoned.” *Id.* Accordingly, the cocaine was obtained as the result of unlawful police conduct, and the court properly suppressed it.

Conclusion

The portion of the trial court’s order dismissing the possession of cocaine charge and habitual felon indictment is vacated; the portion of the order dismissing the RDO charge and allowing Defendant’s motion to suppress is affirmed. We remand to the trial court for further proceedings not inconsistent with this opinion.

Affirmed in part; vacated in part and remanded.

Judges HUNTER, ROBERT C., and ERVIN concur.

STATE OF NORTH CAROLINA v. TODD JOSEPH MARTIN

No. COA11-941

(Filed 7 August 2012)

1. Evidence—expert witness testimony—not necessary

The trial court did not err in a first-degree sexual offense, second-degree sexual offense, and first-degree kidnapping case by refusing to allow defendant’s witness to testify as an expert and testify in his defense. The trial court stated that it was not limiting defendant’s ability to expose inconsistencies in the evidence and argue them to the jury, but expert testimony was not necessary to do so.

2. Constitutional Law—double jeopardy—multiple punishments for same offense

The trial court violated defendant’s right against double jeopardy by entering judgment for first-degree kidnapping, first-degree sexual offense, and second-degree sexual offense. The case was remanded so that the trial court could arrest judgment on the first-degree kidnapping conviction.

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3. Sexual Offenses—denial of requested instruction—lesser-included offense of assault on female

The trial court did not err by denying defendant's request for an instruction on assault on a female as a lesser-included offense. As defendant was found not guilty of first-degree rape, defendant could not establish prejudice. Further, assault on a female is not a lesser-included offense of first-degree sexual offense.

4. Appeal and Error—argument not reached—judgment vacated

Although defendant contended that that the trial court erred by instructing the jury that it could find defendant guilty of first-degree kidnapping if it determined that the victim was not released in a safe place, this argument was not reached because defendant's conviction for first-degree kidnapping was vacated.

Appeal by defendant from judgment entered 7 January 2011 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 14 December 2011.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Ryan McKaig for defendant-appellant.

BRYANT, Judge.

Where the trial court did not abuse its discretion in denying the admission of testimony from a witness defendant proffered for qualification as an expert, we hold no error. Where the restraint of the victim did not extend beyond that inherent in the commission of the sexual assaults and the assault by strangulation, the trial court erred in entering judgment against defendant on the charge of first-degree kidnapping. And, where defendant was not entitled to an instruction on assault on a female as a lesser included offense, we hold no error.

On 3 November 2008, a Carteret County Grand Jury indicted defendant Todd Martin on charges of attempted first-degree murder, assault by strangulation, first-degree kidnapping, first-degree rape, and two counts of first-degree sexual offense. Defendant was initially tried before a jury in Carteret County Superior Court in November 2009. The jury reached a verdict on only one offense, finding defendant guilty of assault by strangulation. The trial court declared a mistrial on the remaining charges. A second trial on the remaining charges was commenced on 3 January 2011.

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The evidence admitted during the second trial tended to show the following: defendant and Mary¹ began dating in December 2003 and married in July 2004. The marital union bore two children ages five and three at the time of the second trial. On 11 August 2008, the couple separated. Mary informed defendant during a marital counseling session that she wanted a divorce. Defendant agreed to move out of their home and stay with a friend, though he retained a key to the residence.

Mary testified that on 18 August 2008, defendant joined her and their two children for dinner at their home. After dinner, defendant left. Later that night, Mary awoke to find defendant asleep on the floor beside her bed; “[h]e wasn’t wearing anything.” Defendant was told that he could not stay. Mary testified that defendant climbed onto the bed, held her down while she struggled, restrained her with novelty handcuffs, forced her to perform fellatio, removed her shorts, forcibly penetrated her vagina and anus with his penis, threatened to kill her and put her body in a pond near the house, and choked her until she passed out.

After the assault, defendant lay on the bed and fell asleep. At 3:00 a.m., Mary woke her children and drove to a friend’s house.

Defendant testified that after dinner he did go back to Mary’s house and fell asleep on the bedroom floor. During the night, Mary woke him, and they talked about their relationship and their future. Mary told him that she wanted him back in the house, in her life, and in the lives of their children. Defendant testified that during the early morning hours of 19 August 2008, Mary agreed to reconcile, and they engaged in consensual oral, vaginal, and anal sex. They used handcuffs, and defendant testified that everything they did, they had done on various occasions before. Defendant described the encounter as passionate “make-up sex.”

Defendant testified that afterwards, as they continued to talk, defendant “came clean” and admitted he had been talking to another woman. Defendant testified that Mary became very angry and threatened to take the kids away and report his behavior to the Marine Corps. Defendant admitted to grabbing Mary around her neck and choking her for several seconds. Defendant testified that when he released Mary, he said, “if you keep f***ing around I’ll put your ass in that pond.” Defendant said he fell asleep, and when he woke up a few hours later, Mary and the children were gone.

1. We use the pseudonym “Mary” to protect the victim’s identity.

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The jury found defendant guilty of first-degree sexual offense, second-degree sexual offense, and first-degree kidnapping. Judgment was entered in accordance with the jury verdict, and defendant was sentenced to an active term of 288 to 355 months for first-degree sexual offense, 100 to 129 months for second-degree sexual offense, and 100 to 129 months for first-degree kidnapping, all sentences to run consecutively. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred in (I) excluding the testimony of defendant's proposed expert witness; (II) entering judgment in violation of the double jeopardy clause of the Fifth Amendment; (III) declining to instruct the jury on assault on a female; and (IV) instructing the jury on a theory not supported by the indictment or the evidence.

I

[1] Defendant first argues the trial court erred in refusing to allow defendant's witness to testify as an expert and testify in his defense. We disagree.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise . . ." N.C. Gen. Stat. § 8C-1, Rule 702 (2011). "North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being 'helpful' to the jury." *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (citation omitted). "Furthermore, the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted). "[I]n North Carolina[,] expert testimony on the credibility of

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a witness is inadmissible[.]” *Davis*, 106 N.C. App. at 602, 418 S.E.2d at 267 (citations omitted). “When the jury is in as good a position as the expert to determine an issue, the expert’s testimony is properly excludable because it is not helpful to the jury.” *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) (citation omitted).

Here, defendant proffered Brent Turvey, a forensic scientist and criminal profiler, for qualification as an expert. During *voir dire*, Turvey identified what he considered inconsistencies in the victim’s version of events leading up to and during the alleged sexual assaults and evidence consistent with what he described as “investigative red flags.”

After defendant’s *voir dire*, the trial court stated that it

has reviewed [Turvey’s] forensic examination, and from all of that this Court can only conclude that the defendant seeks through Mr. Turvey to offer certain opinions about the investigation that was done in this case about which expert testimony is not needed. He also seeks in his opinions to invade the province of the jury. He also seeks to offer opinions on the evidence involving the credibility of certain witnesses and other evidence, which is totally, totally within the province of the jury; and we don’t need expert testimony to show inconsistencies in the evidence, and as such and for other reasons, this Court will not permit the admission of that testimony or his admission as an expert witness.

In response to defendant’s objections, the trial court stated that it was not limiting defendant’s ability to expose inconsistencies in the evidence and argue them to the jury but expert testimony was not necessary to do so.

[The trial court is] certainly not going to let somebody else come in here and say what the [] [p]olice should have done or shouldn’t have done. You brought that out and I’m happy for you to argue that to the jury in your final argument about the inconsistencies that exist, and there are inconsistencies in this case. But nobody needs an expert to shows [sic] those inconsistencies.

Here, Turvey’s testimony, offered to discredit the victim’s account of defendant’s action that night, and to comment on the manner in which the criminal investigation was conducted appears to invade the province of the jury. Nevertheless, the trial court specifically acknowledged defendant’s objections by stating that defendant

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would still be allowed to argue the inconsistencies he observed in the State's evidence. Thus, we hold the trial court did not abuse its discretion by excluding the testimony of defendant's expert witness. Accordingly, defendant's argument is overruled.

II

[2] Defendant next argues the trial court violated his right against double jeopardy by entering judgment as to first-degree kidnapping, first-degree sexual offense, and second-degree sexual offense. We agree.

We note that defendant failed to object before the trial court to the sentence now contested on appeal. "Generally, a defendant's failure to enter an appropriate and timely motion or objection results in a waiver of his right to assert the alleged error upon appeal." *State v. McDougall*, 308 N.C. 1, 9, 301 S.E.2d 308, 314 (1983) (citations omitted). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citations and quotations omitted). However, our General Assembly has listed under General Statutes, section 15A-1446(d), "[e]rrors . . . which are asserted to have occurred, [that] may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446 (d) (2011). Pursuant to section 15A-1446(d)(18), such an error occurs where "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." N.C. Gen. Stat. § 15A-1446(d)(18) (2011).

While General Statutes section 15A-1446(d) lists grounds wherein errors are preserved for appellate review as a matter of law, our Supreme Court has held that "[t]he Constitution of North Carolina provides that '[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division.' N.C. Const. Art. IV § 13 (2)." *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981). "Pursuant to said constitutional authority our Supreme Court promulgated the Appellate Rules of Procedure." *State v. O'Neal*, 77 N.C. App. 600, 603, 335 S.E.2d 920, 923 (1985) (citing *Elam*, 302 N.C. 157, 273 S.E.2d 661). Considering our Rules of Appellate Procedure, "[w]here there have been conflicts between subsections of G.S. 15A-1446 and Rule 10[—Preservation of issues at trial; proposed issues on appeal], the North Carolina Supreme Court has unequivocally stated that the Rules of Appellate Procedure should control." *Id.* (citing *Elam*, 302 N.C. at 160, 273 S.E.2d at 664).

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Rule 10(a) provides generally that an issue may not be reviewed on appeal if it was not properly preserved at the trial level or unless the alleged error has been “deemed preserved” “by rule or law.” N.C. R. App. P. 10(a)(1). Here subdivision [N.C.G.S. § 15A-1446](d)(18) states that an argument that “[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law” may be reviewed on appeal even without a specific objection before the trial court. This provision does not conflict with any specific provision in our appellate rules and operates as a “rule or law” under Rule 10(a) (1), which permits review of this issue.

State v. Mumford, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010); *see also State v. Moses*, 205 N.C. App. 629, 698 S.E.2d 688 (2010) (holding the defendant’s double jeopardy argument preserved pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2009)). Thus, we address defendant’s argument.

“The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted). Jeopardy attaches “when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.” *State v. Lee*, 51 N.C. App. 344, 348, 276 S.E.2d 501, 504 (1981) (quoting *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977)).

Defendant contends that the trial court erred by entering verdicts of guilty on the charges of first-degree sexual offense, second-degree sexual offense and first-degree kidnapping in violation of defendant’s Fifth Amendment right against double jeopardy. Specifically, defendant alleges that by entering judgments against him for first-degree kidnapping and either of the sexual assaults or the assault by strangulation, the trial court subjected defendant to multiple punishments for the same offense. Defendant requests that we remand the case so that the trial court can arrest judgment as to either the kidnapping conviction or the sexual offense convictions, as the conviction for strangulation was entered in the prior proceeding.

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The State concedes the possibility that defendant was subjected to double jeopardy and requests that the matter be remanded for re-sentencing.

The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purposes of facilitating the commission of a felony." *See* N.C. Gen. Stat. § 14–39(a)(2) (2009). This Court has previously held that "the offense of kidnapping under N.C. Gen. Stat. § 14–39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will." *State v. White*, 127 N.C. App. 565, 571, 492 S.E.2d 48, 51 (1997). Kidnapping in the first-degree occurs when "the defendant does not release the victim in a safe place or the victim is seriously injured or sexually assaulted." *State v. Morgan*, 183 N.C. App. 160, 166, 645 S.E.2d 93, 99 (2007) (citing N.C. Gen. Stat. § 14–39(b) (2005)).

In situations involving both kidnapping and sexual offense, "[t]he restraint of the victim must be a complete act, independent of the sexual offense." *State v. Oxendine*, 150 N.C. App. 670, 676, 564 S.E.2d 561, 566 (2002) (citation omitted).

It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. [our Supreme Court has held] that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. . . . We construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

State v. Ripley, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006) (citing *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). "The test of the independence of the act is 'whether there was substantial evidence that the defendant restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape[, statutory sex offense, or crime against nature].'" *State v. Harris*, 140 N.C. App. 208, 213, 535 S.E.2d 614, 618 (2000) (quoting *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255 (1992)) (brackets omitted). Further, "[t]he test . . . does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense." *State v. Williams*, 308 N.C. 339, 347, 302 S.E.2d 441, 447 (1983).

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In *State v. Harris*, we held that there was restraint independent of the underlying felony where the defendant fraudulently coerced the victim into remaining with him in a car so that he could drive her to a secluded place and sexually assault her. 140 N.C. App. at 213, 535 S.E.2d at 618; *see also State v. McKenzie*, 122 N.C. App. 37, 46, 468 S.E.2d 817, 824–25 (1996) (separate and independent restraint found where defendant grabbed victim in front hallway, took victim to bedroom, bound her hands, covered her head with a pillowcase, shut blinds, and rummaged through apartment prior to rape). However, here, the evidence tended to show that defendant restrained Mary solely for the purpose of committing sexual assaults and strangulation. The evidence did not indicate that defendant's restraint of Mary extended beyond the restraint necessary to commit the sexual assaults and the strangulation. Therefore, the restraint operated as an inherent part of the sexual offenses and the assault by strangulation and cannot satisfy the element within the kidnapping statute. *See Ripley*, 360 N.C. at 337, 626 S.E.2d at 292. Accordingly, we must vacate the judgment convicting defendant of first-degree kidnapping.

III

[3] Next, defendant contends the trial court erred in denying his request for an instruction on assault on a female as a lesser included offense. We disagree.

First, we note that during the charge conference, defendant requested an instruction on assault on a female as a lesser included offense of first-degree rape. Defendant's request was denied and the trial court noted defendant's objection for the record. Later, the trial court instructed the jury, as follows: "[D]efendant has been charged with first degree rape. Under the law and evidence in this case it's your duty to return one of the following verdicts: Number 1, guilty of first degree rape; Number 2, guilty of second degree rape; or Number 3, not guilty." On this charge, the jury returned a verdict of not guilty. As defendant was found not guilty, defendant cannot establish prejudice as a result of the trial court's failure to instruct the jury on the charge of assault on a female as a lesser included offense of first-degree rape.

On appeal to this Court, defendant contends that an instruction on assault on a female should have been given as a lesser included offense in the charge of the two counts of first-degree sexual offense, though defendant acknowledges that our Supreme Court has previously held that assault on a female is not a lesser included offense of

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first-degree sexual offense. *See State v. Bagley*, 321 N.C. 201, 210, 362 S.E.2d 244, 249 (1987) (“In order for a defendant to be convicted of assault on a female, the evidence must establish, *inter alia*, that the victim is a female, that the defendant is a male, and that he is at least eighteen years of age. N.C.G.S. § 14-33(b)(2) (1986) [currently codified under § 14-33(c)(2) (2011)]. To convict for first-degree sexual offense, however, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least eighteen years of age. N.C.G.S. § 14-27.4 (1986) [(currently codified under § 14-27.4(a))]. Therefore, the crime of assault on a female has at least three elements not included in the crime of first-degree sexual offense and cannot be a lesser included offense of first-degree sexual offense.” (citing *State v. Weaver*, 306 N.C. 629, 635, 295 S.E. 2d 375, 379 (1982))), cited in *State v. Brunson*, 187 N.C. App. 472, 653 S.E.2d 552 (2007). Accordingly, defendant’s argument is overruled.

IV

[4] Lastly, defendant argues that the trial court erred by instructing the jury that it could find defendant guilty of first-degree kidnapping if it determined, *inter alia*, that the victim was not released in a safe place, because this element was not included in the indictment nor was there evidence in the record to support it. As we hold *supra* that defendant’s conviction for first-degree kidnapping must be vacated, we need not reach this argument.

No error in part; vacated in part.

Judges CALABRIA and STROUD concur.

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[222 N.C. App. 223 (2012)]

STATE OF NORTH CAROLINA v. TYRECE DEMONT MASON

No. COA11-1563

(Filed 7 August 2012)

1. Appeal and Error—preservation of issues—variance between name of victim in indictment and at trial

Although defendant contended the trial court erred by denying his motion to dismiss the charges of robbery with a firearm based on the variance between the name of the victim alleged in the indictment and at trial, defendant failed to preserve this argument for appellate review. Even assuming *arguendo* that defendant preserved this issue for appeal, it would have had no merit.

2. Robbery—firearm—motion to dismiss—alleged variance between evidence and jury instructions—invited error

The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a firearm even though defendant contended there was a variance between the evidence at trial and the jury instructions. Although defendant contended the trial court should have dismissed the charge of robbery with a firearm and instructed the jury on attempted robbery with a firearm, defendant could not show prejudice. The punishment for both was identical. Further, defense counsel objected to the State's request for an instruction on attempted robbery with a firearm at trial.

3. Robbery—firearm—motion to dismiss—sufficiency of evidence—taking—perpetrator

The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a firearm based on alleged insufficient evidence. Viewed in the light most favorable to the State, there was substantial evidence to show an actual taking of property. Further, defendant was present during the robbery and the State presented evidence that he participated in the robbery by rifling through the victim's pockets.

4. Constitutional Law—right to confrontation—statements of unidentified interpreter—corroboration

The trial court did not violate defendant's right to confront witnesses in a robbery with a firearm case by admitting statements of an unidentified interpreter. The testimony was not admitted for the purpose of establishing the truth of the matter

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asserted, but rather was admitted solely for the purpose of corroboration.

5. Accomplices and Accessories—acting in concert—jury instruction—mere presence

The trial court did not err in a robbery with a firearm case by denying defendant's request for a "mere presence" instruction to the jury. The trial court's instructions on acting in concert in the instant case required a finding by the jury that defendant joined in or shared a common plan to commit the robbery.

6. Evidence—sending exhibits to jury room—playing back testimony—no coercion

The trial court did not err in a robbery with a firearm case by sending exhibits back to the jury room over defendant's objection, nor did it improperly coerce a verdict by playing back certain testimony. Although it was error for the trial court to send the exhibits back to the jury room without defendant's consent, there was no prejudice. Further, the trial court's actions were not coercive and did not improperly force the jury to reach a verdict.

Appeal by defendant from judgment entered 28 April 2011 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 25 April 2012.

Attorney General Roy Cooper by Assistant Attorney General Steven Armstrong for the State.

Brock, Payne & Meece, P.A. by C. Scott Holmes for defendant-appellant.

STEELMAN, Judge.

Defendant failed to preserve his argument as to a variance in the victim's name. Where the State presented evidence that a cell phone was taken from the victim, the trial court properly denied defendant's motion to dismiss. Where the State presented evidence that, while the other robber held a gun on the victim, defendant rifled through his pockets, the trial court properly denied defendant's motion to dismiss. Where the police officer testified as to the victim's statements at the scene of the robbery obtained through a telephonic translation service, and the testimony was received only for corroboration purposes, it did not violate defendant's constitutional right of confrontation. Where the trial court charged the jury on the theory of

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“acting in concert,” it was not error to decline to charge the jury on “mere presence.” While it was error for the trial court to send exhibits to the jury deliberation room over defendant’s objections, the error was not prejudicial. The trial court did not coerce the jury into a unanimous verdict by playing back testimony and giving an *Allen* charge.

I. Factual and Procedural Background

On the evening of 10 December 2009, two young men approached Lin You Xing (Lin), owner of a Chinese restaurant in Durham, in the restaurant parking lot. One man had a gun and put his hand into Lin’s pocket. He found a cell phone in the pocket and threw it away. Durham Police Officer McQueen (Officer McQueen) drove by during the robbery and saw Tyrese Mason (defendant) with his hands in Lin’s pockets. The robber with the gun ran when he saw the police. A police canine located the discarded gun nearby. Lin and his brother held defendant until police arrested him.

The police interviewed Lin through a telephone service known as “Language Line.” Defendant testified at trial that he and another man had just been dropped off in front of the Chinese restaurant when the other man ran up to Lin, pointed a gun at Lin, and proceeded to rob Lin.

A jury found defendant guilty of robbery with a firearm. The trial court sentenced defendant to an active term of imprisonment of 42-60 months. This sentence was from the mitigated range.

Defendant appeals.

II. Denial of Motion to Dismiss

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charges. This argument is made in three parts: (1) there was a variance between the name of the victim alleged in the indictment and at trial; (2) there was a variance between the evidence at trial and the jury instructions; and (3) sufficiency of the evidence. We disagree with all three bases of defendant’s argument.

A. Standard of Review

Since defendant offered evidence following the denial of his motion to dismiss at the close of the State’s evidence, we only review his motion to dismiss made at the close of all the evidence. *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985). “[I]n ruling on a motion to dismiss, the trial court must

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determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime.” *State v. Ford*, 194 N.C. App. 468, 472-73, 669 S.E.2d 832, 836 (2008) (quoting *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007)). On appellate review, this Court “must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference.” *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citing *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987)). “If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Locklear*, 322 N.C. at 358, 368 S.E.2d at 383 (citation omitted). Further, “[t]he defendant’s evidence, unless favorable to the State, is not to be taken into consideration.” *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

State v. Banks, ____ N.C. App. ____, ____, 706 S.E.2d 807, 812 (2011) (alterations in original).

B. Variance in Name of Victim

[1] Defendant must preserve the right to appeal a fatal variance. See *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) (“Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review.”); *State v. Roman*, ____ N.C. App. ____, ____, 692 S.E.2d 431, 433 (2010); N.C.R. App. P. 10(a)(1) (2011).

Defendant moved to dismiss at the close of the State’s evidence on the grounds that the State’s evidence was insufficient to show a taking, that the gun was operational, and that defendant was the perpetrator of the offense. Defendant renewed this motion at the close of all evidence. Fatal variance was not a basis of his motions to dismiss.

Defendant failed to preserve this argument for appellate review, and it is dismissed. Even assuming *arguendo* that defendant preserved this issue for appeal, it would have no merit.

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Defendant argues that there was a fatal variance between the name of the victim in the indictment and the evidence at trial. The indictment alleged that the victim's name was You Xing Lin, but the person who testified at trial was Lin You Xing. In *State v. Cameron*, the indictment stated that the name of the victim was "Mrs. Narest Phillips," and at trial, the evidence showed the victim to be "Mrs. Ernest Phillips." *State v. Cameron*, 73 N.C. App. 89, 92, 325 S.E.2d 635, 637 (1985). We held that a variance in names between the indictment and at trial was immaterial because the defendant "was not surprised or placed at any disadvantage in preparing his defense to the crimes charged in the indictment." *Id.* We hold that, in the instant case, defendant was not "surprised or placed at any disadvantage" by this variance due to the fact the name was the same but in a different order.

C. Variance in Evidence

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of robbery with a firearm because there was a variance between the theory of guilt contained in the trial court's instruction to the jury and the evidence at trial. Defendant contends that, because the indictment alleged an actual taking of the property and actual possession of a gun by defendant, and the evidence showed that there was not an actual taking of the property, the trial court should have dismissed the charge of robbery with a firearm and instructed the jury on attempted robbery with a firearm.

N.C. Gen. Stat. § 14-87(a) defines robbery with firearms or other dangerous weapons as:

Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2011). The statute defines two crimes: armed robbery and attempted armed robbery. The jury was instructed solely on the theory of a completed robbery with a firearm together with an acting in concert instruction. Defendant argues that there was no actual "taking" of property and that, in the light most favorable to the State, all of the evidence shows only an attempted taking.

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Taken in the light most favorable to the State, there was sufficient evidence presented of all of the elements of completed robbery, and the trial court's instruction to the jury was proper. The only element at issue is the taking of property. The State's evidence was that the robber with the gun reached into Lin's pocket, grabbed Lin's cell phone, and threw it away. Officer McQueen testified that he saw defendant's hands in Lin's pockets.

Defendant argues that there was no taking of the cell phone to show a completed robbery. The fact that the "taking" was for a relatively short period of time is insignificant. *State v. Lawrence* holds that even if something is forcibly removed from or surrendered by a victim for a short amount of time, such an act still constitutes a taking. *State v. Lawrence*, 262 N.C. 162, 166, 136 S.E.2d 595, 598 (1964). An analogous situation is found in the case of *State v. Simmons*, 167 N.C. App. 512, 606 S.E.2d 133 (2004). In *Simmons*, the defendant slapped a cellular phone out of the victim's hand and returned it to the victim shortly thereafter. *Simmons*, 167 N.C. App. at 514-15, 606 S.E.2d at 135. We held that

[t]he evidence that defendant returned the phone within a few days tends to contradict the circumstantial evidence of defendant's intent at the time of the taking. However, this evidence supporting a contradictory inference is not determinative on a motion to dismiss because defendant's intent at the time of the taking is an issue for the jury to resolve.

Simmons, 167 N.C. App. at 521, 606 S.E.2d at 139. Thus, what is relevant is whether the State offered sufficient evidence to support the trial court's jury charge. In the instant case, there was sufficient evidence presented.

We further note that defendant can show no prejudice. The punishment for attempted robbery with a firearm is identical to that for robbery with a firearm. Additionally, at trial, defense counsel objected to the State's request for an instruction on attempted robbery with a firearm. This constitutes an invited error. Under the doctrine of invited error, a "defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2011). "[A] defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error." *State v. Walker*, 167 N.C. App. 110, 117,

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605 S.E.2d 647, 653 (2004), *vacated in part on other grounds*, 361 N.C. 160, 695 S.E.2d 750 (2006) (alteration in original) (internal quotations marks omitted).

Defendant's argument is without merit.

D. Sufficiency of Evidence

[3] Defendant argues that the trial court improperly denied his motion to dismiss based on the sufficiency of the evidence upon two grounds: (1) no property was taken; and (2) there was no evidence that he was a perpetrator of the robbery. Defendant argues he was merely present at the scene, and there was insufficient evidence of the charge as a matter of law because the State did not provide substantial evidence of each essential element of any of the elements of the charge.

As discussed above, viewed in the light most favorable to the State, the State presented substantial evidence to show that there was an actual taking of property, and the trial court's denial of defendant's motion to dismiss was proper.

It is not necessary that defendant himself committed any of the actions of armed robbery if he acted in concert with another person.

[I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (alterations in original) (internal quotation marks omitted). Further, "[c]onstructive presence is not determined by the defendant's actual distance from the crime; the accused simply must be near enough to render assistance if need be and to encourage the actual perpetration of the crime." *State v. Combs*, 182 N.C. App. 365, 370, 642 S.E.2d 491, 496, *aff'd*, 361 N.C. 585, 650 S.E.2d 594 (2007).

Taken in the light most favorable to the State, the evidence in this case supports the trial court's instruction to the jury of a completed robbery with a firearm under N.C. Gen. Stat. § 14-87(a). Defendant was actually present during the robbery, and the State presented evidence that he participated in the robbery by rifling through Lin's pockets.

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Defendant's argument is without merit.

III. Right to Confront Interpreter

[4] In his second argument, defendant contends that the trial court violated his right to confront witnesses by admitting statements of an unidentified interpreter. We disagree.

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. Glenn*, ____ N.C. App. ____, ____, 725 S.E.2d 58, 61 (2012).

B. Analysis

At trial, Officer McQueen testified as to Lin's statements made at the scene of the robbery through "Language Line," telephone translation service. Officer McQueen used this service because Lin did not speak English, and McQueen did not speak Mandarin Chinese. Defendant objected to Officer McQueen's testimony on the grounds that it violated his constitutional right of confrontation and that it constituted double hearsay. The trial court instructed the jury that this evidence "is not being admitted into evidence for substantive purposes. It is not being admitted into evidence to prove the truth of any matter asserted. But it is being admitted into evidence for the limited purpose of corroboration[.]"

Defendant's argument that his right to confront a witness was denied is not applicable because the testimony of Officer McQueen was not admitted for the purpose of establishing the truth of the matter asserted, but rather was admitted solely for the purpose of corroboration. The Sixth Amendment's Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59-60, n.9, 158 L. Ed. 2d 177, 197-98, n.9 (2004).

"An exception to the new rule espoused in *Crawford* is a familiar one: where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue." *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005) (citing *Crawford*, 541 U.S. at 59-60, n.9, 158 L. Ed. 2d at 197-98, n.9). "[W]here the evidence is admitted for, *inter alia*, corroboration or the basis of an expert's opinion, there is no constitutional infirmity." *Walker*, 170 N.C. App. at 635, 613 S.E.2d at 333.

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Similarly, Officer McQueen's testimony cannot be "double hearsay" because it was not admitted for the purpose of proving the truth of the matter asserted. "[O]ut-of-court statements offered for a purpose other than to prove the truth of the matter asserted are not hearsay[.]" *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009).

This argument is without merit.

IV. Denial of Request for "Mere Presence" Instruction

[5] In his third argument, defendant contends that the court erred in denying his request for a "mere presence" instruction to the jury. We disagree.

A. Standard of Review

A jury charge will be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed. Refusal of a requested charge is not error where the instructions fairly represent the issues. The decision whether to give jury instructions is within the trial court's sound discretion, and will not be overturned absent an abuse of discretion.

Osetek v. Jeremiah, 174 N.C. App. 438, 440, 621 S.E.2d 202, 204 (2005) (citations omitted), *aff'd*, 360 N.C. 471, 628 S.E.2d 760 (2006).

B. Analysis

In the case of *State v. Lundy*, 135 N.C. App. 13, 519 S.E.2d 73 (1999), the defendant requested a "mere presence" instruction in a case where a second-degree murder charge was submitted to the jury under an acting in concert theory. *Lundy*, 135 N.C. App. at 22, 519 S.E.2d at 81. This Court held:

From these instructions, the jury could reasonably infer that more than "mere presence" was necessary to find that defendant Evans acted in concert with defendant Lundy. The trial judge made it abundantly clear that to convict defendant Evans of second-degree murder under the theory that he "acted in concert" with defendant Lundy, the jury had to find beyond a reasonable doubt that defendant Evans joined in or shared a common plan with defendant Lundy to commit the offense. We, therefore, hold that the trial court's instruction on the doctrine of "acting in concert" was without legal error.

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Lundy, 135 N.C. App. at 23, 519 S.E.2d at 82.

As in *Lundy*, the trial court's instructions on acting in concert in the instant case required a finding by the jury that defendant joined in or shared a common plan to commit the robbery.

This argument is without merit.

V. Actions of Trial Court During Jury Deliberations

[6] In his fourth argument, defendant contends that the trial court erred in sending exhibits back to the jury room over the objection of defendant and improperly coerced a verdict by playing back certain testimony. We agree that the trial court erred in sending exhibits back to the jury deliberation room over objection of defense counsel, but hold that this was not prejudicial. We disagree that the trial court's actions coerced a verdict from the jury.

A. Sending Exhibits to Jury Deliberation Room Over Objections of Defense Counsel

After deliberating for a period of time, the jury requested to review a number of exhibits. After consulting with counsel, outside of the presence of the jury, the trial court directed that the English translations of the statement of Lin and his brother, along with all defense exhibits, be sent back to the jury. Defense counsel objected.

"Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2011). In this case, defendant did not consent to the exhibits going back to the jury room. It was error for the trial court to send the exhibits back to the jury room without defendant's consent.

However, this does not end our inquiry. Defendant must not only show error, but that he was prejudiced by the error. N.C. Gen. Stat. § 15A-1443(a).

The statutory violation committed by a trial judge in allowing a witness' statement to go to the jury over objection is corrected by our Court only when it prejudices the defendant. *State v. Taylor*, 56 N.C. App. 113, 287 S.E.2d 129 (1982). "Such prejudice obtains 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; the burden of

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showing such prejudice is upon the defendant.” *Id.* at 115, 287 S.E.2d at 130–31.

State v. Poe, 119 N.C. App. 266, 273, 458 S.E.2d 242, 247 (1995). *See also State v. Thomas*, 132 N.C. App. 515, 518–19, 512 S.E.2d 436, 438 (1999) (noting that a defendant must show prejudicial error for a new trial).

Defendant makes no argument that he was prejudiced by the exhibits going back to the jury room, and, based upon our review of the record and transcript of this case, we discern no prejudice.

B. Playback of Testimony and *Allen* Charge

At the same time that the jury requested the exhibits, they also requested to hear again the trial testimony of Lin, his brother, and Officer McQueen. The trial court initially denied this request because it appeared that the court reporter would not be able to play back the testimony. After the exhibits were sent back, the jury continued its deliberations, but then sent out a note to the judge stating: “We are unable to reach an unanimous agreement on any verdict.” The jury was brought into the courtroom. The trial judge inquired: “Do you feel that if I’m able to have witness testimony played over some type of device, that that would change the vote to a unanimous verdict?” The foreperson responded: “I don’t think it could hurt. I don’t know. I can’t—can’t predict that.” The jury was excused from the courtroom, and the trial court investigated whether there was any way to play back the testimony for the jury. After determining that it could be done, the testimony of Lin, his brother, and Officer McQueen were played back for the jury, over defendant’s objection. The trial court then gave an *Allen*¹ charge to the jury in accordance with the provisions of N.C. Gen. Stat. § 15A-1235.

Defendant argues that the trial court erred in suggesting that the jury consider additional evidence and in giving the *Allen* charge. He contends that these actions coerced the jury into reaching a verdict.

In deciding whether the trial court coerced a verdict by the jury, the appellate courts must look to the totality of the circumstances. “Some of the factors considered are whether the trial court conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors

1. *Allen v. United States*, 164 U.S. 492, 501-02, 41 L. Ed. 528, 530-31 (1896) (approving jury instructions that encourage the jury to reach a verdict after the jury requested additional instructions from the trial court).

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that it would hold them until they reached a verdict.” *State v. Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995).

We hold that the trial court did not improperly coerce a verdict from the jury, based upon the totality of the circumstances. The trial court initially denied the jury’s request to play back testimony, believing that it could not be technologically accomplished. Upon determining that the jury was deadlocked, the court made inquiry as to whether a play back of the testimony would help the jury reach a unanimous verdict. The foreperson indicated that it might help, and the court reporter found a way to play back the testimony. At that point, the trial court had the testimony of the three witnesses played back and delivered an *Allen* charge. Defendant does not challenge the content of the *Allen* charge. The actions of the trial court were not coercive and did not improperly force the jury to reach a verdict.

This argument is without merit.

VI. Conclusion

The trial court properly denied defendant’s motion to dismiss at the close of all of the evidence. The trial court did not err in allowing Officer McQueen to testify to the statements of Lin obtained through the “Language Line” interpreter. It was not error to deny defendant’s request for a jury instruction on “mere presence.” The trial court erred in allowing exhibits to go back to the jury deliberation room over defendant’s objection, but this error was not prejudicial. The trial court did not coerce the jury into reaching a unanimous verdict.

DISMISSED IN PART, NO PREJUDICIAL ERROR IN PART.

Judges CALABRIA and BEASLEY concur.

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[222 N.C. App. 235 (2012)]

STATE OF NORTH CAROLINA v. ALEJANDRO O'CONNOR

No. COA12-167

(Filed 7 August 2012)

1. Search and Seizure—motion to suppress—failure to attach supporting affidavit—trial court discretion to refrain from summarily denying motion

The trial court did not err in a driving while impaired, speeding, and driving without an operator's license case by failing to summarily dismiss defendant's suppression motion based upon his failure to attach a supporting affidavit as required by N.C.G.S. § 15A-977(a). Although the trial court has the authority to summarily deny or dismiss a suppression motion that fails to comply with the required procedural formalities, the trial court has the discretion to refrain from summarily denying such a motion that lacks an adequate supporting affidavit if it chooses to do so.

2. Motor Vehicles—driving while impaired—speeding—driving without operator's license—suppression hearing—insufficient findings of fact

The trial court erred in a driving while impaired, speeding, and driving without an operator's license case by failing to make findings of fact resolving material conflicts in the evidence presented at the suppression hearing as required by N.C.G.S. § 15A-977. The case was remanded to the trial court for the entry of an order that contained appropriate findings and conclusions.

Appeal by the State from order entered 18 August 2011 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 22 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn E. Hathcock, for the State.

Mary McCullers Reece for Defendant-appellee.

ERVIN, Judge.

The State of North Carolina appeals from an order granting a motion filed by Defendant Alejandro Antonio O'Connor seeking to have suppressed certain evidence seized at the time that his vehicle was stopped. On appeal, the State argues that the trial court erred by

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failing to summarily dismiss Defendant's motion based upon his failure to attach a supporting affidavit as required by N.C. Gen. Stat. § 15A-977(a); by failing to make appropriate findings of fact; and by failing to determine that the investigating officer had ample justification for stopping Defendant's vehicle. After careful consideration of the State'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 Durham County Superior Court for further proceedings not inconsistent with this opinion, including the entry of an order ruling on the issues raised by Defendant's suppression motion that contains appropriate findings of fact and conclusions of law.

I. BackgroundA. Substantive Facts

On 12 November 2010, Officer Kyle Staton of the Durham Police Department was on patrol in the vicinity of the McDougald Terrace housing project. At approximately 3:30 a.m., Officer Staton noticed Defendant driving towards him. In light of the fact that the location in question was a high crime area and his own "curiosity," Officer Staton decided to check Defendant's license plate number using a law enforcement computer database.

According to the information that Officer Staton received in response to his query, the registered owner of the vehicle had a Cary address. In Officer Staton's "experience[,] a lot of people from out of town, especially Chapel Hill, Raleigh, Cary, [and] Morrisville . . . come to those areas to possibly buy drugs." Since Defendant's presence in the neighborhood "kind of raised [his] curiosity," Officer Staton turned around and began to follow Defendant.

Although Officer Staton did not use radar equipment, he estimated that Defendant was driving 35 mph in a 25 mph zone. In addition, Officer Staton noticed that Defendant was "slight[ly] weaving inside of the travel lane" and was slowing and then speeding up, which "raised [his] suspicion even more." Although there were no other vehicles in the area, Officer Staton "initiated a traffic stop" of Defendant's vehicle "based on the speed of the vehicle."

According to Officer Staton, Defendant "was pretty good at pulling over immediately." At that point, Officer Staton approached Defendant's car, where he "question[ed] what [Defendant] was doing in the area" and received a negative answer when he asked if

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Defendant was “in the area buying drugs just to see what his reaction was.” Although Defendant did not have a drivers’ license on his person, he provided Officer Staton with a passport I.D. card.

After Officer Staton noticed the smell of alcohol, he asked if Defendant had been drinking. Although Defendant initially denied having consumed any alcoholic beverages, he eventually admitted that he had had at least one drink. When Officer Staton gave Defendant the opportunity to take a roadside breath test, Defendant declined. However, Defendant successfully performed the “one-leg stand and the walk and turn” sobriety tests.

On cross-examination, Officer Staton conceded that he developed his estimate of Defendant’s speed after following him for only fifteen or twenty seconds and acknowledged that Defendant’s weaving within his own lane was “slight.” On redirect examination, Officer Staton denied having made eye contact with Defendant before turning around and following him.

Defendant testified that he lived in Cary on 12 November 2010 and that he had visited his brother, who lived in Durham, on that date. At the time that he left his brother’s residence, Defendant’s “brother said to go down Main Street”; “that . . . there would be a [gas] station”; “that not too far from there would be the Durham Highway”; and that, “once [he] got there, [he] was familiar with” the area. However, Defendant missed a turn and became lost in an unfamiliar neighborhood. At each corner, Defendant slowed down in an attempt to “get [his] bearings and try to find a sign so [he] could sort out where [he] was[.]”

As he was driving through the area in which the housing project was located, Defendant saw Officer Staton, who made eye contact with him. About fifteen seconds after they exchanged glances, Officer Staton turned around and began following him. Defendant “knew there was a police officer behind [him]” and “was probably going maybe 20 [mph].” Officer Staton stopped Defendant’s car, approached his vehicle, and asked Defendant at least three times, “what are you doing in this area?”

B. Procedural History

On 12 November 2010, citations were issued charging Defendant with driving while impaired, speeding 35 miles per hour in a 25 mile per hour zone, and driving without a license. The charges against Defendant came on for trial before Judge Patricia Evans at the 11 May

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2011 criminal session of Durham County District Court. On that date, Judge Evans convicted Defendant of driving while impaired, speeding, and driving without an operator's license. After the entry of judgment, Defendant noted an appeal to the Durham County Superior Court for a trial *de novo*.

On 16 August 2011, Defendant filed a motion to suppress any evidence obtained as a result of the stopping of Defendant's vehicle on the grounds that Officer Staton lacked the reasonable suspicion needed to justify conducting such an investigative detention. Defendant's suppression motion was heard before the trial court on 18 August 2011. At the conclusion of the hearing, the trial court ruled that "[t]he motion to suppress is granted for the reasons argued in the memorandum by the defense, that it was a[n] unlawful investigatory stop," and directed "counsel [] to prepare an order." On the same day, the trial court signed a written order granting Defendant's suppression motion. The State noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Applicable Legal Principles

As we have already noted, Defendant's motion seeks the suppression of evidence obtained as the result of a traffic stop. "[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). "An officer has reasonable suspicion if a 'reasonable, cautious officer, guided by his experience and training,' would believe that criminal activity is afoot 'based on specific and articulable facts, as well as the rational inferences from those facts.'" *State v. Williams*, ___ N.C. ___, ___, 726 S.E.2d ___, ___, 2012 N.C. Lexis 410 *13-*14 (2012) (quoting *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968) (other citation omitted))).

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (internal citation omitted), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)). However, "[c]onclusions of law are reviewed *de*

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novo and are subject to full review.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). “ ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

N.C. Gen. Stat. § 15A-977 “sets forth the procedure for considering a motion to suppress in superior court.” *State v. Salinas*, ____ N.C. ____, ____, ____ S.E.2d ____, ____ 2012 N.C. LEXIS 412 (2012). According to N.C. Gen. Stat. § 15A-977:

(a) A motion to suppress evidence in superior court . . . must state the grounds upon which it is made . . . [and] must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated. . . .

. . . .

(c) The judge may summarily deny the motion to suppress evidence if:

- (1) The motion does not allege a legal basis for the motion; or
- (2) The affidavit does not as a matter of law support the ground alleged.

(d) If the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. Testimony at the hearing must be under oath.

. . . .

(f) The judge must set forth in the record his findings of facts and conclusions of law.

B. Failure to Attach Affidavit

[1] As an initial matter, the State argues that the trial court erred by failing to summarily dismiss Defendant’s suppression motion based upon his failure to attach a supporting affidavit as required by N.C. Gen. Stat. § 15A-977(a). Although the trial court has the authority to summarily deny or dismiss a suppression motion that fails to comply with the required procedural formalities, we conclude that the trial

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court has the discretion to refrain from summarily denying such a motion that lacks an adequate supporting affidavit if it chooses to do so. As a result, we conclude that the State's initial argument lacks merit.

As we have already noted, the trial court "may summarily deny [a] suppression motion" if it "does not allege a legal basis for the motion" or if the accompanying "affidavit does not as a matter of law support the ground alleged." N.C. Gen. Stat. § 15A-977(c). "The decision to summarily deny a motion that is not accompanied by an affidavit is vested in the discretion of the trial court." *State v. Langdon*, 94 N.C. App. 354, 356 S.E.2d 388, 390 (1989). Thus, in the event that the trial court had summarily denied Defendant's suppression motion for lack of an adequate supporting affidavit, it would have been fully entitled to do so. We do not, however, believe that this determination necessarily ends the relevant inquiry for purposes of this case.

Although the relevant statutory language provides that the trial court "may" summarily dismiss a defective suppression motion, nothing in N.C. Gen. Stat. § 15A-977(c) compels it to do so. "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citing *Felton v. Felton*, 213 N.C. 194, 198, 195 S.E. 533, 536 (1938), and *Rector v. Rector*, 186 N.C. 618, 620, 120 S.E. 195, 196 (1923)). For example, in *State v. Marshall*, 92 N.C. App. 398, 374 S.E.2d 874 (1988), *cert. denied*, 328 N.C. 273, 400 S.E.2d 459 (1991), this Court addressed a contention by the State that the defendant failed to comply with the procedural requirements of N.C. Gen. Stat. § 15A-977(a) and had, for that reason, waived the right to obtain appellate review of the trial court's order denying his suppression motion. In response, we stated that:

The trial judge here had the authority pursuant to N.C. [Gen. Stat. §] 15A-977(c)(1) to summarily deny the motion to suppress because defendant did not give a legal basis for his motion to suppress. [N.C. Gen. Stat. §] 15A-977(c)(1) [(2011)] (judge *may* summarily deny the motion to suppress evidence if motion does not contain legal basis for motion) [(emphasis in original)]; *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E. 2d 857, 859 (1985) (where defendant fails to set forth adequate legal grounds, trial court is vested with discretion of whether to summarily deny the motion). However, the trial judge exercised his discretion not to summarily deny the motion and immediately proceeded to conduct a *voir dire* relating to the admissibility of the defendant's state-

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ments[.] . . . Thus, we conclude defendant has not waived his right to contest the admissibility of statements by him for failure to comply with the procedural requirements of [N.C. Gen. Stat. §] 15A-977.

Marshall, 92 N.C. App at 406, 374 S.E.2d at 878. *See also State v. McQueen*, 324 N.C. 118, 128, 377 S.E.2d 38, 44 (1989) (stating that, “when defendant filed his motion to suppress these statements, he failed to file a supporting affidavit as required by N.C. [Gen. Stat.] § 15A-977(a)” and that, “[n]otwithstanding defendant’s omission, however, we elect to address the issue under our supervisory powers”) (citing N.C.R. App. P. 2). As a result, we conclude that the trial court had discretion to refrain from summarily dismissing Defendant’s suppression motion and did not err by proceeding to conduct an evidentiary hearing addressing the merits of the issues raised by Defendant’s motion.

C. Failure to Make Findings of Fact

[2] Secondly, the State argues that the trial court erred by failing to make findings of fact resolving material conflicts in the evidence presented at the suppression hearing. This aspect of the State’s challenge to the trial court’s order has merit.

“ ‘[T]he general rule is that [the trial court] should make findings of fact to show the bases of [its] ruling. If there is a material conflict in the evidence . . . [the trial court] must do so in order to resolve the conflict.’ . . . ‘Findings and conclusions are required in order that there may be a meaningful appellate review of the decision’ on a motion to suppress.’ ” *Salinas*, ___ N.C. at ___, ___ S.E.2d at ___ (quoting *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980), and *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984)). “When the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court. Remand is necessary because it is the trial court that ‘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.’ ” *Salinas*, ___ N.C. at ___, ___ S.E.2d at ___ (citing *State v. McKinney*, 361 N.C. 53, 63-65, 637 S.E.2d 868, 875-76 (2006), and quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982)).

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After the evidence had been presented at the suppression hearing, Defendant's trial counsel argued that Officer Staton stopped Defendant's vehicle because he was driving "a white Lexus in a troubled neighborhood at 3:00 in the morning" rather than because Officer Staton had a reasonable suspicion that Defendant was engaged in criminal activity and that it was "simply not plausible" that, after exchanging glances with a law enforcement officer and after that officer made a U-turn for the purpose of following him, Defendant would drive in an unlawful manner with the officer right behind him. The testimony of Officer Staton and Defendant concerning whether the two men made eye contact before Officer Staton decided to turn around and follow Defendant, the extent to which Officer Staton questioned Defendant about his presence in the neighborhood, and the extent to which Defendant was driving in an inappropriate manner directly conflicted. In light of this conflicting testimony concerning matters which were directly relevant to the issue of whether Officer Staton had a reasonable suspicion that Defendant was engaging in unlawful activity, the trial court was obligated to make findings of fact that resolved the material conflicts between the testimony of Officer Staton and Defendant.

At the conclusion of the suppression hearing, however, the trial court entered an order that simply stated that:

This cause coming before the Court . . . it is hereby order[ed that]:

- (i) Defendant's Motion To Suppress Evidence is hereby granted;
- (ii) Any and all evidence gathered subsequent to the traffic stop made in this matter is hereby suppressed and not admissible at trial[.]

The trial court's order granting Defendant's suppression motion contains no findings of fact resolving the material evidentiary conflicts that became apparent during the suppression hearing. For that reason, we are unable to conduct a meaningful review of the trial court's order and must remand this case to the trial court for the entry of an order ruling on the issues raised by Defendant's suppression motion that contains adequate findings of fact and conclusions of law.

In urging us to affirm the trial court's order, Defendant argues that "the trial court's ruling from the bench indirectly indicated that the trial court resolved the credibility issue in favor of the Defendant"

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and that the trial court “indirectly provided a rationale from the bench” by stating that Defendant’s motion was granted “for the reasons argued in the memorandum for the defense, that it was a[n] unlawful investigatory stop.” Defendant may, of course, be correct in arguing that the trial court’s decision to grant his suppression motion “indirectly” indicated that the trial court resolved disputed factual issues in his favor. However:

We observe that the language of section 15A-977(f) is mandatory—a trial court “*must* set forth in the record [its] findings of fact and conclusions of law.” N.C. Gen. Stat. § 15A-977(f) [(2011)] (emphasis added). Compare *In re Hardy*, 294 N.C. 90, [97,] 240 S.E.2d 367[, 372] (1978) (noting that, when a statute employs the word “may,” it ordinarily shall be construed as permissive and not mandatory, but legislative intent must control the statute’s construction) with *State v. Inman*, 174 N.C. App. 567, 570,] 621 S.E.2d 306[, 309] (2005) (observing that use of the words “must” and “shall” in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory such that failure to observe it is fatal to the validity of the action), *disc. rev. denied*, 360 N.C. 652, 638 S.E.2d 907 (2006).

The language of [N.C. Gen. Stat. §] 15A-977 has been interpreted as mandatory to the trial court *unless* (1) the trial court provides its rationale from the bench, *and* (2) there are no material conflicts in the evidence at the suppression hearing.” *State v. Williams*, [195] N.C. App. 554, 555, 673 S.E.2d 394 ,395 (2009) (citing *State v. Shelly*, 181 N. C. App. 196, 204-205, 638 S.E.2d 516, 523, *disc. review denied*, 361 N.C. [367], 646 S.E.2d 768 (2007) (emphasis added). . . .

State v. Baker, ___ N.C. App ___, ___, 702 S.E.2d 825, 828-29 (2010). In this case, as we have already observed, the evidence presented at the hearing held with respect to Defendant’s suppression motion was sharply conflicting. Were we to adopt the logic espoused in Defendant’s brief, we would have effectively eviscerated the requirement that trial judges make findings of fact and conclusions of law in deciding whether to grant or deny a suppression motion, a step which we decline to take. As a result, we conclude that, by failing to make any factual findings resolving the conflicts in the testimony given by Officer Staton and Defendant at the suppression hearing, the trial court failed to comply with N.C. Gen. Stat. § 15A-977, that the absence of the necessary findings of fact prevents us from reviewing the trial court’s order in accordance with the applicable standard of

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review, and that this case must be remanded to the trial court for the entry of an order that contains appropriate findings and conclusions.

On the other hand, the State contends that the trial court erred by failing to deny Defendant's suppression motion on its merits. In support of this contention, the State relies on Officer Staton's testimony to the effect that Defendant was weaving and exceeding the posted speed limit in order to argue that the nature of Defendant's driving and the time and location at which this driving occurred provided ample justification for Officer Staton's decision to stop Defendant's vehicle. However, as we have already noted, the testimony of Officer Staton and the testimony of Defendant concerning the manner in which Defendant was driving conflicted. In view of the fact that we cannot determine the extent, if any, to which Officer Staton had the authority to stop Defendant's vehicle until these issues of fact have been resolved and since the trial court failed to make any findings of fact that resolved these disputed factual issues, we are simply not in a position to take the State up on its invitation that we decide the validity of Officer Staton's decision to stop Defendant's vehicle on the merits at this time.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by failing to make appropriate findings and conclusions in its order ruling on Defendant's suppression motion. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges McGEE and STEELMAN concur.

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STATE OF NORTH CAROLINA v. WILLIAM WESLEY SELLARS, JR.

NO. COA11-1315

(Filed 7 August 2012)

**Search and Seizure—motion to suppress drugs—traffic stop—
dog sniff—de minimis delay**

The trial court erred by granting defendant's motion to suppress drugs seized during a traffic stop of defendant's vehicle. Following the issuance of the warning ticket, there was a delay of four minutes and thirty-seven seconds for the dog sniff which was a *de minimis* delay that did not rise to the level of a violation of defendant's constitutional rights under the Fourth Amendment to the United States Constitution.

Appeal by the State from order entered 17 May 2011 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for appellant-defendant.

STEELMAN, Judge.

Under the rationale of *State v. Brimmer*, any prolonged detention of defendant for the purpose of a drug dog-sniff of defendant's vehicle was *de minimis*, and did not violate defendant's constitutional rights.

I. Factual and Procedural Background

The State appeals the trial court's order granting defendant's motion to suppress the drugs seized during a traffic stop of William Sellers ("defendant") that occurred on 16 September 2010 in Forsyth County. The factual background is derived from the trial court's findings of fact.¹

Detective P.L. McKaughan and Officer K.L. Jones of the Winston-Salem Police Department stopped a vehicle operated by defendant on

1. In its order, the trial court incorrectly categorized several factual rulings as conclusions of law. We treat them as findings of fact. See *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2012) (reviewing an incorrectly labeled "conclusion of law" as a finding of fact).

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Interstate Highway 40 because defendant's vehicle weaved out of his lane of travel on two occasions. After Detective McKaughan activated his blue lights, defendant pulled over to the shoulder of the highway within a few seconds. Detective McKaughan and Officer Jones had a drug dog present in their car at the time of the stop. After stopping defendant, Detective McKaughan was immediately able to determine that defendant was not suffering from any impairment that would inhibit his ability to safely operate his motor vehicle.

Detective McKaughan asked for defendant's driver's license. The detective noticed that defendant's hand was shaking as he handed the license to the detective. Defendant's heart was beating fast, but defendant did not display "extreme nervousness." Detective McKaughan informed defendant he would not receive a traffic citation.

Detective McKaughan asked defendant to accompany him to the police vehicle. While defendant and Detective McKaughan engaged in "casual conversation" in the police car, Officer Jones stood outside defendant's vehicle. Defendant was polite, cooperative, and responsive to Detective McKaughan's questions. Upon entering defendant's identifying information into his on-board computer, Detective McKaughan found an "alert" posted by the Burlington Police Department indicating that defendant was a "drug dealer" and a "known felon."

After discovering the alert, Detective McKaughan determined that he would have the drug dog conduct an open-air sniff of defendant's vehicle. He then returned defendant's driver's license and issued defendant a warning ticket. With defendant still sitting in the police car, Detective McKaughan asked defendant whether he had any drugs or weapons in his car. Defendant denied having any drugs or weapons in his car. Detective McKaughan asked for consent to allow the officers to conduct an open-air drug dog sniff of the vehicle. Defendant refused. Detective McKaughan directed defendant to stand near Officer Jones while the drug dog sniff was conducted. He retrieved the drug dog, "Basco", from the police car, and conducted an open-air sniff of the exterior of the defendant's vehicle. Basco alerted to the presence of narcotics in the vehicle. Detective McKaughan searched defendant's vehicle and found a bag of cocaine.

The trial court did not make findings of fact regarding where Basco was located throughout the traffic stop and how much time transpired after the police returned defendant's license before Basco alerted. However, the record contains a video recording of the traffic stop. Basco can be heard breathing and barking in the back seat of

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the police vehicle during the stop. He remained there until defendant exited the police vehicle. The video also reveals that after the police issued the warning ticket and returned defendant's license, four minutes and thirty-seven seconds elapsed before Basco alerted on defendant's vehicle.

On 29 November 2010, defendant was indicted for trafficking in cocaine, 200–400 grams, and for possession with intent to sell or deliver cocaine. On 11 April 2011, defendant filed a motion to suppress the evidence discovered in his motor vehicle. The trial court granted defendant's motion to suppress, concluding that the police lacked reasonable suspicion to detain defendant after issuing the warning ticket and returning defendant's license.

The State timely appealed and certified, pursuant to N.C. Gen. Stat. § 15A-979(c) (2011), "that this appeal [was] not taken for the purpose of delay and that the evidence suppressed as a result of the Court's Order [was] essential to the prosecution of the case."

II. Motion to Suppress

In its only argument on appeal, the State contends that the trial court erred granting defendant's motion to suppress. We agree.

A. Standard of Review

Our review "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). Whether the trial court has correctly applied the relevant legal principles to the findings of fact is a question of law we review *de novo*. See *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001).

B. Analysis

The State challenges several of the trial court's findings of fact as well as the trial court's conclusions based on those findings.

1. State's Challenges to Findings of Fact

The State makes several challenges to the trial courts findings of fact. We hold that all these challenges are both without merit and not determinative of the resolution of this appeal.

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2. State's Challenges to Legal Conclusions

The Fourth Amendment to the United States Constitution protects the “right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Generally, when a police officer has probable cause to believe a crime has occurred, he may arrest the suspect without a warrant. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964). Officers have probable cause to arrest if “at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.” *Id.*

The Fourth Amendment also applies to seizures that fall short of an arrest. *Terry v. Ohio*, 392 U.S. 1, 9, 20 L. Ed. 2d 889, 899 (1968). These so-called “*Terry* stops” can be justified by a lesser standard: reasonable articulable suspicion. *See Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990). “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 906.

An officer’s stop of a car and detention of the driver for a traffic violation is a seizure under the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 255, 168 L. Ed. 2d 132, 138 (2007). Defendant does not contend that the stop of his vehicle was unreasonable and the lawfulness of this initial stop is not the subject of this appeal.

The trial court held that the officers lacked reasonable suspicion to continue to detain defendant once the original purpose of the stop was concluded. Therefore, the search of defendant’s vehicle was improper and in violation of defendant’s rights under the Fourth Amendment to the United States Constitution. On appeal, the State makes two arguments: (1) the officers had a reasonable suspicion to extend the stop of defendant after he was issued the warning ticket and his driver’s license was returned; and (2) any prolonged detention was *de minimis* and therefore did not violate defendant’s Fourth Amendment rights. Since we hold that any prolonged detention was *de minimis* and reverse the trial court on that basis, we do not reach the State’s argument on reasonable suspicion.

There are two lines of cases from the North Carolina Court of Appeals which appear to reach contradictory conclusions on the

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question of whether a *de minimis* delay implicates a defendant's Fourth Amendment rights. Upon closer examination of the facts and timing of these decisions, we hold that they are reconcilable.

In the 1998 case of *State v. Falana*, we held that, "Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion to justify further delay." 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citing *Terry*, 392 U.S. 1, 20 L. Ed. 2d 889). After the officer issued defendant a warning ticket, the officer conducted a dog-sniff of defendant's vehicle. *Id.* at 815, 501 S.E.2d at 359. The dog alerted, and the officers discovered cocaine in the vehicle. *Id.* On appeal, the Court reversed the denial of defendant's motion to suppress because the officer lacked reasonable articulable suspicion to detain defendant once the warning ticket had been issued. *Id.* at 817, 501 S.E.2d at 360. There was no discussion in *Falana* of the extent of the delay or whether a *de minimis* delay implicated defendant's Fourth Amendment rights.

Subsequent cases followed the rationale of *Falana*. *State v. Fisher*, ___ N.C. App. ___, ___, 725 S.E. 2d 40, 45 (2012) (holding that police had reasonable, articulable suspicion to continue to detain defendant even after issuing a warning ticket); *State v. Jackson*, 199 N.C. App. 236, 240, 681 S.E. 2d 492, 495 (2009) (holding that "a passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended."); *State v. Hodges*, 195 N.C. App. 390, 399, 672 S.E. 2d 724, 730-31 (2009) (holding that because police had reasonable, articulable suspicion that defendant had drugs or contraband inside the vehicle the extended detention of the defendant was not unreasonable); *State v. Myles*, 188 N.C. App. 42, 51, 654 S.E. 2d 752, 758 (2008) (holding that police did not have reasonable, articulable suspicion to continue detaining the defendant after the purpose of the initial traffic stop was completed); *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E. 2d 858, 863 (2007) (holding that because police had reasonable articulable suspicion that criminal activity was afoot, the canine sniff of the vehicle after the initial purpose of the traffic stop was completed did not violate the defendant's Fourth Amendment rights). None of these cases discussed the concept of a *de minimis* delay.

In the 2007 case of *State v. Brimmer*, this Court first discussed and applied the "*de minimis*" rule, holding that, "[I]f the detention is prolonged for only a very short period of time, the intrusion is considered *de minimis*. As a result, even if the traffic stop has been

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effectively completed, the sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop.” 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007). In that case, the canine unit arrived before the officer gave the defendant a warning ticket. *Id.* at 457, 653 S.E.2d at 199. After defendant received a warning ticket and his license from the officer, the drug dog sniffed his vehicle. *Id.* at 453, 653 S.E.2d at 197. The dog-sniff extended the stop for an additional one-and-a-half to two minutes. *Id.* The dog alerted, and the officers found a large quantity of marijuana. *Id.* This Court affirmed the denial of defendant’s motion to suppress. *Id.* at 458, 653 S.E.2d at 200.

The difference between *Falana* and *Brimmer* is that *Brimmer* incorporated the analysis contained in later United States Supreme Court and federal cases that were not in existence at the time *Falana* was decided. Most significant were the cases of *Illinois v. Caballes*, 543 U.S. 405, 160 L.Ed 842 (2005) and subsequent federal District Court and Court of Appeals decisions interpreting *Caballes*. See *Brimmer*, 187 N.C. App. at 454–57, 653 S.E.2d at 197–200. *Brimmer* followed and adopted the *de minimis* approach of the United States Court of Appeals for the Eight Circuit in the case of *United States v. Alexander*, 448 F.3d 1014 (8th Cir. 2006) which was based on *Caballes*. See 187 N.C. App. At 456, 653 S.E.2d at 198-99.

In *Caballes*, the United States Supreme Court applied *Terry* principles to the dog-sniff of a vehicle that occurred during a traffic stop. An Illinois State Trooper stopped defendant for speeding. *Caballes*, 543 U.S. at 406, 160 L. Ed. 2d at 845. When the trooper radioed the police dispatcher to report the stop, a drug interdiction taskforce officer overheard the call and went to the scene with his drug dog. *Id.* at 406, 160 L. Ed. 2d at 845–46. While the first trooper was in the process of writing a warning ticket, the taskforce officer walked his dog around defendant’s vehicle. *Id.* at 406, 160 L. Ed. 2d at 846. The dog alerted at the trunk, the officers searched the trunk, and discovered marijuana. *Id.* at 406, 160 L. Ed. 2d at 846. The Court noted that “[t]he entire incident lasted less than 10 minutes.” *Id.* at 406, 160 L. Ed. 2d at 846.

In *Caballes*, the United States Supreme Court framed the issue on appeal narrowly: “Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.” 543 U.S. at 407, 160 L. Ed. 2d at 846. In its analysis, the Supreme Court held, “conducting a dog sniff would not change the character of a traffic stop

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that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Id.* at 408, 160 L. Ed. 2d at 837. *Caballes* reversed the Illinois Supreme Court:

[T]he use of a well-trained narcotics-detection dog—one that “does not expose noncontraband items that otherwise would remain hidden from public view,”—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Id. at 409, 160 L. Ed. 2d at 847 (internal citation omitted) (quoting *United States v. Place*, 462 U.S. 696, 707, 77 L. Ed. 2d 110, 121 (1983)). The Court went on to conclude that “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” *Id.* at 410, 160 L. Ed. 2d at 848.

In *State v. Branch*, on remand to apply *Caballes*, this court held:

[O]nce the lawfulness of a person's detention is established, *Caballes* instructs us that officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle. . . . Thus, based on *Caballes*, once [the defendant] was detained to verify her driving privileges, Deputies . . . needed no heightened suspicion of criminal activity before walking [the dog] around her car.

State v. Branch, 177 N.C.App. 104, 108, 627 S.E.2d 506, 509 (2006).

In *United States v. Alexander*, 448 F.3d 1014 (8th Cir. 2006), the 8th circuit expanded upon the reasoning in *Caballes* and embraced the *de minimis* approach to traffic stops. Defendant, Alexander, was stopped due to his car having only one of the required two California license plates. After the officer indicated that he was only going to issue him a warning, the officer then asked for permission to search the vehicle. Alexander declined. *Id.* at 1017. The officer then told Alexander that he would be conducting a dog sniff test on the car and if nothing was detected he would be free to leave. *Id.* The drug dog alerted to the car and a subsequent search revealed drugs in the vehicle. The drug sniff test was completed approximately four minutes after Alexander was told he would be receiving a warning ticket. *Id.* The court held that this four-minute detention was *de minimis*:

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Once an officer has decided to permit a routine traffic offender to depart with a ticket, a warning, or an all clear, the Fourth Amendment applies to limit any subsequent detention or search. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 648 (8th Cir.1999). We recognize, however, that this dividing line is artificial and that dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only *de minimis* intrusions on the defendant's Fourth Amendment rights. *Id.* at 649; *see also Martin*, 411 F.3d at 1002.

448 F.3d at 1016. The court went on to hold that the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior. *Id.* at 1017.

We conclude that the *Falana* line of cases did not consider the *de minimis* analysis created by *Caballas* and *Alexander*. However, the latter case of *Brimmer* allowed police to extend a traffic stop for the purpose of a dog sniff for a *de minimis* amount of time. Under *Brimmer* this *de minimis* rule applies in North Carolina.

In *Brimmer*, the dog sniff was *de minimis* because the police detained defendant for an additional one-and-a-half to two minutes. 187 N.C. App. at 453, 653 S.E.2d at 197. In *Alexander* the dog sniff was held to be *de minimis* because defendant was only detained an additional four minutes. 448 F.3d at 1017. In the instant case, following the issuance of the warning ticket, there was a delay of four minutes and thirty-seven seconds for the dog sniff. We hold that this was a *de minimis* delay that did not rise to the level of a violation of defendant's constitutional rights under the Fourth Amendment to the United States Constitution. The trial court erred in granting defendant's motion to suppress.

REVERSED and REMANDED.

Judges ELMORE and STROUD concur.

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[222 N.C. App. 253 (2012)]

STATE OF NORTH CAROLINA v. CURTIS SMITH, JR.

No. COA11-1335

(Filed 7 August 2012)

Search and Seizure—motion to suppress drugs—drug dog’s positive alert to vehicle—no probable cause to search former passenger outside vehicle

The trial court did not err in a felony possession of cocaine case by granting defendant’s motion to suppress the drugs seized. A drug dog’s positive alert to a motor vehicle while defendant, a former passenger within the motor vehicle, was outside the vehicle did not constitute probable cause to search defendant’s person without a search warrant.

Appeal by State from order entered 2 June 2011 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 2 April 2012.

Attorney General Roy Cooper by Assistant Attorney General Derrick C. Mertz for the State.

Appellate Defender Staples Hughes by Assistant Appellate Defender Constance E. Widenhouse for defendant-appellee.

STEELMAN, Judge.

A drug dog’s positive alert at the front side driver’s door of a motor vehicle does not give rise to probable cause to conduct a warrantless search of the person of a recent passenger.

I. Factual and Procedural History

On 11 September 2010 at 11:02 p.m., Corporal M.S. McDonald (Officer McDonald) of the Winston-Salem Police Department heard loud music emanating from a 1972 Chevrolet automobile in a gas station parking lot. Officer McDonald observed three persons standing outside the vehicle. The driver, Mr. Leach (Leach), stood at the rear of the vehicle, pumping gas, while Curtis Smith, Jr. (defendant) stood next to the right front passenger door, and Mr. McCray stood outside the rear passenger door. Officer McDonald approached Leach and informed him that the music was too loud. McCray apologized, reached into the vehicle, and lowered the volume. Officer McDonald requested a driver’s license and vehicle registration.

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At 11:12 p.m., Officer McDonald returned to his patrol car, requested an additional unit, and verified Leach's license and vehicle registration via his on-board computer. Officers M.L. Canup (Officer Canup) and Singletary (Officer Singletary) arrived and requested identification from the two passengers. Officer McDonald checked defendant's past criminal history through his computer and found "an extensive local record which included numerous drug offenses," including possession of marijuana in June 2010. Based upon the criminal histories of Leach, McCray, and defendant, Officer McDonald requested the assistance of K-9 Officer T.M. Jones (Officer Jones). Officer McDonald cited Leach for a noise ordinance violation. While Officer McDonald was preparing the citation, McCray and Leach became verbally aggressive with the officers, and Officer Canup warned them about their conduct. Defendant remained calm during the entire incident. McCray left the gas station.

At 11:20 p.m., after preparing the citation, Officer McDonald returned Leach's license and registration and began to explain the citation. Officer Jones arrived with the drug dog at 11:22 p.m., while Officer McDonald was still explaining the citation to Leach. At 11:24 p.m., Officer McDonald finished explaining the citation. Officer McDonald asked Leach if he had anything illegal in his motor vehicle. Leach replied "no." Officer McDonald asked if he could search the motor vehicle. Leach responded that he was in a hurry, but the officers could look in through the windows. Officer McDonald had the drug dog sniff the exterior of the motor vehicle. Officer McDonald placed Leach and defendant at the rear of his patrol car. The dog alerted to a controlled substance at the driver's door.

Following this alert, Officer McDonald searched the vehicle and found no contraband other than an open container of alcohol in the rear seat area. Officer Jones advised Officer Canup to search Leach and defendant. Officer Canup searched defendant and found contraband. Defendant grabbed the cocaine and threw it across the police vehicle. On 18 April 2011, defendant was indicted for felony possession of cocaine and for resisting a public officer.

Defendant filed a motion to suppress evidence of the contraband found on his person. On 2 June 2011, the trial court granted defendant's motion to suppress, concluding that "there was no indicia of evidence as it relates to Mr. Smith regarding any reason why his Fourth Amendment rights would have been relinquished and he would have been subject to a search without a warrant."

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The State appealed and certified, pursuant to N.C. Gen. Stat. § 15A-979(c) (2011), “that this appeal [was] not taken for the purpose of delay and that the evidence suppressed as a result of the Court’s Order [was] essential to the prosecution of the case.”

II. Motion to Suppress

The State’s only argument on appeal is that the trial court erred in granting defendant’s motion to suppress. We disagree.

A. Standard of Review

“The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law.” *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). “However, when, as here, the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Conclusions of law are reviewed *de novo*. *Id.*

B. Analysis

“The Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures.” *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005). The same provisions “require the exclusion of evidence obtained by unreasonable searches and seizures.” *State v. McLamb*, 186 N.C. App. 124, 125-26, 649 S.E.2d 902, 903 (2007).

The “touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *State v. Robinson*, 148 N.C. App. 422, 428, 560 S.E.2d 154, 158 (2002) (internal quotation marks omitted). “The Fourth Amendment allows reasonable searches and seizures based upon probable cause.” *State v. Harris*, 95 N.C. App. 691, 696, 384 S.E.2d 50, 52 (1989).

“Probable cause has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.” *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (internal quotation marks omitted). “This Court has determined that probable

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cause to search exists when a reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction.” *State v. Pittman*, 111 N.C. App. 808, 813, 433 S.E.2d 822, 825 (1993) (internal quotation marks omitted).

We note that a sniff by a well-trained narcotics dog has been held not to be a search under the Fourth Amendment.

The United States Supreme Court discussed the Fourth Amendment implications of a canine sniff in *United States v. Place*. 462 U.S. 696, 103 S.Ct. 2637, 77 L. Ed. 2d 110 (1983). There, the Court treated the sniff of a well-trained narcotics dog as *sui generis* because the sniff disclose[d] only the presence or absence of narcotics, a contraband item. *Id.* at 707, 103 S.Ct. 2637, 77 L. Ed. 2d at 121. As the United States Supreme Court explained in *Illinois v. Caballes*, since there is no legitimate interest in possessing contraband, a police officer’s use of a well-trained narcotics dog that reveals only the possession of narcotics does not compromise any legitimate privacy interest and does not violate the Fourth Amendment. 543 U.S. 405, 408-09, 125 S.Ct. 834, 160 L. Ed. 2d 842, 847 (2005).

State v. Washburn, ___ N.C. App. ___, ___, 685 S.E.2d 555, 558 (2009) (internal quotation marks omitted) (alteration in original). We further note that the search of the motor vehicle following the alert by the drug dog was proper. *Id.* at 100, 685 S.E.2d at 560.

In the instant case, the sole issue is whether a drug dog’s positive alert to a motor vehicle while defendant, a former passenger within the motor vehicle, was outside the vehicle constitutes probable cause to search defendant’s person without a search warrant. The State argues that a positive drug dog alert on a motor vehicle provides “probable cause to search the vehicle and its recent occupants, including defendant, for the source of the odor.” No North Carolina case so holds. This is a question of first impression for North Carolina.

i. State’s Authorities

The State cites *U.S. v. Anchondo*, 156 F.3d 1043 (10th Cir. 1998); *State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991); and *Maryland v. Pringle*, 540 U.S. 366 (2003), in support of its argument.

In *Anchondo*, a vehicle operated by defendant and occupied by a passenger were stopped at a checkpoint. *Anchondo*, 156 F.3d at 1044.

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“While one border patrol agent asked the men routine questions, another agent walked a drug-sniffing canine around the exterior of the defendant’s sedan.” *Id.* The opinion does not indicate that defendant was inside or outside of the motor vehicle during the dog sniff. The Tenth Circuit Court of Appeals held that the dog’s alert provided the probable cause necessary to arrest defendant. *Anchondo*, 156 F.3d at 1045. The decision in *Anchondo* has been held to stand for the proposition that a positive alert given by a drug dog followed by a negative search of the vehicle results in probable cause to search the driver of the vehicle. *Whitehead v. Com.*, 278 Va. 300, 316, 683 S.E.2d 299, 315 (2009) (citing *Anchondo*, 156 F.3d at 1045). However, *Anchondo* can be distinguished from the instant case in that in *Anchondo* there was no indication whether defendant was inside the motor vehicle when the drug dog made the positive alert. Further, the positive alert was made on defendant’s own motor vehicle, which is distinguishable from the instant case, in where defendant was merely a passenger.

In *Riggs*, the North Carolina Supreme Court upheld a warrant to search defendant’s residence even though “there was no direct evidence of the presence of contraband within its walls.” *Riggs*, 328 N.C. at 220, 400 S.E.2d at 434. Our Supreme Court noted the Fourth Amendment’s “strong preference for searches conducted pursuant to a warrant[,]” and upheld the search. *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434. The State cites *Riggs* for the proposition that direct evidence was not necessary for a probable cause determination. However, *Riggs* is distinguishable from the instant case, which involves a warrantless search.

In *Pringle*, defendant was the front seat passenger in a vehicle that was stopped for speeding. *Pringle*, 540 U.S. at 367-68, 157 L. Ed. 2d. at 773. The operator consented to a search of the motor vehicle, and cocaine was found. *Pringle*, 540 U.S. at 368, 157 L. Ed. 2d at 774. The question on appeal was whether the officer had probable cause to believe that defendant committed the crimes of “possession with intent to distribute cocaine and possession of cocaine.” *Pringle*, 540 U.S. at 369-70, 157 L. Ed. 2d at 774-75. The Supreme Court held that it was a reasonable inference “from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.” *Pringle*, 540 U.S. at 372, 157 L. Ed. 2d at 776 The State cites *Pringle* for its analysis distinguishing *U.S. v. Di Re*, 332 U.S. 581, 92 L. Ed. 2d 210 (1948), and *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238 (1979). *Pringle* is also distinguishable from the

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instant case, where the search at issue was a non-consensual search of a person rather than a consent search of a motor vehicle.

ii. Defendant's Authorities

Defendant cites *U.S. v. Di Re*, 332 U.S. 581, 92 L. Ed. 2d 210 (1948); *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238 (1979); and *State v. Anderson*, 136 P.3d 406 (Ka. 2006) as being controlling in this case.

In *Di Re*, an informant advised that Buttitta intended to sell counterfeit gasoline ration coupons at a certain location. An investigator found Buttitta's car at that location. The informant, Buttitta, and defendant were in the car. The informant had two counterfeit coupons that he had obtained from Buttitta. All three persons were taken into custody. At the police station, defendant "complied with a direction to put the contents of his pockets on a table," which included two counterfeit coupons. *Di Re*, 332 U.S. at 583, 92 L. Ed. 2d at 214. When defendant was booked and thoroughly searched, one hundred counterfeit coupons were discovered on his person.

"The Court held that the mere presence of the third person in the parked automobile with its owner and the informer was not such as to indicate that he had committed the felony of knowingly possessing counterfeit coupons." *State v. Long*, 37 N.C. App. 662, 669-70, 246 S.E.2d 846, 852 (1978). "Therefore, the arrest without an arrest warrant was unlawful. The search of the third person having been justified as a search incident to a lawful arrest without a warrant, the Court held that it must stand or fall upon the validity of the arrest and was also unlawful." *Long*, 37 N.C. App. at 670, 246 S.E.2d at 852. The Supreme Court declined to expand *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543 (1924), to permit warrantless searches of persons incident to the search of a vehicle based on "mere presence in a suspected car[.]" *Di Re*, 332 U.S. at 587, 92 L. Ed. 2d at 216.

In *Ybarra*, "police officers searched Ybarra, a patron in a public tavern, pursuant to a search warrant issued to search the premises and the bartender named 'Greg.' The officers found drugs in Ybarra's pocket." *Harris*, 95 N.C. App. at 695, 384 S.E.2d at 52. "The Supreme Court overturned Ybarra's conviction on the basis of absence of probable cause to search any patron, and stated that 'a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.'" *Id.* (citing *Ybarra*, 444 U.S. at 92-93, 62 L. Ed. 2d at 246).

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United States v. Di Re, 332 U.S. 581, 92 L. Ed. 210, 68 S.Ct. 222 (1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238, 100 S.Ct. 338 (1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. These cases turned on the unique, significantly heightened protection afforded against searches of one's person.

Wyoming v. Houghton, 526 U.S. 295, 303, 143 L. Ed. 2d. 408, 417 (1999).

In *Anderson*, defendant was stopped for traffic violations. *Anderson*, 136 P.3d at 408. The officers knew that the defendant and his passenger were gang members. *Id.* When the passenger exited the vehicle, an officer saw a plastic bag of marijuana sticking out of the passenger's shoe. *Anderson*, 136 P.3d at 409. Officers arrested the passenger and found pills and \$1,300 in cash on his person. *Id.* While defendant was outside the vehicle, a drug dog alerted on the vehicle. *Anderson*, 136 P.3d at 409. Officers searched the vehicle and found no drugs. *Id.* During the subsequent arrest of defendant, officers found drugs on defendant. *Id.*

The issue presented to the Supreme Court of Kansas is similar to the case *sub judice*. In *Anderson*, the State argued that the officers had probable cause to arrest defendant after the drug dog alerted and a search of the vehicle yielded no drugs. *Anderson*, 136 P.3d at 412. "The State wants us to conclude that additional drugs had to be *somewhere* and that the somewhere was on Anderson's person[.]" *Anderson*, 136 P.3d at 412 (emphasis in original).

The Court noted that only one other court endorsed *Anchondo's* approach. *Anderson*, 136 P.3d at 415 (citing *State v. Voichahoske*, 709 N.W.2d 659 (Neb. 2006)). In *Voichahoske*, in contrast to *Anderson* and the instant case, defendant was inside the vehicle while the drug dog sniffed the vehicle. *Voichahoske*, 709 N.W.2d at 670. The Court also noted that the Court of Appeals of Idaho had rejected *Anchondo*. *Anderson*, 136 P.3d at 415 (citing *State v. Gibson*, 108 P.3d 424 (*Id.* 2005)). The Supreme Court of Kansas concluded that "adherence to *Anchondo* would be unwise, particularly on the facts of this case." *Anderson*, 136 P.3d at 415. "While we are aware that Tenth Circuit precedent may be persuasive, this court is not bound to follow it." *Id.*

We also note that several other state courts have declined to adopt the holding of *Anchondo*, when confronted with similar facts. See *State v. Wallace* (2002), 372 Md. 137, 155–157 (drug dog alerted on

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car containing defendant-passenger and others; defendant removed from car and searched; cocaine found; arrest followed; court held that the dog's alert on car did not give officers probable cause to search passengers); *People v. Fondia* (2000), 317 Ill.App.3d 966, 969 (drug dog alerted on car containing defendant; officer removed defendant from car, searched him, found drug paraphernalia; arrested him; court holds that dog's alert on exterior of car does not, without more, provide probable cause to search car's occupants).

iii. Whitehead v. Commonwealth

Additional authority is found in the case of *Whitehead v. Commonwealth*, 278 Va. 300, 683 S.E.2d 299 (2009). In that case, Whitehead was the right rear passenger in a motor vehicle that was stopped for a traffic violation. While the passengers remained inside the vehicle, the officer led his drug dog around the vehicle. At the driver's door, the dog made a positive alert for drugs. When the search of the vehicle revealed no contraband, the officers proceeded to search the occupants and the driver. Nothing was found until the search of the final occupant, Whitehead, revealed drugs on his person. *Id.*, 278 Va. at 303-04, 683 S.E.2d at 300.

The Virginia Supreme Court held absent some additional incriminating factors, a positive canine alert as to a motor vehicle on its own cannot establish "probable cause sufficiently particularized as to Whitehead to allow the search of his person." *Id.*, 278 Va. at 314, 683 S.E.2d at 305 (reversing decision of the Virginia Court of Appeals). The Court's analysis was based upon several decisions of United States Supreme Court:

The [] decisions in *Di Re* and *Ybarra* demonstrate that probable cause to arrest and/or search an individual must be particularized to that individual; mere proximity to the criminal activity alone is insufficient to establish probable cause. However, as illustrated by the decision in *Pringle*, evidence showing a common criminal enterprise can provide the necessary link between criminal activity and an individual so as to establish probable cause sufficiently particularized to that individual.

Id., 278 Va. At 313, 683 S.E.2d at 305. Because there was no evidence indicating that Whitehead had committed or was going to commit a crime, and because there was no evidence suggesting that the passengers were involved in a common criminal enterprise, The Virginia Supreme Court refused to hold that the positive K-9 alert constituted probable cause to search a recent occupant of the vehicle.

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We note that in *Whitehead*, the Commonwealth had a stronger case for probable cause to search the passengers than was present in the instant case. In *Whitehead*, the drug dog “hit” on the vehicle while defendant was *inside* of the vehicle, whereas in the instant case, the drug dog “hit” on the vehicle while no one was inside. We also note that the drug dog hit at the driver’s door, and that defendant was a passenger.

“The textual touchstone of the Fourth Amendment is reasonableness. When applying this basic principle, the Supreme Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.” *State v. Shearin*, 170 N.C. App. 222, 240, 612 S.E.2d 371, 384 (2005) (quoting *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir. 1998)). Given the specific facts of this case, we hold that it is factually more similar to *Anderson* and *Whitehead* than to *Anchondo*. We note that the rationale of *Anchondo* has been specifically rejected by *Anderson*, *Gibson*, *Wallace*, and *Fondia*. Further, we hold the logic of *Anderson* and *Whitehead* to be more compelling than that of *Anchondo*. The fact that defendant was formerly a passenger in a motor vehicle as to which a drug dog alerted, and a subsequent search of the vehicle found no contraband, is not sufficient, without probable cause more particularized to defendant, to conduct a warrantless search of defendant’s person.

v. Conclusion

The order of the trial court suppressing the fruits of the warrantless search is affirmed.

AFFIRMED.

Judges CALABRIA and BEASLEY concur.

THORPE v. TJM OCEAN ISLE PARTNERS LLC

[222 N.C. App. 262 (2012)]

CHARLES LESTER THORPE AND MARY LOUISE THORPE, ADMINISTRATORS OF THE ESTATE OF CHARLES LEAMON THORPE, PLAINTIFFS v. TJM OCEAN ISLE PARTNERS LLC; COASTAL STRUCTURES CORPORATION; COASTAL CAROLINA CONSTRUCTION AND DEVELOPMENT INC.; UNIDENTIFIED VESSEL, DEFENDANTS

No. COA12-99

(Filed 7 August 2012)

Wrongful Death—inherently dangerous activity—contributory negligence barred claim—admiralty

The trial court did not err in a wrongful death case by granting summary judgment in favor of all defendants. While the facts presented some indicia of inherently dangerous activity including the combination of construction work, water, and electricity, the issue of defendants' duty of care was not reached based on plaintiffs' claims being barred as a matter of law under the doctrine of contributory negligence. The doctrine of contributory negligence applied regardless of whether plaintiffs could have brought their claims in federal court as an admiralty case.

Appeal by Plaintiffs from order entered 28 September 2011 by Judge Robert F. Floyd in Brunswick County Superior Court. Heard in the Court of Appeals 5 June 2012.

Hodges & Coxe, PC, by Bradley A. Coxe, for Plaintiff-appellants.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Justin K. Humphries and Andrew J. Hanley, for Defendant-appellee TJM Ocean Isle Partners LLC.

Cranfill Sumner & Hartzog LLP, by Colleen N. Shea, Melody J. Jolly, and Carolyn C. Pratt, for Defendant-appellee Coastal Structures Corporation.

Williams Mullen, by Rebecca A. Scherrer and H. Mark Hamlet, for Defendant-appellee Coastal Carolina Construction and Development, Inc.

HUNTER, JR., Robert N., Judge.

This is a wrongful death action arising from the electrocution of Charles Leamon Thorpe ("Thorpe") while he was building a pier in Ocean Isle Beach, North Carolina. The administrators of Thorpe's

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estate, Charles Lester Thorpe and Mary Louise Thorpe (“Plaintiffs”), appeal from the trial court’s order granting summary judgment in favor of all defendants. We affirm.

I. Factual & Procedural Background

In late 2006, Defendant TJM Ocean Isle Partners LLC (“TJM”) purchased the Pelican Point Marina in Ocean Isle Beach, with the intent to refurbish and expand the marina facilities and to reopen the marina as the Ocean Isle Marina & Yacht Club (“Ocean Isle”). Part of the expansion plan consisted of adding floating docks to the marina. Access to one of these docks required installation of a ramp, which would run from the end of a newly built wooden pier down to the dock below. TJM retained Defendant Coastal Structures Corporation (“Coastal Structures”) to build the pier and install the ramp, and Coastal Structures, in turn, subcontracted with Coastal Carolina Construction and Development, Inc. (“Coastal Carolina”) to build the pier.

During the week of 13 June 2008, Coastal Structures informed Coastal Carolina’s owner, Jeremy Ridenhour (“Ridenhour”), that the pier needed to be built by the end of the week. TJM was eager to provide dock access to its customers at Ocean Isle during the summer boating season. Ridenhour was busy with another project, however, so he referred Coastal Structures to his longtime friend, Charles Leamon Thorpe (“Thorpe”) d/b/a Buck’s Construction.

Thorpe arrived at Ocean Isle on the morning of 13 June 2008 with four employees.¹ When Thorpe’s employees inquired where they could obtain power for their tools, they were told² to use an outlet in the Sailfish Building, one of the marina’s two boat storage buildings. One of Thorpe’s employees went to plug an extension cord into the outlet and observed there was no Ground Fault Circuit Interrupter (“GFCI”) protection. Another member of Thorpe’s crew confirmed the outlet was not GFCI protected and reported this to Thorpe. Thorpe responded by telling his crew to “get to work.”

That afternoon, Thorpe decided cross-braces needed to be installed between two of the pier’s wooden uprights. Thorpe asked one of his crew to install the cross-braces, but the crewman refused, citing the dangers of drilling so close to the water. Thorpe himself

1. Coastal Structures and Coastal Carolina dispute who actually contracted with Thorpe to perform the work at the marina.

2. It is unclear from the record whether an employee of TJM or of Coastal Structures told Thorpe’s employees where to obtain power for their tools.

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began the task, which required predrilling pilot holes into the wooden uprights. The lower holes were in close proximity to the water line, requiring Thorpe to sit on the edge of the floating dock with his legs dangling inches above the water. Recognizing the danger of the situation, one of Thorpe's employees urged Thorpe to hold off on the work until the next morning when the tide would be lower. Another worker observed Thorpe working and warned him "he couldn't be more dangerous if he was standing in the water."

Plaintiffs allege that a few minutes later, while Thorpe was drilling the lower holes, a twenty-six-foot Bayliner boat passed by the marina at an excessive rate of speed,³ causing a large wake. The wake washed over the drill in Thorpe's hands, subjecting Thorpe to an electric shock. Because the drill was not connected to a GFCI-protected outlet, the power to the drill did not automatically shut off. The continuing shock contracted Thorpe's muscles, freezing his grip on the drill and pulling him into the water. From the water, Thorpe yelled "unplug me." One of Thorpe's crew unplugged the drill and pulled him out of the water. Thorpe was administered CPR and transported to Brunswick Community Hospital, where he was pronounced dead at 3:32 p.m. The official cause of death was described as electrocution caused by an electric drill coming into contact with the water.

On 10 March 2010, Plaintiffs filed a complaint in Brunswick County Superior Court, alleging claims of negligence and wrongful death and naming TJM, Coastal Structures, and Coastal Carolina (together, "Defendants") as defendants. Plaintiffs' complaint additionally named an Unidentified Vessel (the boat that allegedly caused the wake) as a defendant, but this vessel was never identified and consequently was never a party to Plaintiffs' suit. Plaintiffs' complaint originally cited the saving-to-suitors clause in 28 U.S.C. § 1333⁴ as the source of the trial court's jurisdiction over their claims. Pursuant to an order entered 11 June 2010, Plaintiffs amended their complaint to include N.C. Gen. Stat. § 7A-240 as an alternative source of the trial court's jurisdiction.

3. Plaintiffs claim the boat's speed was excessive in light of the no-wake signs flanking either side of the marina.

4. "The [federal] district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (2006). The saving-to-suitors clause "allows state courts to entertain *in personam* maritime causes of action," subject to the condition that any remedy provided be consistent with federal maritime standards. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222–23 (1986).

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Each defendant timely filed an answer, denying liability on all claims. Each defendant also filed cross-claims against the other defendants for indemnification and contribution. In addition, Defendant Coastal Carolina filed third-party claims for indemnification and contribution against Charles Lester Thorpe, Thorpe's father and one of the administrators of Thorpe's estate, for allegedly providing the drill that contributed to Thorpe's death.

Following discovery, each defendant moved for summary judgment on all claims. At or about this time, the Guardian Ad Litem representing Thorpe's minor son moved to intervene in the case pursuant to N.C. Gen. Stat. § 1A-1, Rule 24. These matters came on for hearing in Brunswick County Superior Court on 27 September 2011, Judge Robert F. Floyd presiding. By order entered 28 September 2011, the trial court granted summary judgment in favor of all defendants on all claims. The order dismissed without prejudice the Guardian Ad Litem's motion to intervene, Defendants' cross-claims, and Coastal Carolina's third-party claim as moot. Plaintiffs timely filed notice of appeal with this Court on 5 October 2011.

II. Jurisdiction

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

III. Analysis

Plaintiffs contend the trial court erred in granting Defendants' motions for summary judgment on all claims. We disagree, and we affirm the trial court's ruling.

"This Court reviews orders granting summary judgment de novo." *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007). When moving for summary judgment, the movant has the burden to show "(1) an essential element of the non-movant's claim is nonexistent, (2) the non-movant cannot produce evidence to support an essential element of his claim, or (3) the non-movant cannot surmount an affirmative defense which would bar his claim." *Taylor v. Ashburn*, 112 N.C. App. 604, 606-07, 436 S.E.2d 276, 278 (1993). "Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256, 258, 515 S.E.2d 483, 485 (1999). "A court

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ruling upon a motion for summary judgment must view all the evidence in the light most favorable to the non-movant, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor.” *Id.*

Plaintiffs contend the trial court erred in granting Defendants’ motions for summary judgment because Defendants violated their nondelegable duty of care to provide a safe workplace. Plaintiffs recognize the general rule that neither a general contractor nor a landowner who hires a general contractor owes a duty to a subcontractor’s employees, *see Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991), but argue this case falls within an exception to the general rule because the subcontracted work was inherently dangerous, *see id.* at 356, 407 S.E.2d at 238 (recognizing the “inherently dangerous” exception). In the alternative, Plaintiffs argue Defendants violated their duty of ordinary care to Thorpe under a theory of common law premises liability. While we note that the facts in the instant case present some indicia of inherently dangerous activity—for instance, the combination of construction work, water, and electricity—we need not reach the issue of Defendants’ duty of care, as we hold Plaintiffs’ claims are barred as a matter of law under the doctrine of contributory negligence.

Plaintiffs contend this is an admiralty case requiring application of comparative negligence, not contributory negligence. We conclude the doctrine of contributory negligence applies regardless of whether Plaintiffs could have brought their claims in federal court as an admiralty case.

Under North Carolina law, a plaintiff is completely barred from recovering for any injury proximately caused by the plaintiff’s contributory negligence. *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001). Federal admiralty law, on the other hand, applies the doctrine of comparative negligence, according to which a plaintiff’s negligence reduces the plaintiff’s recovery in direct proportion to the plaintiff’s fault. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). But an admiralty court does not necessarily apply federal law to every claim before it. *See, e.g., Western Fuel Co. v. Garcia*, 257 U.S. 233, 243–44 (1921) (applying the state law statute of limitations to a wrongful death claim brought in federal district court under admiralty jurisdiction). Instead, an admiralty court applies the substantive law of whatever source of law provides the right to recover. *Byrd v. Napoleon Ave. Ferry Co.*, 125 F. Supp. 573, 578 (E.D. La. 1954), *aff’d*, 227 F.2d 958 (5th Cir. 1955) (*per curiam*).

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Where admiralty law provides the right to recover, a court, whether state or federal, must apply federal admiralty law, with some room to apply state law if it does not conflict with core admiralty principles. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243–44 (1942). This is true whether the remedy for that right is state-created or federal. *Pope & Talbot*, 346 U.S. at 409. Conversely, “admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.” *Garrett*, 317 U.S. at 245. Specifically, “when admiralty adopts a State’s right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached.” *The M/V Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959).

Byrd illustrates how an admiralty court applies different legal standards depending on the source of the right to recover. In *Byrd*, a husband and wife were disembarking from a river ferry in their car when the husband lost control and drove the car into the river. 125 F. Supp. at 575-76. The husband died, and the wife sustained injuries but survived. *Id.* at 576. The trial court found both the husband’s and the ferry operator’s negligence contributed to the accident. *Id.* at 579. At the time, federal admiralty law did not recognize a right to recover for wrongful death, so the wrongful death claim for the husband was raised under state law. *Id.* at 577. On the other hand, admiralty law did recognize a right to recover for nonfatal injuries caused by maritime negligence, so the right to recover for the wife’s injuries arose under federal admiralty law. *Id.* The difference in the source of the right to recover was important because, as in the instant case, the applicable state law recognized contributory negligence as a complete bar to recovery, whereas federal admiralty law applied the doctrine of comparative negligence. *Id.* at 576-77. Because the right to recover for the husband’s death arose from state law, state law dictated that his contributory negligence completely barred any recovery for his death. *Id.* at 579. Contrarily, as the right to recover for the wife’s injuries arose from federal law, comparative negligence applied, and any negligence on her part reduced, but did not necessarily eliminate, recovery for her injuries. *Id.*

Applying *Byrd’s* analysis here, we conclude that the claims against Defendants are rooted in North Carolina law and Defendants can therefore raise contributory negligence as a bar to Plaintiffs’ claims. Plaintiffs’ complaint asserts N.C. Gen. Stat. § 28A-18-2, North Carolina’s wrongful death statute, as the source for their right to

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recover. This statute allows Plaintiffs, as administrators of Thorpe's estate, to bring a tort claim against Defendants, subject to the same conditions as would have applied to a claim brought by Thorpe himself, had he survived. *See* N.C. Gen. Stat. § 28A-18-2 (2011). Because Plaintiffs are relying on North Carolina's wrongful death statute to recover, the substantive law of North Carolina, including the doctrine of contributory negligence, applies.

This is true even though Plaintiffs' complaint additionally asserts "a wrongful death claim under general maritime law" because such a claim is unavailable against Defendants. The right to recover recognized under federal admiralty law is restricted to "an action . . . for death caused by violation of *maritime duties*." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970) (emphasis added); *see also Norfolk Shipbuilding & Drydock Corp. v. Garriss*, 532 U.S. 811, 820 (2001) ("The maritime cause of action that *Moragne* established for unseaworthiness is equally available for negligence."). But Plaintiffs are not claiming Defendants violated any maritime duties. Instead, Plaintiffs' allegations against Defendants are for violations of duties imposed by North Carolina law. Notably, every argument Plaintiffs raise about whether Defendants owed Thorpe a duty of care cites North Carolina case law, North Carolina statutes, or North Carolina regulations. Because the allegations against Defendants are for violations of nonmaritime duties imposed by state law, Plaintiffs cannot bring a wrongful death claim based in admiralty against Defendants.⁵ This leaves N.C. Gen. Stat. § 28A-18-2 as the source for Plaintiffs' right to recover, and consequently, North Carolina law determines Defendants' available defenses, which include Thorpe's contributory negligence.

Having established that the doctrine of contributory negligence applies regardless of whether or not this case would have qualified for federal admiralty jurisdiction, we turn to the issue of whether Thorpe's conduct in the instant case bars Plaintiffs' recovery as a matter of law. As previously stated, under North Carolina law, a defendant can raise the plaintiff's contributory negligence as an affirmative defense to bar the plaintiff's claim in its entirety. *Sawyer*, 144 N.C. App. at 401, 549 S.E.2d at 869. To prove a plaintiff's contributory

5. Had Plaintiffs identified and served the boat that they allege caused the wake, they would have had the option to bring a *Moragne*-type claim or a claim under N.C. Gen. Stat. § 28A-18-2 *against the boat*. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215-16 (1996) (holding that the admiralty wrongful death claim recognized in *Moragne* did not preempt the availability of a state wrongful death claim).

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negligence, the defendant must demonstrate (1) that the plaintiff failed to act with due care and (2) such failure proximately caused the injury. *Shelton v. Steelcase*, 197 N.C. App. 404, 424, 677 S.E.2d 485, 499 (2009). Where the plaintiff is injured by an unsafe condition, “[t]he doctrine of contributory negligence will preclude a defendant’s liability if the [plaintiff] actually knew of the unsafe condition or if a hazard should have been obvious to a reasonable person.” *Allsup v. McVile, Inc.*, 139 N.C. App. 415, 416, 533 S.E.2d 823, 824 (2000), *aff’d*, 353 N.C. 359, 543 S.E.2d 476 (2001) (per curiam). Because a reasonable care standard is used to determine a plaintiff’s negligence, the question of contributory negligence is ordinarily one for the jury. *Sawyer*, 144 N.C. App. at 401, 549 S.E.2d at 869–70. However, “[w]here the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury, summary judgment is appropriate.” *Id.* at 401, 549 S.E.2d at 870 (citation omitted).

Here, the evidence is uncontroverted that Thorpe was aware that the drill he was using was plugged into an outlet that lacked GFCI protection. Thorpe was alerted to this fact but responded simply by telling his employees to “get to work.” At least two people warned Thorpe about the danger he was exposing himself to by drilling so close to the surface of the water. One of his employees suggested that he come back in morning, when the tide was low. Another worker noticed Thorpe sitting on the deck and warned him about the danger.

Plaintiffs argue that Thorpe was not negligent because he could *assume* the electrical outlet he was using was GFCI protected, as required by the North Carolina Electrical Code. *See* N.C. Electrical Code §§ 555.19(B)(1), 590.6(A) (2008) (requiring GFCI protection on electrical receptacles in boathouses and when a receptacle is temporarily used for construction). For this proposition, Plaintiffs cite *Shelton*, where this Court held that “ ‘one is not required to anticipate the negligence of others; *in the absence of anything which gives or should give notice to the contrary*, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others’ safety.’ ” 197 N.C. App. at 425, 677 S.E.2d at 500 (emphasis added) (quoting *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 469, 279 S.E.2d 559, 563 (1981)). Plaintiffs’ reliance on *Shelton* is misplaced because *Shelton* speaks in terms of an assumption in the absence of notice. Thorpe was aware the outlet he was using had no GFCI protection. Once he was aware of that, he could no longer assume there was GFCI protection because the North Carolina Electrical Code or any other regulations required it.

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We note that this Court's ruling in *Sawyer* supports our conclusion. In *Sawyer*, the plaintiff was installing acoustic ceiling tiles in a grocery store when the wheels of the rolling scaffolding he was standing on slipped into an open hole in the floor, causing the scaffold to collapse and throwing him to the ground. 144 N.C. App. at 400, 549 S.E.2d at 869. The hole was one of many left open by another independent contractor on site. *Id.* Before his fall, the plaintiff noticed the holes and talked to the general contractor's supervisor about them. *Id.* The plaintiff even attempted to cover the holes, but when he was unable to find anything to use as a cover, he went forward installing the tiles, with the wheels of his scaffolding unlocked and mere inches from a hole. *Id.* at 400, 549 S.E.2d at 869. The plaintiff argued that the independent contractor violated OSHA regulations by leaving the holes uncovered. *Id.* at 400-01, 549 S.E.2d at 869. Although this Court agreed with the plaintiff that the independent contractor may have violated OSHA regulations, thereby providing sufficient evidence to survive summary judgment on the issue of the independent contractor's negligence, we nevertheless held the plaintiff's contributory negligence could be determined as a matter of law, and his claims were barred. *Id.* at 401-02, 549 S.E.2d at 869-70.

Like the plaintiff in *Sawyer*, Thorpe knew about the regulatory violations and the associated danger but proceeded with his work. We accordingly conclude that even if Defendants owed Thorpe a duty of care, Thorpe's contributory negligence barred Plaintiffs' claims as a matter of law. We hold the trial court did not err in granting Defendants' motions for summary judgment on all claims.

IV. Conclusion

For the foregoing reasons, the trial court's order is

Affirmed.

Chief Judge Martin and Judge Elmore concur.

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DANIEL TUNELL, EMPLOYEE, PLAINTIFF v. RESOURCE MFG/PROLOGISTIX, EMPLOYER, AMERICAN CASUALTY COMPANY, CARRIER (GALLAGHER BASSETT, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA12-103

(Filed 7 August 2012)

Workers' Compensation—temporary partial disability—no deduction for wages earned from concurrent employer

The Industrial Commission erred in a workers' compensation case by calculating plaintiff employee's partial disability compensation pursuant to N.C.G.S. § 97-30. A defendant employer cannot deduct wages earned from a concurrent employer in calculating the defendant employer's obligation to pay partial disability compensation. The portion of the opinion and award calculating plaintiff's temporary partial disability compensation was reversed and remanded.

Appeal by plaintiff from Opinion and Award by the North Carolina Industrial Commission entered 21 November 2011. Heard in the Court of Appeals 10 May 2012.

R. James Lore, Attorney at Law, by R. James Lore, for the plaintiff.

Teague Campbell Dennis & Gorham, LLP, by John A. Tomei and Tara Davidson Muller, for the defendants.

THIGPEN, Judge.

Daniel Tunell ("Plaintiff") appeals from an Opinion and Award of the North Carolina Industrial Commission ("Full Commission") awarding him temporary partial disability compensation. We must decide whether a defendant-employer can deduct wages earned from a concurrent employer in calculating the defendant-employer's obligation to pay partial disability compensation pursuant to N.C. Gen. Stat. § 97-30 (2009). Because North Carolina law does not allow aggregation of wages from concurrent employment in calculating a plaintiff's average weekly wages, by extension, we hold that an employer cannot deduct wages earned from a concurrent employer in calculating partial disability compensation. Accordingly, we reverse the portion of the Opinion and Award calculating Plaintiff's temporary partial disability compensation and remand for entry of an Opinion and Award consistent with this opinion.

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I. Factual and Procedural Background

On 23 March 2010, Plaintiff was employed full-time by Resource MFG (“Employer”) and sustained a compensable injury by accident arising out of and in the course of his employment when his left foot was injured. After his injury, Plaintiff was unable to return to work with Employer and was subsequently terminated by Employer. On the date of his injury, Plaintiff was also employed at Ross Dress-for-Less (“Ross”). After his injury, Plaintiff returned to work at Ross. Plaintiff subsequently filed a workers’ compensation claim against Employer.

An Opinion and Award was entered by a deputy commissioner on 17 May 2011 concluding, in part, that Plaintiff was entitled to “temporary partial disability compensation at the rate of two thirds the difference between his average weekly wage at the time of his 23 March 2010 injury of \$430.77 and the average weekly wages he earned thereafter while working for Ross Dress-for-Less[.]” Plaintiff disagreed with the method used to calculate compensation under N.C. Gen. Stat. § 97-30, and he filed a Motion to Reconsider and Modify Opinion and Award. When his motion was denied, Plaintiff appealed to the Full Commission.

On 21 November 2011, the Full Commission filed an Opinion and Award upholding the deputy commissioner’s method of calculating compensation. Specifically, the Full Commission concluded, in part, as follows:

5. Based upon the preponderance of the credible vocational and medical evidence of record, including his work for Ross Dress-for-Less, and as a result of his March 23, 2010 injury by accident, Plaintiff is entitled to be paid by Defendants temporary partial disability compensation at the rate of two thirds the difference between his average weekly wage at the time of his March 23, 2010 injury of \$430.77 and the average weekly wages he earned thereafter while working for Ross Dress-for-Less commencing in May 2010 and continuing through the present until such time as he returns to work at his pre-injury wage level, or further Order of the Commission, but subject to the statutory maximum period of three-hundred (300) weeks. N.C. Gen. Stat. § 97-30.

Plaintiff appeals from the 21 November 2011 Opinion and Award, contending that the Full Commission erred by calculating his partial disability compensation pursuant to N.C. Gen. Stat. § 97-30 because Employer should not receive a credit for Plaintiff’s post-injury earnings from Ross.

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II. Analysis

“[O]n appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law.” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). “This Court reviews the Commission’s conclusions of law *de novo*.” *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

N.C. Gen. Stat. § 97-30 governs the calculation of partial disability compensation and states in relevant part:

Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3 %) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter[.]

N.C. Gen. Stat. § 97-2(5) (2009) defines “average weekly wages” as “the earnings of the injured employee in the employment in which he was working at the time of the injury[.]” “Results fair and just, within the meaning of G.S. 97-2[.], consist of such ‘average weekly wages’ as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury.” *Liles v. Electric Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (emphasis omitted).

In interpreting “average weekly wages” pursuant to N.C. Gen. Stat. § 97-2(5), it is clear from our case law that a plaintiff cannot aggregate or combine his wages from more than one employment in calculating his compensation rate. *See McAninch v. Buncombe County Schools*, 347 N.C. 126, 134, 489 S.E.2d 375, 380 (1997) (holding that “the definition of ‘average weekly wages’ and the range of alternatives set forth in the five methods of computing such wages, as specified in the first two paragraphs of N.C.G.S. § 97-2(5), do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured”); *see also Barnhardt v. Cab Co.*, 266 N.C. 419, 429, 146 S.E.2d 479, 486 (1966) (holding that “in determining plaintiff’s average weekly wage [pursuant to N.C. Gen. Stat. § 97-2(5)], the Commission had no authority to combine his earnings from the employment in which he was

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injured with those from any other employment”), *overruled on other grounds by Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986). Thus, for purposes of computing compensation rate where a plaintiff worked two separate jobs at the time of injury, his average weekly wages are determined only from the earnings of the employment in which he was injured. *See McAninch*, 347 N.C. at 134, 489 S.E.2d at 380; *see also Barnhardt*, 266 N.C. at 429, 146 S.E.2d at 486.

However, our review of North Carolina law does not reveal, nor did either party cite, a case deciding whether a defendant-employer can deduct wages earned from a concurrent or second employer in calculating the defendant-employer’s obligation to pay partial disability compensation pursuant to N.C. Gen. Stat. § 97-30. Plaintiff contends that since North Carolina does not allow aggregation of wages from concurrent employment to determine the compensation rate, wages earned in concurrent employment should also be disregarded in computing partial disability. Defendants argue that wages earned from any source, including concurrent employment, must be included in computing partial disability. We agree with Plaintiff.

The issue raised in the instant case appears to be one of first impression in our appellate courts. According to 5 Larson’s Workers’ Compensation Law § 93.03[1][g] (2011):

When aggregation of wages from concurrent employments is disallowed, the effect, as has been noted, is often to relegate the claimant to a part-time wage basis, although his or her actual earnings have been that of a full-time worker. Sometimes the harshness of the result is mitigated by a holding that, since wages in the concurrent employment were not considered in computing prior earnings, they will likewise be disregarded in appraising the degree of disability after the accident.

(internal citation omitted). Other jurisdictions have adopted the approach discussed in Larson’s. For example, the Supreme Court of Florida has held that “[i]f earnings from concurrent employment, engaged in by claimant at the time of the injury, are excluded from determination of the average weekly wage, i.e., pre-injury earning capacity, earnings from that same employment should also be excluded from the determination of post-recovery earning capacity.” *Parrott v. City of Fort Lauderdale*, 190 So.2d 326, 329 (1966), *receded from on other grounds, Perez v. Carillon Hotel*, 272 So.2d 488 (1973). This holding, however, is subject “to the proviso that to the extent

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that the claimant, after injury, enlarges his participation in the concurrent employment as a substitute for the employment in which he was injured, then such enlarged participation may be considered in determining post-recovery earning capacity.” *Id.* The Court of Appeals of New York similarly held that “if claimant’s average wage before the accident is determined on the basis only of earnings from the employment in which he suffered the injury, reason and fairness demand that the earnings after the accident should likewise be limited to wages from that same employment[.]” *Brandfon v. Beacon Theatre Corporation*, 300 N.Y. 111, 114 (1949) (quotation marks omitted).¹ Although not binding on this Court, the North Carolina Industrial Commission has also addressed the issue raised in the present case and reached a similar conclusion.²

1. We note that the Florida and New York statutes governing the calculation of temporary partial disability compensation do not contain the exact same language as N.C. Gen. Stat. § 97-30. However, because all three statutes provide for the subtraction of post-injury wages from pre-injury average weekly wages, we find *Parrott* and *Brandfon* instructive. See Fla. Stat. § 440.1 (2011) (stating that “in case of temporary partial disability, compensation shall be equal to 80 percent of the difference between 80 percent of the employee’s average weekly wage and the salary, wages, and other remuneration the employee is able to earn postinjury, as compared weekly”); see also N.Y. Workers’ Comp. Law § 15(5) (McKinney 2012) (stating that for temporary partial disability “the compensation shall be two-thirds of the difference between the injured employee’s average weekly wages before the accident and his wage earning capacity after the accident in the same or other employment”).

2. In *Haire v. Norwest Corporation* (I.C. No. 569750. Opinion and Award for the Full Commission by Bernadine S. Balance, filed 7 April 1999) (citations omitted) (emphasis added), the Industrial Commission stated as follows:

At the time of injury, plaintiff worked in two separate jobs. It is clear from the prevailing law (and is not an issue herein) that plaintiff’s average weekly wage should be determined from the employment of his injury. Plaintiff was able in the instant case to return to work within a short period of time in his part-time employment, but was totally disabled from work in his job of injury. The issue presented herein is whether the defendant, who is allowed by law to disregard plaintiff’s pre-injury wages at his second or concurrent job for purposes of computing average weekly wage, can receive a credit for those same “disregarded” wages when calculating defendant’s obligation to pay temporary partial disability. This issue does not appear to have been specifically addressed by our appellate courts. In the Interlocutory Opinion and Award by the Full Commission in the instant case, this panel adopted the analysis of the Full Commission in *Karen McGuire v. Mid Atlantic Marketing, Incorporated*, I.C. File Number 457082 (May, 1996) which determined that in computing “partial disability”, plaintiff’s average weekly wage in the employment of injury and the second job must be considered. Although this Full Commission panel agrees that in computing partial disability, wages from both of his employments should be considered, it appears that the Larson’s preferred rule used by the deputy commissioner herein should be followed. *Accordingly, since North Carolina does not allow aggregation of*

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Adopting the reasoning in the above cited sources, we hold that since our statutes and case law do not allow aggregation of wages from concurrent employment in calculating a plaintiff's average weekly wages pursuant to N.C. Gen. Stat. § 97-2(5), by extension, an employer cannot deduct wages earned from concurrent employment in calculating the employer's obligation to pay partial disability compensation pursuant to N.C. Gen. Stat. § 97-30. We note, however, that this holding may not apply in situations where the post-injury employment is found to have been enlarged or used as a substitute for the loss of earnings in the injury producing employment.

In reaching this holding, we note that "the General Assembly enacted our workers' compensation act considering what it deemed 'fair and just' to *both* parties." *Thompson v. STS Holdings, Inc.*, ____ N.C. App. ____, ____, 711 S.E.2d 827, 832 (2011) (emphasis in original). We believe the approach adopted by this Court is fair to the employee because it excludes from the determination of post-injury average weekly wages any earnings that were excluded from the determination of pre-injury average weekly wages. See N.C. Gen. Stat. § 97-30 (providing that the employer shall pay the injured employee "a weekly compensation equal to sixty-six and two-thirds percent (66 2/3 %) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter"). Furthermore, the approach is fair to the employer because it does not require him to pay compensation based upon earnings from concurrent employment. See *Barnhardt*, 266 N.C. at 427, 146 S.E.2d at 485 (stating that "to combine plaintiff's wages from his two employments would not be fair to the employer").

In this case, Plaintiff was working concurrently for Ross and Employer when he was injured while in the employment of Employer. The parties stipulated that Plaintiff's "average weekly wage is \$430.77[,] " which included only the earnings from Employer. Thus, Plaintiff's earnings from Ross were not included in the calculation of his average weekly wages before his injury. However, the Full Commission subtracted Plaintiff's post-injury earnings from Ross in calculating Employer's obligation to pay temporary partial disability. Following the holding of this opinion, because Plaintiff's earnings from Ross were not included in his average weekly wages before his

wages from concurrent employment to determine the compensation rate, wages earned from concurrent employment will be disregarded in determining the extent of disability. However, if the concurrent employment were enlarged or resorted to as a substitute for loss of earning from the employment where the employee was hurt, then the additional wages would be considered.

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injury, the Full Commission erred by subtracting Plaintiff's post-injury earnings from Ross in calculating Employer's obligation to pay temporary partial disability compensation. Accordingly, we reverse the portion of the Opinion and Award calculating Plaintiff's temporary partial disability compensation and remand for entry of an Opinion and Award consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and GEER concur.

RAY C. WHITE, IN HIS CAPACITY AS GUARDIAN OF THE ESTATE OF AUDREE SHORE MILLS PLAINTIFF, v. HAROLD L. AND AUDREE S. MILLS CHARITABLE REMAINDER UNITRUST; FLETCHER L. HARTSELL, JR., IN HIS CAPACITY AS TRUSTEE OF THE HAROLD L. AND AUDREE S. MILLS CHARITABLE REMAINDER UNITRUST; H & A MILLS PROPERTIES, LLC; EDMOND THOMAS HARTSELL, IN HIS CAPACITY AS MANAGER OF H & A MILLS PROPERTIES, LLC; THE ESTATE OF HAROLD L. MILLS; EDMOND THOMAS HARTSELL, INDIVIDUALLY AND [IN] HIS CAPACITY AS EXECUTOR OF THE ESTATE OF HAROLD L. MILLS; AND MCGILL BAPTIST CHURCH OF CONCORD, NORTH CAROLINA, INC., DEFENDANTS

NO. COA11-1351

(Filed 7 August 2012)

1. Guardian and Ward—death of ward—guardian no longer had authority to maintain action

The trial court erred when it entered its summary judgment order after decedant's death because then-named plaintiff Mr. White, in his capacity as guardian of decedant's estate, no longer had the authority to sustain the present action on behalf of decedant's estate under N.C.G.S. § 35A 1251(3). The case was remanded for the trial court's consideration of those issues, if any, presented by Mr. Bland, as collector of Mrs. Mills' estate.

2. Powers of Attorney—competency at time of execution—question of fact

The issue of Mrs. Mills' competence at the time of the execution of the 2005 power of attorney was a question of fact that should be considered and determined by a fact-finder.

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[222 N.C. App. 277 (2012)]

Appeal by plaintiff from order entered 5 March 2010 by Judge Tanya T. Wallace in Cabarrus County Superior Court. Heard in the Court of Appeals 5 June 2012.

Weaver, Bennett & Bland, P.A., by Michael David Bland, for plaintiff-appellant.

Poyner Spruill LLP, by Cynthia L. Van Horne and E. Fitzgerald Parnell, III, for defendant-appellee Fletcher L. Hartsell, Jr.

Orsbon & Fenninger, LLP, by R. Anthony Orsbon, for defendants-appellees H & A Mills Properties, LLC, The Estate of Harold L. Mills, and Edmond Thomas Hartsell, Individually and in his capacity as Executor of the Estate of Harold L. Mills.

James, McElroy & Diehl, P.A., by John S. Arrowood and Edward T. Hinson, Jr., for defendant-appellee McGill Baptist Church of Concord, North Carolina, Inc.

MARTIN, Chief Judge.

Michael David Bland, in his capacity as Collector of the Estate of Audree Shore Mills, appeals from the trial court's order denying a motion for partial summary judgment—originally filed by then-plaintiff Ray C. White, in his capacity as Guardian of the Estate of Audree Shore Mills—and entering partial summary judgment in favor of the following defendants: Harold L. and Audree S. Mills Charitable Remainder Unitrust; Fletcher L. Hartsell, Jr., in his capacity as Trustee of the Harold L. and Audree S. Mills Charitable Remainder Unitrust; H & A Mills Properties, LLC; the Estate of Harold L. Mills (“Mr. Mills’ Estate”); Edmond Thomas Hartsell, in his capacities as Manager of H & A Mills Properties, LLC, as Executor of Mr. Mills’ Estate, and as an individual; and McGill Baptist Church of Concord, North Carolina, Inc. For the reasons stated, we vacate the trial court's order.

On 27 August 1996, Audree Shore Mills executed an eight-page durable power of attorney (“the 1996 POA”), in which she appointed her husband Harold L. Mills or Central Carolina Bank and Trust Company to serve as her attorney-in-fact and conveyed upon them the power and authority to act on her behalf with respect to a number of matters, including: to collect and control “any sums of money”; to sell or otherwise dispose of “all or any part of [Mrs. Mills’] real or personal property or [her] interest in such property”; to continue to own or to “form initially” and operate “any business interest” and to dispose of any part of such business interest; to borrow or lend

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money “upon any terms and conditions”; to register, hold, and vote any securities; to make gifts of Mrs. Mills’ real or personal property; and to assign, transfer, and convey “all or any part of [Mrs. Mills’] real or personal property” to any revocable trust established by Mrs. Mills or by her attorney-in-fact during her lifetime. In addition, Article VII, Paragraph F of the 1996 POA provided the following further instructions:

If this Power of Attorney has not been registered in an office of the register of deeds in any county in North Carolina, then in addition to the methods of revocation provided by [N.C.G.S. § 32A 13(b)], this Power of Attorney may be revoked by my executing and acknowledging, in the manner provided for execution of durable powers of attorney in Article 2 of Chapter 32A of the General Statutes of North Carolina, a subsequent Power of Attorney, a copy of which is delivered to the Attorney-in-Fact acting under this Power of Attorney in person or to such person’s last known address by certified or registered mail, return receipt requested.

The 1996 POA was not recorded in the Cabarrus County Register of Deeds until 14 December 2009.

However, on 21 June 2005—almost five years before the 1996 POA was recorded—Mrs. Mills executed another durable power of attorney (“the 2005 POA”), in which she appointed only her husband to serve as her attorney-in-fact. In contrast to the detailed terms of the eight-page 1996 POA, the 2005 POA was a two-page short form durable power of attorney, which borrowed its content from a then-outdated version of N.C.G.S. § 32A 1¹, and indicated Mrs. Mills’ intent-by-check-mark that Mr. Mills was authorized to act on her behalf with respect to the following matters: “Real property transactions”;

1. Although N.C.G.S. § 32A 1 was amended in 1995, it appears that, based on the language of the form included in the record before us, the content of the 2005 POA was derived from a version of N.C.G.S. § 32A 1 that pre-dated the 1995 amendments. The 1995 amendments to N.C.G.S. § 32A 1 enumerated two additional powers that could be conveyed through a statutory short form power of attorney, which included the power to convey “[g]ifts to charities, and to individuals other than the attorney-in-fact” and “[g]ifts to the named attorney-in-fact.” See 1995 N.C. Sess. Laws 786, 787, ch. 331, sec. 1; see also N.C. Gen. Stat. § 32A 1, items (14) and (15) (2011); see generally *Whitford v. Gaskill*, 345 N.C. 475, 478–79, 480 S.E.2d 690, 692–93 (“[A]n attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal’s real property unless that power is expressly conferred. . . . [C]onsequently and in light of the General Assembly’s 1995 amendment to N.C.G.S. § 32A 1, [t]he principal must specifically acknowledge (by initialing this section) his or her intent to confer the authority to make gifts.”), *disposition modified on reh’g* by 345 N.C. 762, 489 S.E.2d 177 (1997).

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“Personal property transactions”; “Banking transactions”; “Personal relationships and affairs”; and “Tax.” The 2005 POA did not, by its enumerated terms, expressly revoke the then-as-yet-unrecorded 1996 POA, and was itself recorded with the Cabarrus County Register of Deeds on 24 June 2005.

In September 2005, Mr. Mills’ nephew filed a Petition for Adjudication of Incompetence and Application for Appointment of Guardian, by which he sought to have Mrs. Mills declared incompetent. Almost a year-and-a-half later, on 28 December 2006, H & A Mills Properties, LLC (“the LLC”) was formed by operating agreement, establishing Mr. and Mrs. Mills as the LLC’s sole and equal members, and designating E. Thomas Hartsell and Mr. Mills as its managers. Within the next week, two non-warranty deeds were recorded, one in Mecklenburg County and one in Cabarrus County, conveying a total of sixteen tracts of land from Mr. and Mrs. Mills to the LLC. The following month, on 9 February 2007, the Harold L. and Audree S. Mills Charitable Remainder Unitrust (“the Unitrust”) was established by an instrument that named Mr. and Mrs. Mills as the Unitrust’s grantors and Fletcher L. Hartsell, Jr. as its trustee, and provided that “100% of the ownership interest of the [LLC]” would constitute the original property of the Unitrust. According to the record, the establishing instruments of both the LLC and the Unitrust were each signed once by Mrs. Mills on her own behalf, and twice by Mr. Mills; once on his own behalf, and once on behalf of Mrs. Mills as her attorney-in-fact. The deeds conveying the real property from Mr. and Mrs. Mills to the LLC were not signed by Mrs. Mills, and were instead signed twice by Mr. Mills; once on his own behalf, and once on behalf of Mrs. Mills as her attorney-in-fact.

On 1 May 2008, Mrs. Mills was adjudicated incompetent by the Cabarrus County Clerk of Superior Court and, three months later, Ray C. White was appointed to serve as Guardian of the Estate of Audree Shore Mills (“Mrs. Mills’ Estate”). On 9 September 2008, Mr. White, in his capacity as Guardian of Mrs. Mills’ Estate, filed a complaint against defendants in which he challenged the formation of the LLC and of the Unitrust based on Mrs. Mills’ incompetence and based on claims of unjust enrichment, breach of fiduciary duties, constructive fraud, and conversion. In addition to seeking damages and attorney’s fees, Mr. White asked the trial court to rescind the transfers of real property to the LLC, to rescind the transfer of the LLC’s assets to the Unitrust, and to return the real property or the proceeds of any subsequent sale of such properties to Mr. and Mrs. Mills’ respective

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estates. Mr. White then moved for summary judgment as to six of his ten claims.

Since the 1996 POA was not recorded at the time that Mr. White was appointed to serve as Guardian of Mrs. Mills' Estate, Mr. White first learned of the existence of the 1996 POA only after it was recorded in the Cabarrus County Register of Deeds—less than three hours before the court heard arguments regarding his motion for partial summary judgment on 14 December 2009. Four days later, Mr. White recorded a Revocation of Durable Power of Attorney with the Cabarrus County Register of Deeds, in which he sought to revoke the 1996 POA in accordance with his authority as Guardian pursuant to N.C.G.S. § 32A 10(a), based on allegations that the 1996 POA was recorded “by a third party with no apparent standing to file [the document] and no authorization from Audree S. Mills, an adjudicated incompetent, from [Mr. White,] as Guardian of the Estate of Audree S. Mills, or from Harold L. Mills, deceased, to file [the document].”

About six weeks later, on 29 January 2010, Mrs. Mills died. The following week, defendants moved to dismiss the complaint on the grounds that, pursuant to N.C.G.S. § 35A 1295, Mr. White's powers and duties to serve as Guardian of Mrs. Mills' Estate and to maintain the underlying action terminated upon Mrs. Mills' death and, therefore, Mr. White lacked standing to prosecute the claims further. Mr. White moved to stay the proceedings pending the appointment of a personal representative of, or a collector for, Mrs. Mills' Estate. Then, with defendants' motion to dismiss and plaintiff's motion to stay both still pending, on 5 March 2010, the trial court entered an order in which it determined that the 1996 POA was “duly and properly recorded,” and that Mr. Mills was acting within his authority as Mrs. Mills' attorney-in-fact when he conveyed their real property to the Unitrust through the LLC. After determining that there were no genuine issues of any material fact, the trial court granted partial summary judgment in favor of defendants and dismissed the challenged claims with prejudice as a matter of law.

More than fifteen months later, in June 2011, the assistant clerk of court appointed Michael David Bland as Collector of Mrs. Mills' Estate. Then, pursuant to Rule 25(c) of the North Carolina Rules of Civil Procedure, Mr. Bland moved, with defendants' consent, to substitute himself, in his capacity as Collector of Mrs. Mills' Estate, as the named plaintiff in this action, which the court allowed. After Mr. Bland, in his capacity as Collector of Mrs. Mills' Estate, voluntarily dismissed the remaining claims that had been retained by the court

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for further proceedings, Mr. Bland appealed from the court's 5 March 2010 order granting summary judgment.

[1] Mr. Bland first contends the trial court erred when it entered its summary judgment order after Mrs. Mills' death because he asserts that then-named plaintiff—Mr. White, in his capacity as Guardian of Mrs. Mills' Estate—no longer had the authority to sustain the present action on behalf of Mrs. Mills' Estate. We agree.

The guardian of an estate has the power “[t]o maintain any appropriate action or proceeding to recover possession of any of the ward's property . . . ; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.” N.C. Gen. Stat. § 35A 1251(3) (2011). Nonetheless, “[e]very guardianship shall be terminated and all powers and duties of the guardian . . . shall cease when the ward . . . [d]ies.” N.C. Gen. Stat. § 35A 1295(a)(3) (2011). Upon such death, “all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person . . . shall survive to and against *the personal representative or collector of the person's estate,*” see N.C. Gen. Stat. § 28A 18 1(a) (2011) (emphasis added), and “the court . . . may order the substitution of said . . . personal representative or collector and allow the action to be continued by or against the substituted party.” See N.C. Gen. Stat. § 1A 1, Rule 25(a) (2011).

In *Purvis v. Moses H. Cone Memorial Hospital Service Corp.*, 175 N.C. App. 474, 624 S.E.2d 380 (2006), one of four named defendants in a medical malpractice action—Dr. Newell, the supervising physician on call—passed away during the pendency of the action. See *id.* at 475–76, 624 S.E.2d at 382–83. Almost eighteen months after Dr. Newell's death, plaintiffs filed a motion to substitute the executrix of Dr. Newell's estate as a named party to the action. See *id.* at 476, 624 S.E.2d at 383. Nevertheless, before the trial court ruled on plaintiffs' motion for substitution, defense counsel moved for summary judgment as to Dr. Newell, and the court entered an order granting summary judgment “‘in favor of defendant McArthur Newell, M.D. (and his estate).’” See *id.* On appeal, plaintiffs sought review of the merits of the trial court's order granting summary judgment as to Dr. Newell. See *id.* However, this Court determined that we could not address the merits because the trial court had not yet ruled on plaintiffs' motion for substitution pursuant to Rule 25(a) of the North Carolina Rules of Civil Procedure. See *id.* at 482–83, 624 S.E.2d at 386.

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Instead, we concluded that, “at the present moment, the trial court’s summary judgment order with respect to Dr. Newell has no effect”: “it cannot be effective as to Dr. Newell’s estate because the executrix for that estate has never been made a party to the action, and it cannot be effective as to Dr. Newell himself because he passed away.” *Id.* at 482, 624 S.E.2d at 386; *see also id.* at 483, 624 S.E.2d at 387 (“Substitution in the event of death is not automatic and . . . whether or not to allow substitution must be decided in the first instance by the trial court.”). Accordingly, we vacated the trial court’s order granting summary judgment in favor of Dr. Newell. *See id.* at 483, 624 S.E.2d at 387.

In the present case, at the time the trial court entered its March 2010 order, Mr. White no longer had the authority to sustain the present action as Guardian of Mrs. Mills’ Estate pursuant to N.C.G.S. § 35A 1251(3). However, unlike *Purvis*—in which the court had not yet entered an order on a pending Rule 25(a) motion for substitution at the time of the appeal—in the present case, the trial court below *has* entered a Consent Order Pursuant to Rule 25(a) Substituting Collector of Estate as Plaintiff. In other words, where this Court in *Purvis* concluded that, “[u]nder North Carolina law, there is *currently* no party in favor of whom summary judgment could be granted,” *see Purvis*, 175 N.C. App. at 481, 624 S.E.2d at 386 (emphasis added), the same is no longer true of the case presently before us, because such motion has since been decided.

Nevertheless, the consent order substituting Mr. Bland as the named plaintiff in the pending action was signed and entered only *after* the court entered its March 2010 order granting summary judgment in defendants’ favor. Moreover, neither party brings forward any argument to address whether, if at all, Mr. Bland’s subsequent appointment as Collector of Mrs. Mills’ Estate can render the court’s earlier error harmless. Rather, defendants assert only that the March 2010 order should be affirmed because it was “entirely consistent” with a letter sent from the court to counsel before Mrs. Mills’ death indicating how the court intended to rule on Mr. White’s motion, and because Mr. White remained the representative of record after Mrs. Mills’ passing. However, defendants do not provide any legal authority to support their assertions as to how such a letter could essentially be deemed a judgment entered by the court in accordance with N.C.G.S. § 1A 1, Rule 58, or how remaining the representative of record after Mrs. Mills’ death could somehow imbue Mr. White with the authority to continue as Guardian to Mrs. Mills’ Estate in contravention to N.C.G.S. § 35A 1295(a)(3), when “the legal entity known

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as the life of [Mrs. Mills]’ ” ceased to exist and Mr. White no longer had legal standing to continue the present action. *See Purvis*, 175 N.C. App. at 482, 624 S.E.2d at 386 (quoting *Pierce v. Johnson*, 154 N.C. App. 34, 40, 571 S.E.2d 661, 665 (2002)). Thus, in the absence of any contrary relevant legal argument presented by the parties, and because, at the time the trial court entered its order denying Mr. White’s motion for summary judgment, Mr. White was no longer authorized by statute to continue the action as Guardian of Mrs. Mills’ Estate, we vacate the trial court’s order allowing summary judgment in favor of defendants and against then-named plaintiff Mr. White, and remand this matter for the court’s consideration of those issues, if any, presented by Mr. Bland, as Collector of Mrs. Mills’ Estate.

[2] Although we are mindful that this Court “ha[s] no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions,” *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), we feel compelled to identify an inconsistency in the record before us that appears relevant to any further consideration of the same claims below. According to the terms of Article VII, Paragraph F of the 1996 POA—excerpted at the outset of this opinion—if another durable power of attorney was executed and acknowledged *before* the 1996 POA was registered with any North Carolina county register of deeds, the 1996 POA “may be revoked” by the execution and acknowledgement of such a document pursuant to the terms of the 1996 POA. Although the parties do not dispute whether Mrs. Mills was competent at the time she executed the 1996 POA, and further agree that the 1996 POA was not registered with the Cabarrus County Register of Deeds until December 2009, the parties presented conflicting evidence in competing affidavits regarding whether Mrs. Mills was competent at the time she executed the 2005 POA. Because the execution and acknowledgement of the 2005 POA could effectively revoke the 1996 POA, provided that a copy of this later-executed power of attorney was also delivered to Mr. Mills—who was named as attorney-in-fact in both the 1996 and 2005 POAs—in a manner that would satisfy the requirements set out in Article VII, Paragraph F of the 1996 POA, it appears that the issue of Mrs. Mills’ competence at the time of the execution of the 2005 POA is a question of fact that should be considered and determined by a fact-finder. *See Kessing v. Nat’l Mtge. Corp.*, 278 N.C. 523, 534–35, 180 S.E.2d 823, 830 (1971) (“[N.C.G.S.

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§ 1A 1, Rule 56] does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists. . . . If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied.” (citations and internal quotation marks omitted)).

Vacated and remanded.

Judges ELMORE and HUNTER, JR. concur.

MARY ANN WILCOX, PLAINTIFF v. CITY OF ASHEVILLE; WILLIAM HOGAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE CHIEF OF THE CITY OF ASHEVILLE POLICE DEPARTMENT; STONY GONCE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF ASHEVILLE; BRIAN HOGAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF ASHEVILLE; CHERYL INTVELD, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF ASHEVILLE, DEFENDANTS

No. COA12-12

(Filed 7 August 2012)

1. Appeal and Error—interlocutory order—substantial right—public official immunity

While an order denying summary judgment is an interlocutory order from which there is generally no right to appeal, a public official may immediately appeal from an interlocutory order denying a summary judgment motion based on public official immunity.

2. Immunity—public official immunity—individual capacity—malice exception—summary judgment denied

The trial court did not err in a negligence case by denying summary judgment for three officers on plaintiff’s claims against them in their individual capacities even though the officers claimed public official immunity. Viewed in the light most favorable to plaintiff, the evidence established that there were genuine issues of material fact regarding the applicability of the malice exception to public official immunity. However, with respect to any claims plaintiff asserted against a fourth officer, the chief, in his individual capacity, this case was remanded to the trial court for entry of summary judgment in the chief’s favor.

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3. Constitutional Law—state constitutional claims—summary judgment—claims against individual police officers was adequate remedy

The trial court did not err in a negligence case by granting summary judgment for defendant police officers on plaintiff's state constitutional claims. Plaintiff's claims against the individual defendants in their individual capacities served as an adequate remedy.

Appeal by Defendants from order entered 9 September 2011 and cross-appeal by Plaintiff from order entered 9 September 2011 and amended order entered 15 September 2011 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 May 2012.

Hylar & Lopez, P.A., by Stephen P. Agan and George B. Hylar, Jr., for Plaintiff.

Parker Poe Adams & Bernstein LLP, by Jason R. Benton and Kelly L. Whitlock, for Defendants.

Patterson Harkavy LLP, by Burton Craige, and Tin Fulton Walker & Owen, PLLC, by S. Luke Largess, for Amicus North Carolina Advocates for Justice.

General Counsel Kimberly S. Hibbard and Senior Assistant General Counsel Gregory F. Schwitzgebel III for Amicus North Carolina League of Municipalities.

STEPHENS, Judge.

In May 2007, Plaintiff Mary Ann Wilcox was shot by Asheville Police Department (“APD”) officers during APD’s pursuit of a vehicle in which Wilcox was the only occupant other than the driver. The pursuit began when the driver of the vehicle sped away from an APD officer during a traffic stop. At several points during the approximately 20-minute pursuit, which involved multiple APD officers and reached speeds up to 45 miles per hour, APD officers Defendant Stony Gonce, Defendant Brian Hogan, and Defendant Cheryl Intveld attempted to stop the vehicle by shooting at the vehicle and its driver. A total of 27 bullets were fired; Gonce fired six, Hogan fired 17, and Intveld fired four. Later investigation revealed that the vehicle was hit with 16 bullets, the driver was not hit by any of the bullets, and Wilcox was hit by two bullets.

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Thereafter, Wilcox commenced the present action in Buncombe County Superior Court against Defendant City of Asheville, as well as against APD Chief Defendant William Hogan (“Chief Hogan”) and officers Gonce, Hogan, and Intveld (collectively, the “Individual Defendants”) in both their official and individual capacities, asserting claims for (1) “negligence, gross negligence, recklessness, willfull [sic] and wanton conduct” by Gonce, Hogan, and Intveld in shooting Wilcox; (2) “imputed liability” of the City of Asheville for Gonce’s, Hogan’s, and Intveld’s actions; (3) “negligence, gross negligence, recklessness, willful and wanton conduct” by the City of Asheville and Chief Hogan in failing to adequately train and supervise Gonce, Hogan, and Intveld; (4) “violation of [Wilcox’s] state constitutional rights” by all Defendants; and (5) punitive damages for the “egregiously wrongful, malicious, willful and/or wanton” conduct of the Individual Defendants.

Subsequently, pursuant to a motion by the City of Asheville and the Individual Defendants in their official capacities, the trial court dismissed all claims against those Defendants as barred by governmental immunity. Defendants later filed a motion for summary judgment seeking dismissal of Wilcox’s remaining claims as follows: (1) public official immunity as barring all claims against the Individual Defendants in their individual capacities; and (2) the existence of an adequate state remedy as barring the claims arising under the North Carolina Constitution. The trial court partially granted the motion, dismissing the state constitutional claims and leaving as Wilcox’s only viable claims those against the Individual Defendants in their individual capacities. From that order partially granting summary judgment for Defendants, both Wilcox and Defendants appeal.¹ We review a trial court’s summary judgment order *de novo*, viewing all evidence in the light most favorable to the nonmoving 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).

Defendants’ appeal

[1] Defendants appeal from that portion of the trial court’s order denying summary judgment for the Individual Defendants on Wilcox’s

1. On 9 September 2011, Defendants gave notice of appeal from the trial court’s order entered that same day. Pursuant to Wilcox’s subsequent motion for certification of the court’s order “as a final ruling under Rule 54(b) of the [North Carolina] Rules of Civil Procedure,” the trial court entered a 15 September 2011 order amending its previous order to include a Rule 54(b) certification. On 16 September 2011, Wilcox gave notice of appeal from both of the trial court’s orders.

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claims against them in their individual capacities. While an order denying summary judgment is an interlocutory order from which there is generally no right to appeal, this Court has previously held that a public official—which each of the Individual Defendants is, *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730, *disc. review denied*, 357 N.C. 457, 585 S.E.2d 385 (2003)—may immediately appeal from an interlocutory order denying a summary judgment motion based on public official immunity. *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Thus, Defendants’ appeal of the trial court’s order declining to dismiss the claims against them on grounds of public official immunity is properly before this Court.

[2] Public official immunity is “a derivative form” of governmental immunity, *Epps v. Duke Univ.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996), which precludes suits against public officials in their individual capacities as follows:

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.

Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). Thus, a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt. *Id.* As Wilcox has not alleged that the Individual Defendants’ actions were corrupt or outside the scope of their authority,² the only

2. Wilcox contends that her complaint “inartfully” raises the issue of whether the Individual Defendants acted beyond the scope of their official authority. However, those portions of the complaint that Wilcox claims raise that issue address only the Individual Defendants’ alleged negligence, recklessness, and maliciousness. As Defendants correctly note, this Court has previously held that a plaintiff must separately allege the exceptions to public official immunity. *See Epps*, 122 N.C. App. at 207, 468 S.E.2d at 853 (“[I]f a plaintiff wishes to sue a public official in his [] individual capacity, the plaintiff must, at the *pleading stage and thereafter*, demonstrate that the official’s actions . . . are commensurate with one of the [] exceptions.” (emphasis added)); *Pigott v. City of Wilmington*, 50 N.C. App. 401, 402-03, 273 S.E.2d 752, 753-54 (noting that a claim against an official is subject to dismissal “*unless it be alleged and proved*” that the official acted beyond his authority, maliciously, or corruptly (emphasis in original) (quoting *Smith*, 289 N.C. at 331, 222 S.E.2d at 430)), *cert. denied*, 303 N.C. 180, 280 S.E.2d 453 (1981). As Wilcox did not allege that the Individual Defendants acted beyond the scope of their authority—and, indeed, instead alleged that the Individual Defendants “were acting in the course and scope of their employment and their agency as [] police officers”—Wilcox may not now attempt to establish that the Individual Defendants acted beyond the scope of their authority.

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relevant exception to public official immunity is malice. The questions on appeal, then, are (1) what is malice, and (2) did Wilcox sufficiently forecast its existence in this case?

As for the first question, the most commonly-cited definition of malice in this context is from our Supreme Court's decision in *In re Grad v. Kaasa*, which states that "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). Thus, elementally, a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another. *Id.* There is little disagreement between the parties on what type of conduct, generally, would satisfy the first two elements, but on the third element—intent to injure—the parties' positions diverge.

While Wilcox contends that the intent to injure may be implied by the actor's conduct such that direct evidence of a defendant's actual intent to injure the plaintiff is unnecessary, the Individual Defendants contend in their brief that only direct evidence of a defendant's actual intent to injure the plaintiff is sufficient. Hardening this position at oral argument, the Individual Defendants asserted that nothing but a statement by each of them that he or she was intending to injure Wilcox would be sufficient to show intent to injure and, thus, show malice. The authority in this State, however, does not support the Individual Defendants' rigid position on this issue.

Although there are no decisions in North Carolina addressing the sufficiency of evidence of an implied intent to injure *specifically* in the public official immunity context, our Supreme Court has held *generally* that "the intention to inflict injury may be constructive as well as actual" and that constructive intent to injure exists where the actor's conduct "is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent." *Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E. 36, 38 (1929). Further, in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), where our Supreme Court held that evidence of constructive intent, as defined in *Foster*, may be sufficient to show intentional injury in the workers' compensation context, the Court noted the broad applicability of the constructive intent doctrine, stating that "wanton and reckless behavior *may be equated* with an intentional act" for various purposes beyond workers' compensation actions, including intentional tort claims, punitive damages claims, and

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second-degree murder prosecutions. *Id.* at 715, 325 S.E.2d at 248 (emphasis added). In light of our Supreme Court's broad acceptance of the constructive intent doctrine in multiple situations where findings of malice and intent are required, the doctrine should, likewise, apply here so long as the doctrine's application accords with the purpose and rationale for extending immunity to public officials in the first place. *Cf. id.* at 712, 716-17, 325 S.E.2d at 246-47, 249-50 (in deciding whether to equate wanton and reckless conduct with intentional torts with respect to co-employee immunity in workers' compensation context, reviewing "social policy" of workers' compensation scheme and "rationale supporting co-employee immunity"). We believe it does.

The policy underpinnings of public official immunity have been described as follows:

It is generally recognized that public officers and employees would be unduly hampered, deterred and intimidated in the discharge of their duties, if those who acted improperly, or even exceeded the authority given them, were not protected to some reasonable degree by being relieved from private liability. Accordingly, the rationale for official immunity is the promotion of fearless, vigorous, and effective administration of policies of government. The threat of suit could also deter competent people from taking office.

Pangburn v. Saad, 73 N.C. App. 336, 344, 326 S.E.2d 365, 370 (1985) (citing 63A AM. JUR. 2D *Public Officers and Employees* § 358 (1984)); *see also* 63C AM. JUR. 2D *Public Officers and Employees* § 298 (2009). Thus, officials have been granted this immunity in order to promote (1) the primary goal of allowing public officials to perform their duties vigorously without undue hampering and deterrence, and (2) the secondary goal of ensuring effective democratic government. *See Pangburn*, 73 N.C. App. at 344, 326 S.E.2d at 370; *see also Epps*, 122 N.C. App. at 203, 468 S.E.2d at 850-51 ("If governmental officials were constantly exposed to the threat of personal liability at the hands of disgruntled or damaged citizens, the basis of our democracy might well be jeopardized."). In our view, applying the doctrine of constructive, rather than actual, intent to injure in this case does not hinder the promotion of either of those goals.

Although undeterred and vigorous enforcement of official duties is a generally laudable goal in this State, with respect to the use of deadly force in apprehending criminal suspects, our legislature has

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evinced a clear intent to hamper and deter officers performing that specific duty. As noted by our Supreme Court, North Carolina General Statutes Section 15A-401(d)—which delimits those situations in which use of deadly force by law enforcement officers may be “justified,” N.C. Gen. Stat. § 15A-401(d) (2011)—was designed solely “to codify and clarify those situations in which a police officer may use deadly force *without fear of incurring criminal or civil liability.*” *State v. Irick*, 291 N.C. 480, 501, 231 S.E.2d 833, 846 (1977) (emphasis added). Implicit in that codification is the notion that unjustified use of deadly force may lead to civil liability.

Moreover, section 15A-401(d) states that “[n]othing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person.” N.C. Gen. Stat. § 15A-401(d)(2). In labeling as unjustified “criminally negligent conduct”—that is, “such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others,” *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E.2d 456, 458 (1933))—our legislature has “clarified” for law enforcement officers that they may be subject to liability for “recklessness” or “heedless indifference to the safety and rights of others” when using deadly force. Indeed, the commentary to section 15A-401(d) notes that

the law[] enforcement officer cannot act with indifference to the safety of others in the use of force. Shooting into a crowded street would be an obvious example of criminally negligent conduct, and this section would not justify such action.

N.C. Gen. Stat. § 15A-401 (official commentary to subsection(d)). Thus, because our legislature has already “clarified” for law enforcement officers that they may be liable for reckless conduct that is short of being intentionally injurious, we cannot conclude that allowing constructive intent to satisfy the malice exception to public official immunity would *unduly* hamper officials’ use of deadly force or would undermine effective democratic government in this State in any way. We conclude instead that adopting the constructive intent doctrine in this context would not hinder the achievement of the goals of public official immunity, and we hold that evidence of constructive intent to injure may be allowed to support the malice exception to that immunity.

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We are satisfied that this conclusion does not, as the Individual Defendants contended at oral argument, effectively turn the malice exception into a “reckless indifference” exception. As noted in previous decisions of this Court, a plaintiff may not satisfy her burden of proving that an official’s acts were malicious through allegations and evidence of mere reckless indifference. *See, e.g., Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) (emphasis added) (citation omitted), *disc. review denied*, 355 N.C. 215, 560 S.E.2d 136 (2002). Rather, as discussed *supra*, the plaintiff must show at least that the officer’s actions were “*so reckless or so manifestly indifferent to the consequences . . . as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent.*” *Foster*, 197 N.C. at 192, 148 S.E. at 38 (emphasis added). Thus, in line with our previous holdings, and contrary to the Individual Defendants’ position, a showing of mere reckless indifference is insufficient, and a plaintiff seeking to prove malice based on constructive intent to injure must show that the level of recklessness of the officer’s action was so great as to warrant a finding equivalent in spirit to actual intent.

Although we have concluded that Wilcox *may* satisfy her burden of proving the malice exception by forecasting sufficient evidence of the Individual Defendants’ implied intent to injure, along with evidence that satisfies the other two elements of malice—that the Individual Defendants’ acts were contrary to their duty and done wantonly—whether she has done so is a separate factual question to be answered for each Individual Defendant based on the evidence presented in “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011), viewed in the light most favorable to Wilcox. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009).

First, with respect to Chief Hogan, Wilcox alleged in her complaint that she was entitled to recover compensatory and punitive damages from Chief Hogan in his individual capacity based on his reckless, willful, wanton, and malicious failure to provide “adequate policies and procedures,” “adequate training,” and “adequate control and supervision.” The trial court denied summary judgment for Defendants as to all of Wilcox’s “individual-capacity tort law and punitive damages claims,” allowing these individual-capacity claims against Chief Hogan to proceed. We think this was error. Beyond Wilcox’s vague allegations, she alleged no specific actions or omis-

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sions by Chief Hogan that would constitute a failure to train or supervise. Furthermore, Wilcox has presented no evidence of any specific conduct by Chief Hogan amounting to a failure to adequately train or supervise. Rather, the evidence shows that APD provided its officers with training and operational guidelines that instruct officers on appropriate conduct for vehicular pursuits and the use of deadly force.³ Accordingly, we conclude that Wilcox's failure to support her claim against Chief Hogan on the theory of inadequate training and supervision warrants judgment for Defendants on Wilcox's individual-capacity tort claims against Chief Hogan. *See Epps*, 122 N.C. App. at 207, 468 S.E.2d at 853 (“[I]f a plaintiff wishes to sue a public official in his [] individual capacity, the plaintiff must, at the pleading stage and thereafter, demonstrate that the official's actions . . . are commensurate with one of the [] exceptions.” (emphasis added)); *see also Turner v. City of Greenville*, 197 N.C. App. 562, 567 n.2, 677 S.E.2d 480, 484 n.2 (2009) (declining to address allegations of negligent training and supervision claim where plaintiffs’ “[c]omplaint alleges no specific acts or omissions that might constitute [] a failure to adequately train, [p]laintiffs’ forecast of evidence before the trial court did not substantiate this allegation, the trial court’s judgment does not address this theory of liability, and [p]laintiffs have not argued this theory on appeal”).

As for Gonce, the evidence before the trial court tended to show the following: During the pursuit, Gonce heard radio transmissions indicating that there was a passenger in the vehicle. Later, despite being told over the radio not to join the pursuit, Gonce drove to an apartment complex where the pursuit was expected, exited his patrol car, and positioned himself in front of his car with the intention of deploying “stop sticks.” When the pursued vehicle arrived at Gonce’s location and began approaching him at 25 miles per hour, Gonce fired six bullets, one of which was later determined to have struck Wilcox. In our view, the foregoing evidence, taken in the light most favorable to Wilcox, is sufficient to raise a genuine issue of fact as to the existence of the elements of malice, *i.e.*, that Gonce’s actions were contrary to his duty, wanton, and so reckless as to justify a finding of intent to injure.

As for the requirement that Gonce’s actions must have been contrary to his duty, we first note that section 15A-401(d) provides that a

3. We also note that while the Individual Defendants argue on appeal that summary judgment should have been granted for all “Defendant-officers,” including Chief Hogan, Wilcox’s appellate brief does not mention any alleged liability of Chief Hogan for failure to adequately train and supervise.

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“law[] enforcement officer is justified in using deadly physical force” only when it is reasonably necessary to defend himself or a third person from the imminent use of deadly force. N.C. Gen. Stat. § 15A-401(d)(2). There is a question of fact as to whether Gonce could have timely moved from his position in front of his car to avoid any potential threat from the slow-approaching vehicle. Further, this Court has stated that evidence of “gross violations of generally accepted police practice and custom” contributes to the finding that officers acted contrary to their duty. *Prior v. Pruett*, 143 N.C. App. 612, 623-24, 550 S.E.2d 166, 174 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 572 (2002). The APD “Use of Force Training Manual” provides that “[o]fficers are prohibited from discharging firearms when it is likely that an innocent person may be injured.” APD training materials also provide that officers should not shoot at moving vehicles unless the public threat is serious and imminent. Because it was likely that the passenger would be hurt when officers fired into the moving vehicle, and because the vehicle did not pose an obvious imminent public threat (the vehicle was traveling at only 25 miles per hour and there was no evidence of pedestrian or vehicular traffic at Gonce’s location at the time the vehicle approached him), we conclude that there is a genuine issue of fact as to whether Gonce acted contrary to his duty.

Furthermore, the evidence is sufficient to raise an issue of fact as to whether Gonce’s actions were so wanton and reckless as to justify a finding of constructive intent to injure: Gonce fired six bullets into a slow-moving vehicle, knowing it was occupied by a passenger, and he did so despite having been called off the pursuit and despite the absence of a clear public threat. Thus, we conclude that the forecast of evidence is sufficient to raise a genuine issue of fact as to the existence of malice with respect to Gonce’s actions.

The evidence before the trial court regarding officer Hogan’s actions revealed the following: Hogan responded to the pursuit as a passenger in Intveld’s patrol car. Despite having been called off the pursuit,⁴ Hogan and Intveld arrived at the apartment complex where the pursuit was expected. Although he remembered several specific radio communications, Hogan stated in an interview with a State Bureau of Investigation agent that he did not remember any regarding the number of occupants in the pursued vehicle. By the time the vehi-

4. Early in the pursuit, Hogan and Intveld heard an APD sergeant’s radio communication announcing that “there were enough cars involved in the chase and that the speeds were not excessive” and that Hogan, Intveld, and other responding officers “needed to cut back.”

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cle arrived at Hogan's position off to the side of the street, the vehicle had run over the "stop sticks" and was driving with a flat tire at 20 miles per hour. Hogan fired nine bullets as the vehicle approached. As the vehicle turned away from him, Hogan followed behind the vehicle, reloaded, and fired another eight bullets. In our view, this evidence is sufficient to raise a genuine issue of material fact as to whether Hogan's actions support a finding of malice.

First, the evidence tends to show that Hogan's actions were contrary to his duty. Hogan claimed he fired to defend himself from the oncoming vehicle. However, Hogan was positioned off the street, away from the path of the vehicle, and began firing when the vehicle was 75 feet away and approaching slowly. Further, although Hogan allegedly continued firing after the vehicle passed him because the threat had not ceased for the other officers, the evidence tends to show that Hogan was unaware of where the other officers were located. Considering the distance between Hogan and the vehicle, the vehicle's slow speed, and Hogan's position away from the street, a reasonable juror could conclude that Hogan's use of deadly force was contrary to his duty and was not justified. Accordingly, we conclude that there is a genuine issue of fact as to whether Hogan acted contrary to his duty.

Regarding the requirement of wantonness—that the act be done "needlessly, manifesting a reckless indifference to the rights of others," *In re Grad*, 312 N.C. at 313, 321 S.E.2d at 890-91—although Hogan claimed he does not remember radio transmissions describing the number of occupants in the vehicle, most officers involved in the incident knew there was a passenger. The evidence tends to show that Hogan heard the majority of the other radio communications, and, most importantly, there is no evidence indicating Hogan made any effort to ascertain the number of occupants in the vehicle. This evidence, viewed in the light most favorable to Wilcox, is sufficient to show that Hogan acted with a reckless indifference to Wilcox's rights.

Further, that same evidence is sufficient to raise an issue of fact as to whether Hogan's actions were so reckless as to justify a finding of intent to injure. Hogan fired 17 bullets into a slow-moving car with an unknown number of occupants. Not only did he fire upon the vehicle's approach, he also followed behind the vehicle and continued shooting. He made a second ammunition change, loading a third magazine, indicating that he would have fired more bullets had the vehicle stayed in sight. In our view, this evidence raises an issue of material fact as to whether Hogan's actions in firing at the vehicle

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were so reckless and manifestly indifferent to Wilcox's rights that application of the constructive intent doctrine is justified. Therefore, we conclude that the forecast of evidence is sufficient to raise a genuine issue of fact as to the existence of malice with respect to Hogan's actions.

As for Intveld, the evidence before the trial court tended to show the following: Although Intveld had been called off the pursuit because the pursuit speeds "were not excessive," she drove to an area where the pursuit was expected. While she denied knowledge of a passenger in the vehicle at the time she fired her weapon, she "remembered hearing that [the vehicle] was occupied" over the radio. When Intveld arrived at the apartment complex, she hid behind bushes on the side of the street. As the vehicle passed at 20 miles per hour, she fired four bullets. In our view, this evidence, viewed in the light most favorable to Wilcox, is sufficient to raise a genuine issue of material fact regarding whether Intveld acted with malice.

As for the requirement that Intveld's actions must have been contrary to her duty, we note that Intveld admitted she did not feel that she was in danger of imminent force being used against her. While Intveld claimed she shot at the vehicle to defend other officers, she also admitted she was unsure where other officers were positioned. Further, the vehicle was moving at approximately 20 miles per hour and driving on a flat tire, which was about to fall off. In our view, this evidence is sufficient to establish a genuine issue of fact as to whether Intveld acted contrary to her duty.

Moreover, we think this evidence is sufficient to raise a genuine issue as to whether Intveld's actions were reckless in such a way as to support a finding of intent to injure. Although Intveld denied knowing there was a passenger in the vehicle, she "remembered hearing that it was occupied," and most officers involved in the incident knew there were two occupants. More importantly, there is no indication that Intveld believed there was only one person in the vehicle. In addition, Intveld fired from a hidden position, away from any danger posed by the vehicle, and she was unaware of whether any other officers were in danger. In our view, this evidence raises a genuine issue of material fact as to whether Intveld's actions were so reckless and manifestly indifferent to Wilcox's rights that they support the application of the constructive intent doctrine. As such, we conclude that the forecast of evidence is sufficient to raise a genuine issue of fact as to the existence of malice with respect to Intveld's involvement with the incident.

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Based on the foregoing, we hold that the evidence before the trial court, viewed in the light most favorable to Wilcox, establishes that there are genuine issues of material fact regarding the applicability of the malice exception to public official immunity with respect to officers Gonce, Hogan, and Intveld.⁵ Accordingly, the trial court properly denied these Defendants' motion for summary judgment on public official immunity grounds.

Nevertheless, Hogan and Intveld argue in the alternative that summary judgment should have been granted for them on the ground that Wilcox has failed to "show that her injuries or damages were proximately caused by [Hogan and Intveld's] use of force." We are unpersuaded.

In *McMillan v. Mahoney*, 99 N.C. App. 448, 393 S.E.2d 298 (1990), this Court recognized a "concurrent negligence" theory whereby one defendant may be liable for the negligent acts of another defendant if that first defendant "gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." *Id.* at 451, 393 S.E.2d at 300 (quoting Restatement (Second) of Torts § 876(b), (c) (1977)). In that case, we held that the following allegations were sufficient to support a concurrent negligence theory: "(i) that the [] defendants were shooting air rifles near the plaintiffs' home"; "(ii) that one of the [] defendants fired his air rifle in a negligent, careless and reckless manner"; and "(iii) as a result of the [] defendants shooting their air rifles, [the] plaintiff was struck." *Id.* at 453, 393 S.E.2d at 301. Similarly, in this case, the evidence before the trial court, viewed in the light most favorable to Wilcox and tending to show that Hogan and Intveld were shooting recklessly at the vehicle in which Wilcox was a passenger, is sufficient to allow a reasonable juror to find the existence of concurrent negligence. Accordingly, we conclude that summary judgment on this issue was properly denied.

In sum, we hold that the trial court did not err in denying summary judgment for officers Hogan, Intveld, and Gonce on Wilcox's claims against them in their individual capacities. However, with respect to any claims Wilcox has asserted against Chief Hogan in his

5. The Individual Defendants also argue that summary judgment should have been granted on Wilcox's punitive damages claims because the evidence does not "establish that the [Individual Defendants] acted with malice or willful or wanton conduct in discharging their firearms." We find this argument unconvincing with respect to Gonce, Hogan, and Intveld for all those reasons discussed above regarding the genuine issues of material fact as to the existence of malice. Thus, this argument is overruled.

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individual capacity, this case is remanded to the trial court for entry of summary judgment in Chief Hogan's favor.

Wilcox's appeal

[3] Wilcox appeals from that portion of the trial court's order granting summary judgment for Defendants on Wilcox's state constitutional claims.⁶ As we have concluded *supra* that Wilcox's claims against officers Gonce, Hogan, and Intveld in their individual capacities remain viable, the question is whether, despite that conclusion, Wilcox may still pursue her constitutional claims against Defendants. We conclude the answer is no.

Direct claims against the State arising under the North Carolina Constitution "[are] permitted *only* 'in the absence of an adequate state remedy,'" and where an adequate state remedy exists, those direct constitutional claims must be dismissed. *Davis v. Town of S. Pines*, 116 N.C. App. 663, 675-76, 449 S.E.2d 240, 247-48 (1994) (emphasis added) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). In *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 538 S.E.2d 601 (2000), *appeal dismissed, disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001), where the trial court granted summary judgment for an individual defendant on the plaintiff's individual-capacity state tort claims, this Court reversed the trial court, holding that the plaintiff was entitled to go to the jury on her state law tort claims and on the question of the applicability of public official immunity. *Id.* at 624-26, 538 S.E.2d at 615-16. In so holding, we stated as follows:

As we have reversed the trial court's grant of summary judgment on plaintiff's state tort law claims against [the individual defendant], *there is an adequate state remedy* for plaintiff's alleged injury resulting from [the individual defendant's] conduct.

Id. at 632, 538 S.E.2d at 619 (emphasis added). Thus, this Court affirmed the dismissal of the plaintiff's state constitutional claims. *Id.* The clear implication from that holding is that leaving for the jury the question of the applicability of public official immunity to a plaintiff's

6. Wilcox's cross-appeal of the trial court's order is properly before this Court because, as discussed in Wilcox's brief, the order affects a substantial right of Wilcox's, *viz.*, the right to avoid two trials on the same issues. See *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (The possibility of undergoing a second trial affects a substantial right where "the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.").

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state tort law claims provides a plaintiff with an adequate state remedy such that any direct state constitutional claims should be dismissed.

As in *Glenn-Robinson*, in this case we have held that the applicability of public official immunity is a question for the jury and have allowed Wilcox's state law tort claims to proceed. Thus, we must conclude, as we did in *Glenn-Robinson*, that Wilcox has an adequate state remedy that precludes her state constitutional claims. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that a panel of the Court of Appeals is bound by a prior decision of another panel of the same Court addressing the same question of law, but in a different case).

This conclusion, and our reading of *Glenn-Robinson*, comports with our Supreme Court's decision in *Craig*. There, our Supreme Court held that the existence of a state common law action that would generally serve as an "adequate remedy at state law" does not foreclose a plaintiff's claims arising directly under our State constitution where "governmental immunity stands as an absolute bar" to that state common law claim. *Craig*, 363 N.C. at 340, 678 S.E.2d at 355. Interpreting its prior holding that governmental immunity may not "stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the [North Carolina Constitution's] Declaration of Rights," *Corum*, 330 N.C. at 785-86, 413 S.E.2d at 291, the Supreme Court reasoned that a holding otherwise—that a common law claim absolutely barred by governmental immunity is an adequate remedy and warrants dismissal of state constitutional claims—would violate its holding in *Corum* and allow governmental immunity to effectively block a state constitutional claim. *Craig*, 363 N.C. at 338, 678 S.E.2d at 354. Thus, the Supreme Court concluded in *Craig* that a state common law claim absolutely barred by governmental immunity is not an adequate state remedy. *Id.* at 340, 678 S.E.2d at 355. In this case, because we have held that Wilcox's claims are not, as a matter of law, barred by public official immunity, the precise question is whether a state common law claim that *may*, at trial, ultimately fail based on a defense of public official immunity is an adequate remedy. The answer to this question can be found in the language used by the Supreme Court in *Craig*.

Our Supreme Court stated in *Craig* that an adequate remedy must give the plaintiff "at least the *opportunity* to enter the courthouse doors and present his claim" and must "provide the *possibility* of relief under the circumstances." *Id.* at 339-40, 678 S.E.2d at 355 (emphasis added). Thus, adequacy is found not in success, but in

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chance. Further, when discussing the *inadequacy* of the remedy in that case, the Supreme Court used the language of impossibility, noting that governmental immunity stood as “an absolute bar” to the plaintiff’s claim, “entirely” and “automatically” precluded recovery, and made relief “impossible.” *Id.* at 340-41, 678 S.E.2d at 355-56. As we have concluded that there is a genuine issue of material fact as to the applicability of public official immunity, it follows that Wilcox still has a chance to obtain relief and that her claims against the Individual Defendants in their individual capacities are not absolutely, entirely, or automatically precluded. Therefore, because the Supreme Court’s decision in *Craig* indicates that such a possibility warrants a finding of adequacy, we conclude that Wilcox’s claims against the Individual Defendants in their individual capacities serve as an adequate remedy.⁷

Furthermore, like governmental immunity, public official immunity is immunity from suit, not just from liability. *Blevins v. Denny*, 114 N.C. App. 766, 769, 443 S.E.2d 354, 355 (1994). As such, like governmental immunity, public official immunity is “effectively lost” when that public official is forced to go to trial. *Id.* (quoting *Corum v. Univ. of N.C.*, 97 N.C. App. 527, 531-32, 389 S.E.2d 596, 598 (1990), *aff’d in part; rev’d in part on other grounds*, *Corum*, *supra*). So while the Individual Defendants have not lost their ability to assert the immunity defense at trial, the normal effect of the immunity — to deny a plaintiff the opportunity to present her claim — is lost. As this “effectively lost” immunity defense is not operating to prevent Wilcox from presenting her claim, but only as a usual affirmative defense, it cannot be said that the Individual Defendants’ assertion of the public official immunity defense entirely precludes suit and renders Wilcox’s common law claims inadequate. *Cf. Craig*, 363 N.C. at 340, 678 S.E.2d at 355 (Adequacy does not depend on whether “plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case.” (emphasis added)).

Although, as concluded *supra*, Wilcox has a remedy alternative to her state constitutional claims in that she may pursue her common law claims against the Individual Defendants in their individual

7. We note that in *Craig*, the plaintiff also filed individual-capacity claims against a defendant, which were dismissed early in the proceedings (based on public official immunity, according to the appellate briefs in that case) and were not appealed by the plaintiff. Though this fact raises a question as to the adequacy of an individual-capacity state common law claim preliminarily dismissed (and potentially absolutely precluded) on grounds of public official immunity, it does not alter our conclusion in this case, as we find Wilcox’s *possibility* of relief here dispositive.

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capacities, Wilcox contends that this remedy is inadequate because her claims under the state constitution—which she contends seek redress of the violation of her right “to be free from seizure by the use of excessive or unreasonable force”—are different from her common law causes of action in that the only individual-capacity claims she may assert are “subjective bad motive” claims for intentional torts. This contention is premised on Wilcox’s misapprehension of the effect of public official immunity on her individual-capacity claims, specifically, that the Individual Defendants’ assertion of public official immunity leaves Wilcox “[unable] to sue the [Individual Defendants] for negligent use of unreasonable force.”

Although this Court has previously stated that, pursuant to the public official immunity doctrine, public officials cannot be held liable for “mere negligence,” *see, e.g., Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990), that holding simply means that “a public official sued individually is not liable for ‘mere negligence’—because such negligence *standing alone*, is insufficient to support the ‘piercing’ [] of the cloak of official immunity.” *Epps*, 122 N.C. App. 206-07, 468 S.E.2d at 852-53 (emphasis in original). However, once the “cloak of official immunity” has been pierced—by a showing that the defendant acted maliciously, corruptly, or beyond his duty—the defendant “is not entitled to [immunity] protection on account of his office” and he “is then liable for simple negligence” and “subject to the standard liabilities of a tortfeasor.” *Id.* at 205-06, 468 S.E.2d at 852. Thus, Wilcox is incorrect regarding her inability to sue the Individual Defendants for negligence; so long as she can also satisfy her burden of showing that the Individual Defendants acted maliciously, Wilcox can assert claims against the Individual Defendants in their individual capacities for negligent use of unreasonable force. *See id.*; *see also Prior*, 143 N.C. App. at 619, 550 S.E.2d at 171 (noting that a plaintiff’s claims against law enforcement officers for negligent use of excessive force can be maintained against officers in their individual capacities if that plaintiff “brings forth evidence sufficient to ‘pierce the cloak of official immunity’ ”).

Wilcox goes on to argue, however, that such a remedy is not an adequate alternative to her state constitutional claims because it requires her to prove, in addition to the elements of her common law tort claim, that the Individual Defendants acted with a “subjective bad motive,” or malice. This heightened burden, Wilcox argues, warrants a conclusion that her remedy is inadequate. We disagree.

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Initially, we note that the imposition of an additional “element” to be proved by Wilcox does not impact her chance or opportunity to obtain relief. And even if, as Wilcox suggests, that imposition makes it less likely that Wilcox’s claims will succeed, it does not make relief an impossibility. Indeed, we have already held that summary judgment is inappropriate because there is a genuine issue of material fact as to whether malice exists in this case, which holding itself implicitly indicates that there is at least a possibility that a jury could find in Wilcox’s favor on the issue. *See Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 165-66, 458 S.E.2d 30, 32 (the inquiry on summary judgment “unavoidably asks . . . whether there is evidence upon which a jury can properly proceed to find a verdict for the party producing it” (bracket and internal quotation marks omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202 (1986))), *disc. review denied*, 341 N.C. 652, 462 S.E.2d 517 (1995). Further, and more importantly, this Court has already rejected a similar argument in a similar case, holding that a remedy is still an adequate alternative to state constitutional claims where the plaintiff must show that the defendant acted with malice, despite the fact that “such a showing would require more evidence.” *Rousselo v. Starling*, 128 N.C. App. 439, 448-49, 495 S.E.2d 725, 731-32, *disc. review denied*, 348 N.C. 74, 505 S.E.2d 876 (1998). As we are bound by this previous decision, we must conclude that Wilcox’s remedy in this case is adequate despite the fact that she must prove malice in addition to the elements of her common law cause of action for negligent use of excessive force.

Based on the foregoing, we hold that Wilcox has an adequate state remedy such that her claims arising directly under the North Carolina Constitution were properly dismissed by the trial court. Thus, the trial court did not err in granting Defendants’ motion for summary judgment on Wilcox’s state constitutional claims.

The trial court’s order granting summary judgment for Defendants on Wilcox’s state constitutional claims is affirmed. The trial court’s order denying summary judgment for Defendants on Wilcox’s tort claims against officers Gonce, Hogan, and Intveld in their individual capacities is affirmed. The trial court’s order denying summary judgment on Wilcox’s tort claims against Chief Hogan in his individual capacity is reversed, and we remand that portion of the case to the trial court for entry of summary judgment for Chief Hogan.

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AFFIRMED in part; REVERSED and REMANDED in part.

Judge THIGPEN concurs.

Judge BRYANT concurs in the result.

TERRY WAYNE WOOD, PLAINTIFF v. JEREMY NUNNERY, ET AL., DEFENDANTS

No. COA11-750

(Filed 7 August 2012)

1. Accord and Satisfaction—personal injury—no credit for payments to clerk’s office

The trial court erred by declaring that the judgment entered against defendant in a personal injury case had been satisfied based on the payments of State Farm and Firemen’s Insurance Company (Firemen’s). Defendant was not entitled to a credit for payments made by Firemen’s into the office of the clerk of superior court. On remand, the trial court may consider whether defendant was entitled to additional credits against the judgment, other than the \$30,000 paid by State Farm.

2. Discovery—motion to compel production—insurance policy—motion to compel disclosure—waiver of subrogation rights

The trial court did not err by denying plaintiff’s motion to compel production of Firemen’s Insurance Company’s (Firemen’s) insurance policy and to compel disclosure of whether Firemen’s agreed to waive its subrogation rights because it was a matter for resolution between Firemen’s and defendant, and was of no concern to plaintiff.

Appeal by plaintiff from order entered 29 December 2010 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2012.

Maynard & Harris, Attorneys at Law, PLLC by C. Douglas Maynard, Jr. for plaintiff-appellant Terry Wayne Wood.

Bennett & Guthrie, P.L.L.C. by Rodney A. Guthrie and Roberta King Latham for defendant-appellee Jeremy Nunnery.

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Horton Henry & Halvorsen, P.L.L.C. by R. Shane Walker for defendant-appellee Firemen's Insurance Company of Washington, D.C.

STEELMAN, Judge.

The trial court erred in declaring that the judgment entered against defendant in a personal injury case had been satisfied.

I. Factual and Procedural History

On 10 May 2006, Terry Wayne Wood (plaintiff) was injured in an automobile accident in Harnett County as a result of the negligence of Jeremy Nunnery (defendant). On 30 April 2009, plaintiff filed a complaint against defendant, North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau), and Firemen's Insurance Company of Washington, D.C. (Firemen's).

Farm Bureau was dismissed from the action and is not a party to this appeal. Firemen's is the underinsured motorist carrier for plaintiff's employer.¹ Defendant was insured at the time of the accident by State Farm Mutual Automobile Insurance Company (State Farm). On 26 May 2009, defendant filed an answer to the complaint. On 15 June 2009, Firemen's filed an answer to the complaint in its own name.

On 11 August 2010, a jury awarded plaintiff \$300,000 in damages for his personal injuries, against defendant. On 31 August 2010, the trial court entered a judgment directing that plaintiff recover damages in the amount of \$300,000.00 along with interest at the statutory rate of 8% from 30 April 2009 from defendant.² On 2 September 2010, State Farm paid its policy limit of \$30,000 into the office of the Forsyth County Clerk of Court. On 13 September 2010, Firemen's paid \$202,627.58 into the office of the Forsyth County Clerk of Court. Plaintiff had received workers' compensation benefits totaling more than \$148,000.00. The amount of the lien of plaintiff's workers' compensation carrier was reduced, by agreement, to \$50,000.00.

1. Apparently, plaintiff was operating a vehicle owned by his employer at the time of the accident. There is no dispute that Firemen's underinsured motorist policy is applicable to this case.

2. In accordance with N.C. Gen. Stat. § 24-5(b), the trial court awarded interest from the date of filing of the complaint. The judgment states that plaintiff "shall have and recover from Defendant Jeremy Nunnery compensatory damages in the amount of \$300,000.00, interest on the compensatory damages at the legal rate of 8% from April 30, 2009 until the Judgment is satisfied[.]"

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On 1 December 2010, defendant filed a motion for credit upon and satisfaction of the judgment and for Rule 11 sanctions against plaintiff's counsel. On 13 December 2010, plaintiff filed a response and moved for an order compelling Firemen's to divulge any agreement to waive subrogation rights and to produce the applicable insurance policy in effect on the date of the accident.

On 29 December 2010, the trial court entered an order declaring that the payments of \$30,000.00 by State Farm and \$202,627.58 by Firemen's paid into the office of the Clerk of Superior Court of Forsyth County constituted payment in full of the judgment and that the judgment was satisfied. The trial court denied defendant's motion for sanctions and plaintiff's motions.

Plaintiff appeals.

On appeal, Firemen's filed a brief that merely adopts the arguments of defendant and makes no independent arguments.

II. Satisfaction of Judgment

[1] In his first argument, plaintiff contends that the trial court erred in concluding that the payments of State Farm and Firemen's constituted satisfaction of the judgment entered against defendant. We agree.

The trial court held that the \$30,000.00 from State Farm, \$202,627.58 from Firemen's, and the net benefit of \$98,000.00 in workers' compensation benefits (\$148,000.00 less the reduced lien of \$50,000.00) constituted a recovery to the plaintiff of at least \$330,627.58. The trial court went on to hold that "the collective payments paid into the Office of the Clerk of Court of Forsyth County constitute full payment and satisfaction of the final Judgment entered herein." In making its ruling, the trial court cited to N.C. Gen. Stat. §§ 1-239, 20-279.21(b) and (e); *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854 (1989); *Austin v. Midgett*, 166 N.C. App. 740, 603 S.E.2d 855 (2004); and *Walker v. Penn National*, 168 N.C. App. 555, 608 S.E.2d 107 (2005).

A. Bases of Liability

We initially note that the trial court conflated the concepts of the amounts owed by defendant as the tortfeasor in this matter and the amount owed by Firemen's as an underinsured motorist carrier (UIM). Plaintiff instituted this action against defendant, seeking monetary damages for personal injuries proximately caused by the negligence of defendant. The jury found that plaintiff's injuries were

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proximately caused by the negligence of defendant and awarded damages to plaintiff of \$300,000.00. The trial court entered judgment against only defendant. This judgment was based upon defendant's negligence and was a tort recovery.

The liability of Firemen's is based in contract, not in tort. It is undisputed that Firemen's was the UIM carrier for the vehicle that plaintiff was operating at the time of the accident and that plaintiff was an insured under Firemen's UIM coverage. Firemen's was notified of the pendency of this action, was afforded an opportunity to participate in this litigation, and in fact did participate in the litigation. Plaintiff does not dispute that the \$202,627.58 paid by Firemen's was the correct computation of Firemen's liability to plaintiff under the UIM coverage of its policy.

Plaintiff's argument on appeal is that the computation of defendant's liability and the computation of Firemen's liability are two different calculations and that, while Firemen's contractual obligation under the UIM coverage has been discharged, defendant's tort liability has not been so discharged.

B. N.C. Gen. Stat. § 20-279.21

N.C. Gen. Stat. § 20-279.21 does not determine a defendant's responsibility to pay a judgment entered against him. N.C. Gen. Stat. § 20-279.21 is the principal statute governing automobile liability insurance policies in North Carolina, including minimum required policy amounts, uninsured motorist coverage, and underinsured motorist coverage. The provisions of this statute are deemed to be a part of every automobile insurance policy written in North Carolina and control over contrary provisions contained in such policies. *Corbett v. Smith*, 131 N.C. App. 327, 328-29, 507 S.E.2d 303, 304 (1998). Relevant provisions of this statute are as follows:

Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. . . .

Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the

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amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. . . .

In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer.

N.C. Gen. Stat. § 20-279.21(b)(4) (2011).

Since Firemen's paid \$202,627.58 into the office of the Clerk of Court for Forsyth County, and not to plaintiff directly, there would have been no "assignment" or subrogation receipt executed by plaintiff to Firemen's. However, under subsection (b) of this above-cited statute, Firemen's would be subrogated to plaintiff's right against defendant to the extent of its payment (\$202,627.58). Because of this statutory right of subrogation, defendant cannot be entitled to a credit against the judgment for payments made by Firemen's as a UIM carrier. Since no party has raised the issue of whether Firemen's is estopped from seeking subrogation from defendant by adopting defendant's brief, we do not address that issue.

We further hold that the trial court's reliance upon *Manning*, *Austin*, and *Walker* was misplaced. Plaintiff correctly notes that the issue in each of these cases was the computation of the amount owed by a UIM carrier to its insured. Defendant was not a UIM carrier. Therefore, these cases and the provisions of N.C. Gen. Stat. § 20-279.21 are not relevant to the issue in this case: whether defendant is entitled to a credit for payments made by Firemen's.

We hold that defendant is not entitled to a credit for payments made by Firemen's into the Office of the Clerk of Superior Court for Forsyth County.

C. N.C. Gen. Stat. § 1-239

"The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, in cash or by check, to the clerk of the court in which the same was rendered[.]" N.C. Gen. Stat. § 1-239 (2011).

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In this case, the judgment was entered only against defendant. It was not entered against Firemen's. By the plain language of N.C. Gen. Stat. § 1-239, defendant is responsible for satisfying the judgment entered against him.

The only payment to which defendant is entitled to a credit against the judgment is the \$30,000.00 paid by State Farm, defendant's liability insurance carrier. As noted above, defendant is not entitled to a credit for the \$202,627.58 paid by Firemen's.

III. Motion to Compel

[2] In his next argument, plaintiff contends that the trial court erred in denying plaintiff's motion to compel production of Firemen's insurance policy and to compel disclosure of whether Firemen's agreed to waive its subrogation rights. We disagree.

As stated above, Firemen's was subrogated to the extent of its payments to plaintiff to a portion of plaintiff's judgment against defendant. N.C. Gen. Stat. § 20-279.21(b)(4). The statute providing for this subrogation right would control over the policy provisions. Whether Firemen's agreed to waive its subrogation rights as to defendant is a matter for resolution between Firemen's and defendant and is of no concern to plaintiff. Plaintiff received the \$202,627.58 from Firemen's and has acknowledged the correctness of the amount of this payment.

We affirm the trial court's denial of plaintiff's motion to compel.

IV. Conclusion

The trial court erred in declaring that the judgment against defendant had been paid and satisfied in full. The portion of the trial court's order so declaring is vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion. At such a hearing, the trial court may consider whether defendant is entitled to additional credits against the judgment, other than the \$30,000.00 paid by State Farm.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

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

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NICOLE RENEE WRIGHT, PLAINTIFF v. ANTHONY LAVON WRIGHT, DEFENDANT

No. COA11-1511

(Filed 7 August 2012)

1. Divorce—equitable distribution—classification of benefits—line of duty disability benefits—analytic approach

The trial court erred in an equitable distribution case by awarding 37.5 percent of defendant husband's line of duty disability benefits to plaintiff wife. The trial court did not make a reasoned decision in classifying these benefits as a deferred compensation plan. The trial court's award was reversed and remanded with instructions for the trial court to make additional findings of fact using the analytic approach to justify its conclusion regarding the classification of the benefits.

2. Divorce—equitable distribution—classification—total permanent disability benefits—loss of earning capacity—separate property

The trial court erred in an equitable distribution case by awarding plaintiff wife 37.5 percent of defendant husband's total permanent disability benefits because these benefits were "disability benefits of the traditional type" and were intended to replace a loss of earning capacity. Thus, the trial court should have classified his total permanent disability benefits as separate property.

3. Divorce—equitable distribution—delayed judgment—no showing of prejudice

The trial court did not err by rendering its equitable distribution judgment twenty-one months after the last evidentiary hearing. Defendant made no showing that he was actually prejudiced by the trial court's delay.

Appeal by defendant from judgment of equitable distribution entered 26 July 2011 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 26 April 2012.

Nicole Renee Wright, attorney for plaintiff.

Matthew F. Ginn of Ginn & Link, attorney for defendant.

ELMORE, Judge.

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Anthony Lavon Wright (defendant) appeals from an equitable distribution judgment awarding, among other things, 37.5 percent of his line of duty disability payments and 37.5 percent of his total permanent disability payments to Nicole Renee Wright (plaintiff). After careful consideration, we affirm in part, and reverse and remand in part.

I. Background

Plaintiff and defendant were married on 21 September 2002, and they separated on 18 May 2008. During the duration of their marriage defendant was employed as a professional football player with the National Football League. He played for several teams including the Baltimore Ravens, the Dallas Cowboys, and the New York Giants.

Defendant sustained four significant injuries during his playing career. Three of those injuries occurred during his marriage to plaintiff. Defendant's fourth, and final, injury occurred after the parties had separated. As a result of these injuries, defendant retired from the league in 2008. At that time, he began receiving line of duty disability benefits. These benefits are paid to former players who suffer a football-related injury, and who are no longer able to participate in football activities. Defendant also applied for total permanent disability benefits. These benefits are paid to former players who suffer an injury which renders the player unable to sustain any type of employment, even employment unrelated to football.

On 15 May 2008, plaintiff filed a complaint requesting, in part, equitable distribution. Two evidentiary hearings were held on the issue of equitable distribution. The first hearing was held on 10 September 2009, and the second hearing was held on 2 October 2009. On 26 July 2011, the trial court entered a judgment of equitable distribution.

In that judgment, the trial court made several specific findings related to the line of duty disability benefits and the total permanent disability benefits. The trial court found that both benefits "notwithstanding their designation as 'disability' or something similar in this case, are not conventional disability programs. A conventional disability program is designed in anticipation of a full extended lifetime ability to work."

With regards to the line of duty disability benefits, the trial court found that they "are more analogous to a deferred compensation plan in an ordinary industry, [when] taking into consideration the fact that a career as a professional athlete in football is exceptionally brief,

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exceptionally lucrative, and exceptionally uncertain.” The trial court also found that the line of duty disability benefits “involve injuries that affect the person’s ability to play football, but do not necessarily prevent the person from working in a wide variety of other more ordinary and long-term professions.” Therefore, the line of duty disability benefits “are a form of extended or deferred benefit incurred during a very limited term of employment.” As such, they “may be appropriately considered as partially marital property, or in the alternative, a basis for an unequal distribution.” The trial court then determined that “three-quarters (75%) of these [benefits] were the results of injuries occurring during the parties['] marriage, based upon . . . 4 injuries . . . 3 of which occurred during the marriage. The 25% remainder would be separate property of [defendant].”

With regards to the total permanent disability benefits, the trial court found that they are “a long-term disability plan” which are “a separate private employment benefit of [defendant] which was partially purchased with . . . marital employment. Thus [they are] classified as partial marital property and distributed in the same manner as the [line of duty disability benefits].”

Accordingly, the trial court then ordered, in part, that 37.5 percent of both defendant’s line of duty disability benefits and total permanent disability benefits be distributed to plaintiff as marital property. Defendant now appeals.

II. Analysis

“A trial court is vested with wide discretion in family law cases, including equitable distribution cases.” *Cooper v. Cooper*, 143 N.C. App. 322, 324, 545 S.E.2d 775, 777 (2001) (quotations and citations omitted). “Accordingly, a trial court’s ruling in an equitable distribution award is entitled to great deference upon appellate review, and will be disturbed only if it is so arbitrary that [it] could not have been the result of a reasoned decision.” *Gagnon v. Gagnon*, 149 N.C. App. 194, 197, 560 S.E.2d 229, 231 (2002) (citations and quotations omitted).

A. Line of duty benefits

[1] Defendant first argues that the trial court erred in awarding 37.5 percent of his line of duty disability benefits to plaintiff. Specifically, defendant argues 1) that the trial court erred in finding these benefits to be more like a deferred compensation plan and 2) that in the alternative, the trial court erred in finding that three-fourths of the bene-

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fits were marital property, because his fourth, and final injury, which occurred after the date of separation, was the sole reason he was no longer employable in a football-related capacity. We agree.

“Our Supreme Court has adopted an analytic approach for classifying personal injury awards.” *Johnson v. Johnson*, 117 N.C. App. 410, 412, 450 S.E.2d 923, 925 (1994) (citation omitted). Under the analytic approach, “the portion of [a personal injury] award representing compensation for non-economic loss—i.e., personal suffering and disability—is the separate property of the injured spouse; the portion of an award representing compensation for economic loss . . . during the marriage . . . is marital property.” *Id.* (quotation omitted).

Similarly, employing the analytic approach to disability benefits requires the determination of “whether the benefits that [the] plaintiff received were truly disability benefits or were retirement benefits (compensation for economic loss).” *Id.* This Court has held that “‘disability retirement benefits’ which were intended to replace the recipient’s loss of earning capacity due to disability were the separate property of that spouse.” *Finkel v. Finkel*, 162 N.C. App. 344, 347, 590 S.E.2d 472, 474 (2004) (citation omitted).

In this case, defendant received line of duty disability benefits as part of his retirement plan. The line of duty disability benefits were provided to defendant because, “[d]uring his playing days[,] he . . . incurred a ‘substantial disablement arising out of NFL football activities.’ ”

However, the trial court found that defendant’s line of duty disability benefits were more like a deferred compensation plan and not a true disability benefit. The trial court reasoned that these benefits are paid to individuals whose injuries render them unable to continue to play football, but who may continue to work in other more “ordinary” professions. The trial court determined that the line of duty disability benefits were not intended to actually compensate defendant for a physical disability, given the “exceptionally brief, exceptionally lucrative, and exceptionally uncertain” duration of a professional football career. Therefore, the trial court concluded, “the disability programs in this case are a form of extended or deferred benefit incurred during a very limited term of employment.”

We are unable to find that the trial court made sufficient findings of fact showing an application of the analytic approach. “In assessing the status of disability benefits in equitable distribution actions, the analytic approach mandates the focus be directed at what is the

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nature of the wages being replaced.” *Finkel*, 162 N.C. App. at 348, 590 S.E.2d at 475. Therefore, rather than focusing generally on the nature of a career in football or the ability of a typical player to play football after an injury, the trial court’s findings of fact should have focused on “the nature of the wages being replaced” by the line of duty disability benefits in this particular case. The appropriate inquiry requires questions such as, whether the line of duty disability program compensates defendant for loss of earning capacity due to disability? Whether it compensates defendant for future economic loss? What facts specific to this case make defendant’s line of duty disability benefits similar or dissimilar to a deferred compensation plan? Do the benefits, or a portion of the benefits, compensate defendant for non-economic losses— i.e., personal suffering, injury, or disability?

Thus, we conclude that the trial court did not make a reasoned decision in classifying these benefits as a deferred compensation plan. Accordingly, we reverse the trial court’s award of 37.5 percent of these benefits to plaintiff, and remand the issue with instructions that the trial court make additional findings of fact using the analytic approach to justify its conclusion regarding the classification of the benefits.

B. Total permanent disability benefits

[2] Defendant next argues that the trial court erred in awarding plaintiff 37.5 percent of his total permanent disability benefits because these benefits are “disability benefits of the traditional type” and are intended to replace a loss of earning capacity. As a result, defendant contends that the trial court erred in failing to classify his total permanent disability benefits as separate property. We agree.

In *Johnson* we held that “disability benefits which truly compensate for disability are separate property.” 117 N.C. App. at 414, 450 S.E.2d at 926. There we noted that the benefits at issue were the plaintiff’s separate property because “no marital labor contributed to plaintiff’s acquisition of the disability retirement benefits[.]” and that “[the] [p]laintiff did not contribute money specifically to a disability fund.” *Id.* at 415, 450 S.E.2d at 927.

Here, the record shows that the total permanent disability benefits at issue are paid to individuals whose injuries “render[.] them unable to hold or sustain any type of employment, even non-football related employment.” Thus, it is clear from the record that the total permanent disability benefits were paid to defendant to compensate him for an actual physical disability, which rendered him wholly

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unable to secure any type of employment. As a result, under *Johnson*, these benefits would be classified as defendant's separate property. However, the trial court classified the benefits "as partial marital property" because it found that the benefits were "partially purchased with marital income and/or marital employment[.]" But, upon further review of the record, we conclude that it lacks any evidence showing that defendant's marital labor contributed to his acquisition of these benefits, or that defendant contributed money to acquire these benefits. As such, we are unable to conclude that the trial court made a reasoned decision in finding these benefits to be partial marital property. Accordingly, we reverse the trial court's award of 37.5 percent of these benefits to plaintiff, and we remand the issue for further proceedings.

C. Delay in judgment

[3] Finally, defendant argues that the trial court erred in rendering its equitable distribution judgment twenty-one months after the last evidentiary hearing. Specifically, defendant argues that the delay here requires the trial court to enter a new order after allowing the parties to offer additional evidence. We disagree.

Defendant directs our attention to this Court's ruling in *Wall v. Wall*, 140 N.C. App. 303, 314, 536 S.E.2d 647, 654 (2000). In *Wall*, the defendant argued that his due process rights under both the United States Constitution and the North Carolina Constitution were violated by a delay of nineteen months from the date of the trial to the entry of equitable distribution judgment. 140 N.C. App. at 313-14, 536 S.E.2d at 654. We concluded that "there is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment[.]" but that "a nineteen-month delay between the date of trial and the date of disposition. . . . [is] more than a *de minimis* delay, and requires that the trial court enter a new distribution order on remand." *Id.* at 314, 536 S.E.2d at 654.

However, subsequent to our ruling in *Wall* we addressed the same issue in *Britt v. Britt*, 168 N.C. App. 198, 606 S.E.2d 910 (2005). There, we determined that "*Wall* establishes a case-by-case inquiry as opposed to a bright line rule for determining whether the length of a delay is prejudicial." *Id.* at 202, 606 S.E.2d at 912. And that "since *Wall*, this Court has declined to reverse late-entered equitable distribution orders where the facts have revealed that the complaining party was not prejudiced by the delay." *Id.* We then found that "[i]n *Wall*, potential changes in the value of marital or divisible property

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between the hearing and entry of the equitable distribution order warranted additional consideration by the trial court.” *Id.* We then concluded that the plaintiff in *Britt* “made no argument that the circumstances that counseled in favor of reversing the order in *Wall* are present in the case *sub judice*.” *Id.*

Likewise, here on appeal defendant has made no showing that he was actually prejudiced by the trial court’s delay. He argues only that “both parties potentially could have benefited from further hearing given the passage of such a significant period of time.” While we strongly advise against lower courts allowing such a significant lapse of time to occur between the hearing date and the entry of order, we nonetheless conclude that the trial court did not err with regards to this issue.

III. Conclusion

In sum, we reverse the trial court’s award of 37.5 percent of defendant’s line of duty disability benefits to plaintiff and we reverse the trial court’s award of 37.5 percent of defendant’s total permanent disability benefits to plaintiff. We remand for further proceedings consistent with this opinion. Finally, we conclude that the trial court did not err in entering its judgment twenty-one months after the last evidentiary hearing on this matter, because defendant has failed to show that he was prejudiced by the delay.

Affirmed in part, reversed and remanded in part.

Judges GEER and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 AUGUST 2012)

ALLEN v. HBD INDUS., INC. No. 12-37-1	Indus. Comm. (198348)	Affirmed
BEGLEY v. BEGLEY. No. 11-1087-1	Lincoln (10CVD1054)	Reversed and Remanded
BOYNTON. v. McLAURIN No. 11-1089-1	Catawba (08CVS2501)	Affirmed in part; reversed and remanded in part
CABBS v. CABBS No. 11-1536-1	Mecklenburg (07CVD20611)	Affirmed
CAROLINA BEACH, LLC v. CARPENTER No. 11-1269-1	Mecklenburg (09CVS16767)	Dismissed
COUNTY OF DURHAM O/B/O WILKERSON v. DANISI No. 12-245-1	Durham (06CVD4792)	Remanded
FLORA v. FLORA No. 11-1600-1	Nash (09CVD2617)	Reversed and Remanded
GRANCRETE, INC. v. SSA COOPER, LLC No. 12-77-1	Wake (09CVS14559)	Dismissed
HAITHCOX v. FLYNT AMTEX, INC. No. 11-1568-1	Indus. Comm. (990094)	Affirmed
HAYWOOD BUILDERS SUPPLY CIOMPANY, INC. v. SCANLON No. 12-198-1	Haywood (11CVD294) (09JT65-68)	Reversed and Remanded
IN RE GRANDFATHER VISTAS LITIGATION No. 11-1139-1	Mecklenburg (08CVS27336) (09CVS18264)	Dismissed
IN THE MATTER OF C.H. and J.H. No. 12-1359-1	Iredell (07JA198) (07JA199)	Affirmed

<p>IN THE MATTER OF C.L.K.C. No. 12-94-1</p>	<p>Forsyth (11JB198)</p>	<p>Reversed and Remanded</p>
<p>IN THE MATTER OF D.B.G. No. 12-114-1</p>	<p>Stanly (11JB62)</p>	<p>Affirmed in part, reversed in part and remanded for a new dispositional hearing.</p>
<p>KING v. CAPITAL OF CARY No. 12-35-1</p>	<p>Indus. Comm. (W55368)</p>	<p>Affirmed</p>
<p>LAND, et al v. LAND No. 11-1027-1</p>	<p>Guilford (05CVS11688)</p>	<p>No Error</p>
<p>NEW PRIME, INC. v. HARRIS TRANSPORT COMPANY No. 12-271-1</p>	<p>Union (08CVS1974)</p>	<p>Affirmed</p>
<p>NEWSOME v. NEWSOME No. 12-10-1</p>	<p>Alamance (08CVD1982)</p>	<p>Affirmed</p>
<p>RUSHING v. BARRON No. 11-1471-1</p>	<p>Burke (08CVS1269)</p>	<p>Affirmed</p>
<p>STATE v. ARMSTRONG No. 11-1564-1</p>	<p>Catawba (09CRS4196) (09CRS5754) (11CRS6057)</p>	<p>Affirmed</p>
<p>STATE v. BALLARD No. 12-159-1</p>	<p>Brunswick (09CRS56342) (09CRS56348) (09CRS56687)</p>	<p>No Error</p>
<p>STATE v. BANKERT No. 11-1523-1</p>	<p>Wake (07CRS4045)</p>	<p>No Error</p>
<p>STATE v. BECKELHEIMER No. 10-1055-1</p>	<p>Chatham (08CRS50128)</p>	<p>Affirmed</p>
<p>STATE v. BECKELHEIMER No. 10-203-2</p>	<p>Chatham (08CRS50128-29) (08CRS3773-74)</p>	<p>No Error</p>

STATE v. BOYD No. 11-1549-1	Lincoln (10CRS51391)	Dismissed in Part; No Error in Part
STATE v. CALDWELL No. 11-1599-1	Mecklenburg (08CRS225677-79) (08CRS71596)	No Error
STATE v. CLOUD No. 12-83-1	Mecklenburg (09CRS228164)	No Error
STATE v. COGDELL No. 11-1562-1	Johnston (09CRS4434) (09CRS53749)	No Error
STATE v. COLEMAN No. 11-1491-1	New Hanover (10CRS60048)	No Error
STATE v. DAVIS No. 12-21-1	Randolph (11CRS30)	Reversed and Remanded
STATE v. GAINES No. 12-31-1	Wayne (09CRS53944-45)	No Error
STATE v. HICKS No. 11-1165-1	Pitt (09CRS60047-48) (10CRS4863-68)	No Error
STATE v. HOLMES No. 12-293-1	Brunswick (10CRS3733-40)	Vacated and Remanded
STATE v. JOHNSON No. 12-87-1	Lincoln (10CRS51586) (11CRS1321)	No Error
STATE v. KREMSKI No. 12-30-1	Robeson (08CRS55710)	No Error in Part; No Prejudicial Error in Part
STATE v. MARSLENDER No. 11-1410-1	Onslow (10CRS327) (10CRS56881)	No error in part; no plain error in part
STATE v. NAUSHAD No. 12-207-1	Mecklenburg (08CRS248096-97)	No Error
STATE v. PENNIX No. 12-47-1	Guilford (11CRS24153) (11CRS66067) (11CRS66069)	No Error

STATE v. PHILLIPS No. 12-249-1	Chatham (08CRS50085-86) (08CRS755-56)	No Error
STATE v. RIVERA No. 11-1209-1	Mecklenburg (09CRS235007-08) (09CRS235026-27)	Dismissed in Part, No Error in Part
STATE v. ROMERO No. 12-127-1	Johnston (10CRS56473)	No Error
STATE v. SILER No. 11-1230-1	Randolph (09CRS5826-30)	No Error
STATE v. STEWART No. 11-1512-1	Forsyth (08CRS53528) (08CRS9718) (08CRS9726) (08CRS9727)	No Error
STATE v. VESTER No. 11-1587-1	Franklin (10CRS50965) (10CRS50966) (10CRS50969) (11CRS110)	No Error
STATE v. WHISENANT No. 11-1519-1	Catawba (09CRS56222)	No Error in part; reversed in part
STATE v. WISCHHUSEN No. 12-188-1	Wake (10CRS4684)	No Error; remanded for correction of a clerical error.
STATE v. WONG No. 11-994-1	Catawba (09CRS5848-53)	No prejudicial error
SYNOVUS BANK v. CNTY. OF HENDERSON No. 11-1601-1	Henderson (10CVS1008)	Affirmed in part, reversed and remanded in part.
TARRANT v. HUDSON No. 11-1311-1	Wake (10CVS2541)	Affirmed
THE FISHER HOUS. COMPANIES, INC. v. HENDRICKS No. 12-120-1	Edgecombe (09CVS96)	Affirmed
WASHINGTON v. MAHBUBA No. 11-1199-1	Forsyth (08CVS9006)	Affirmed in part; dismissed in part

BRIDGES v. PARRISH

[222 N.C. App. 320 (2012)]

CATRYN DENISE BRIDGES, PLAINTIFF V. HARVEY S. PARRISH AND
BARBARA B. PARRISH, DEFENDANTS

No. COA12-181

(Filed 21 August 2012)

1. Negligence—parents enabling son—former girlfriend shot—active course of conduct—claim not stated

The trial court correctly dismissed a negligence claim pursuant to N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff was shot by defendants' son after plaintiff attempted to end her relationship with him. Plaintiff alleged that defendants owed her a duty because they engaged in an active course of conduct that created a risk of harm to her by providing their son with assistance, downplaying his behavior, and not securing their firearms. Plaintiff did not allege how her harm was the reasonably foreseeable result of defendants' conduct or that defendants were in any way aware that their conduct would cause their son to act violently.

2. Firearms and Other Weapons—negligent entrustment—duty to secure

The trial court did not err by dismissing plaintiff's claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff alleged that defendants were negligent in not securing their firearms from their son, who shot plaintiff after she attempted to end their relationship. *Belk v. Boyce*, 263 N.C. 24, was distinguished because it found a duty based on defendant's use of a firearm rather than its storage, and involved a defendant who caused harm directly rather than through a third party. North Carolina courts have not recognized a duty to secure firearms on common law principles.

3. Negligence—entrustment of firearm—no consent to use—harm not foreseeable

The trial court did not err by granting a Rule 12(b)(6) dismissal of plaintiff's negligence claim where plaintiff alleged that defendants negligently entrusted their firearm to their son, who drove to plaintiff's workplace and shot her. Plaintiff did not allege that defendants expressly or impliedly consented to their son's use of the handgun and could not have foreseen that their son's possession of the gun would cause plaintiff's harm.

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4. Appeal and Error—brief—no substantive argument

Plaintiff did not preserve for appellate review the question of whether defendants were liable to plaintiff for a shooting by their son using their truck where plaintiff alluded to the theory in the “Issues Presented” section of the brief but did not support it with any substantive arguments. Moreover, negligent entrustment was not a cause of plaintiffs harm.

Judge GEER concurring in part and dissenting in part.

Appeal by plaintiff from order entered 3 November 2011 by Judge Thomas D. Haigwood in Johnston County Superior Court. Heard in the Court of Appeals 6 June 2012.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen, for plaintiff-appellant.

Poyner Spruill LLP, by Steven B. Epstein, for defendants-appellees.

HUNTER, Robert C., Judge.

Catryn Denise Bridges (“plaintiff”) appeals the order granting defendants Harvey and Barbara Parrish’s (collectively “defendants’ ” or individually “Harvey’s” and “Barbara’s”) motion to dismiss entered 3 November 2011 by Judge Thomas D. Haigwood in Johnston County Superior Court. On appeal, plaintiff argues that she stated a negligence claim upon which relief could be granted.

After careful review, we affirm the trial court’s order granting defendants’ motion to dismiss.

Background

Plaintiff made the following allegations in her complaint. Lyle Bernie Parrish (“Bernie”), defendants’ son, was 52 years old at the time of the incident that gave rise to plaintiff’s cause of action. He lived in a building that was owned, maintained, and controlled by defendants. Bernie has been charged with a wide array of crimes throughout his adult life, including numerous drug and weapon charges. Bernie also exhibited a pattern of violent behavior toward women. Specifically, plaintiff contends Bernie hurt former wives and girlfriends. Defendants were aware of Bernie’s criminal history and violent conduct toward women.

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Plaintiff and Bernie began a romantic relationship shortly after they met in April 2010. Plaintiff met defendants multiple times, and defendants were aware of plaintiff's relationship with their son. Defendants did not inform plaintiff of their son's past violent behavior.

Plaintiff claims that beginning in the year 2000, defendants took it upon themselves to prevent Bernie from continuing any unlawful conduct by providing him with lodging, financial assistance, guidance, and advice. However, Bernie was charged in 2007 with first degree kidnapping, assault with a deadly weapon with intent to kill or inflict serious injury, and possession of a firearm by a felon. Defendants were aware of these charges and did not reveal them to plaintiff.

Plaintiff ended her relationship with Bernie in early November 2010 after Bernie engaged in "controlling, accusatory, and risky" behavior. Plaintiff contends Barbara assured her that Bernie was not a threat. At that time, neither defendant informed plaintiff of their son's violent history.

In mid-January 2011, plaintiff claims she agreed to see Bernie again "from time to time." On or about 7 March 2011, Bernie called plaintiff and accused her of seeing other men. At approximately 12:30 p.m. on 8 March 2011, Bernie drove defendants' red pickup truck to the office building where plaintiff worked. He shot plaintiff in the abdomen with a .38 caliber handgun, which was registered to Harvey, and was possessed and used by both defendants. Plaintiff was seriously injured as a result of the shooting.

Plaintiff filed a complaint against defendants in Johnston County Superior Court on 1 September 2011. Defendants filed a motion to dismiss, and a hearing was held on 31 October 2011 before Judge Thomas D. Haigwood. Judge Haigwood dismissed plaintiff's complaint with prejudice on 3 November 2011, concluding that plaintiff failed to state a claim upon which relief may be granted.

Plaintiff filed a notice of appeal to this Court on 2 December 2011.

Discussion

Plaintiff argues on appeal that the trial court erred in granting defendants' motion to dismiss the complaint for failure to state a claim of negligence upon which relief can be granted. Specifically, plaintiff asserts three theories by which defendants owed her a legal duty: (1) defendants engaged in an active course of conduct that created a foreseeable risk of harm to plaintiff; (2) defendants negligently

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failed to secure their firearms from Bernie; and (3) defendants negligently entrusted Bernie with the handgun and truck.¹ After careful review, we affirm the trial court's order.

“The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient.” *Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (quotation marks omitted). A complaint is legally insufficient if an insurmountable bar to recovery exists, such as “an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim.” *Id.*

This Court conducts a *de novo* review of motions to dismiss. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Plaintiff’s factual allegations in the complaint are to be treated as true on review. *Block v. Cnty. of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000).

In order for a claim of negligence to survive a motion to dismiss, the plaintiff must allege all of the following elements in the complaint: “1)[a] legal duty; 2) breach of that duty; 3) actual and proximate causation; and 4) injury.” *Mabrey v. Smith*, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186 (2001); *see also Sterner v. Penn*, 159 N.C.

1. In her reply brief, plaintiff also argues that defendants are liable for failing to prevent the harm by virtue of a “special relationship” existing between defendants and Bernie, whereby defendants would have a duty to control Bernie and protect plaintiff from his “dangerous propensities.” *King v. Durham Cnty. Mental Health Developmental Disabilities & Subst. Abuse Auth.*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774 (citing W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 56, at 383-85 (5th ed. 1984)), *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). Generally there “is no duty to protect others against harm from third persons” unless a “special relationship” exists. *Id.* Plaintiff waived the argument that a special relationship existed between defendants and Bernie because she failed to include it in her initial brief on appeal. *See Hardin v. KCS Intern., Inc.*, 199 N.C. App. 687, 707-08, 682 S.E.2d 726, 740 (2009). Assuming, *arguendo*, that plaintiff had argued a special relationship, we find that plaintiff’s argument is without merit because defendants lacked the control necessary to create a special relationship. *See Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 330-31, 626 S.E.2d 263, 269 (holding that an essential element of a special relationship is the ability and opportunity to control the third party), *rehearing denied*, 360 N.C. 546, 635 S.E.2d 58 (2006). The duties alleged in plaintiff’s initial brief and addressed in the opinion stem from defendants’ own conduct, not their relationship with Bernie.

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App. 626, 629, 583 S.E.2d 670, 673 (2003). The trial court did not specify which element or elements it deemed to be lacking in the complaint, but the arguments on appeal focus only on whether defendants owed plaintiff a duty. A claim of negligence necessarily fails if there is no legal duty owed to the plaintiff by the defendant. *See Sterner*, 159 N.C. App. at 629, 583 S.E.2d at 673; *see also Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555, 638 S.E.2d 260, 265 (2006) (“If no duty exists, there logically can be neither breach of duty nor liability.”).

Duty is defined as an “obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” *Davis v. N.C. Dep’t of Human Res.*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995) (quoting W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 30, at 164-65 (5th ed. 1984)), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996). Here, plaintiff contends that defendants owed her a legal duty because the harm she suffered was a foreseeable result of actions undertaken by defendants. Specifically plaintiff alleges that defendants owed her a legal duty based on their: (1) active course of conduct; (2) negligent storage of their guns; and (3) negligent entrustment. Therefore, the issue becomes whether, taking plaintiff’s allegations as true, she established a legal duty sufficient to plead a negligence claim upon which relief can be granted.

I. Active Course of Conduct

[1] First, plaintiff argues that defendants owed her a duty because they engaged in an active course of conduct that created a risk of harm to plaintiff. Specifically, plaintiff alleges that by providing Bernie with assistance and shelter, downplaying his behavior, and failing to secure their guns, defendants engaged in an active course of conduct that resulted in plaintiff’s harm. We disagree.

Generally, “[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.” *Council v. Dickerson’s Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951). “The duty of ordinary care is no more than a duty to act reasonably. The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable” *Carsanaro v. Colvin*, ___ N.C. App. ___, ___, 716 S.E.2d 40, 45 (2011) (quoting *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010)). Therefore, there is

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no legal duty to protect against the results of one's conduct that are "only remotely and slightly probable." *Winters v. Lee*, 115 N.C. App. 692, 696, 446 S.E.2d 123, 125 (quotation omitted), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 186 (1994); *see also Carsanaro*, ___ N.C. App. at ___, 716 S.E.2d at 45-46; *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 178 (1992); *James v. Charlotte-Mecklenberg Bd. of Educ.*, 60 N.C. App. 642, 648, 300 S.E.2d 21, 24 (1983).

In *Winters*, the defendant was not liable for loaning her car to her grandson, who used the car to drive to the plaintiff's house and stab the plaintiff 37 times. 115 N.C. App. at 693-97, 446 S.E.2d at 123-26. Even though the defendant knew her grandson was intoxicated, in an "emotionally unstable" state, and had harmed the plaintiff in the past, this Court held that the resulting attack was an unforeseeable result of the defendant's conduct. *Id.* Thus, because the harm was unforeseeable, this Court affirmed the trial court's dismissal of the complaint for failure to state a claim upon which relief could be granted. *Id.*

Here, plaintiff is not suing Bernie, the person who shot her, but defendants, based on the contention that she would not have been shot if they had not engaged in an active course of conduct by providing assistance to Bernie, "attempt[ing] to downplay [Bernie's] behavior," telling plaintiff he posed no threat, and failing to take steps to secure their firearms.² However, there is no allegation in the complaint, treated as true, that establishes "facts supporting any nexus of foreseeability between defendant[s'] [conduct] and plaintiff's subsequent injury." *Id.* at 697, 446 S.E.2d at 126. Here, like in *Winters*, plaintiff fails to establish how her harm was the reasonably foreseeable result of defendants' conduct of assisting Bernie, downplaying his behavior, or saying that he posed no threat. The complaint does not allege that any of Bernie's violent behavior was "in any way associated," *Id.* at 697, 446 S.E.2d at 126, with defendants' conduct in the past. Furthermore, as in *Winters*, the complaint does not indicate that defendants were "on notice," *Id.*, or in any way aware that their conduct would cause Bernie to act violently. Therefore, we cannot hold that defendants had the duty to guard against such an unforeseeable result of their actions.

Because the injury was not foreseeable, we find no duty imposed by defendants' active course of conduct.

2. Whether the negligent storage of firearms created a duty is discussed in section II, *infra*.

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II. Negligent Storage of Firearms

[2] Plaintiff next argues that defendants had a duty to secure their firearms from their son. We decline to recognize such a duty based on the facts of this case.

Plaintiff relies on *Belk v. Boyce*, 263 N.C. 24, 138 S.E.2d 789 (1964) to establish the basis of her argument. In *Belk*, the defendant fired several times in the direction of the plaintiff while trying to hit a stray dog that was on the defendant's land. 263 N.C. at 25, 138 S.E.2d at 790. One of the bullets struck the plaintiff, who then sued the defendant for negligence. *Id.* The Court, in finding the defendant liable, noted that “[i]t is often said that a very high degree of care is required from all persons using firearms in the immediate vicinity of others regardless of how lawful or innocent such use may be, or that more than ordinary care to prevent injury to others is required.” *Id.* at 31, 138 S.E.2d at 794 (internal quotation marks omitted) (emphasis added).

Although the Court added that “[p]ersons having possession and control over dangerous instrumentalities are under duty [sic] to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others,” plaintiff seems to ignore the context of the holding in attempting to use it as support for her theory of negligent storage. *Id.* *Belk* is distinguishable and inapposite because it found a duty based on the defendant's use of a firearm, not storage, and dealt with a defendant who caused harm directly, not through a third party. *Id.* at 25, 138 S.E.2d at 790.

The cases from other jurisdictions which have recognized a duty to secure firearms under general negligence principles, including those cited by plaintiff and the dissent, while persuasive, are not controlling. *See, e.g., Heck v. Stoffer*, 786 N.E.2d 265, 271 (Ind. 2003) (reversing a dismissal of a negligence action because the determination of whether the storage of a gun was negligent was a question for the jury); *Kuhns v. Brugger*, 135 A.2d 395, 409 (Pa. 1957) (holding that the defendant was under a duty to keep his pistol away from his young grandchild). Our Courts have not recognized a duty to secure firearms under common law principles, and we decline to do so based on the facts of this case.³ Therefore, plaintiff's argument is overruled.

3. We acknowledge that individuals must secure their firearms from minors living in the same residence under North Carolina law. *See* N.C. Gen. Stat. § 14-315.1 (2011).

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III. Negligent Entrustment

[3] Finally, plaintiff argues that in the alternative to negligent storage of firearms, defendants' duty is based on negligent entrustment of their handgun and truck to Bernie. We are not persuaded.

Almost all negligent entrustment cases in North Carolina involve automobiles, and the cause of action generally arises when "the owner of an automobile 'entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver' who is 'likely to cause injury to others in its use.'" *Swicegood v. Cooper*, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995) (quoting *Heath v. Kirkman*, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954); see also *Bogen v. Bogen*, 220 N.C. 648, 650, 18 S.E.2d 162, 163 (1942)); *Tart v. Martin*, 353 N.C. 252, 254, 540 S.E.2d 332, 334 (2000). "[T]he basis for the defendant's liability is not imputed negligence, but the independent and wrongful breach of duty in entrusting his automobile to one who he knows or should know is likely to cause injury." *Hutchens v. Hankins*, 63 N.C. App. 1, 23, 303 S.E.2d 584, 597 (emphasis omitted), *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

Entrustment, for the purposes of establishing a claim under this doctrine, requires consent from the defendant, either express or implied, for the third party to use the instrumentality in question. See *Hill v. West*, 189 N.C. App. 189, 193, 657 S.E.2d 694, 697 (2008) (holding that because evidence failed to show the defendants gave consent to drive the vehicle involved in the accident, summary judgment for the defendants in negligent entrustment action was proper); see also *Swicegood*, 341 N.C. at 179, 459 S.E.2d at 206 (noting that because the "plaintiff had given his son permission to *drive* the automobile on this occasion," he met the element of consent in a negligent entrustment suit) (emphasis added); *Lane v. Chatham*, 251 N.C. 400, 405, 111 S.E.2d 598, 603 (1959) ("Where parents entrust their nine-year old [sic] son with the possession *and use* of an air rifle . . . the parents are liable . . . and failed to exercise reasonable care to prohibit, restrict or supervise his *further use thereof*." (emphasis added)).

Although this Court has not had occasion to determine whether a defendant's consent to mere possession of an instrumentality rises to the level of entrustment, we have concluded "where a party did not give another permission to use the vehicle in the accident, our Courts do not appear to have applied the doctrine of negligent entrustment in a situation where the vehicle was *operated* without the owner's

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knowledge or consent.” *Hill*, 189 N.C. App. at 193, 657 S.E.2d at 697 (emphasis added). Additionally, the *Hill* Court noted that “[a]mong the necessary elements of a cause of action for negligent entrustment of a motor vehicle to an unlicensed operator is that the motor vehicle *be operated* with the consent or authorization of the entrustor[.]” *Id.* (emphasis added) (quoting Karen L. Ellmore, J.D., Annotation, *Negligent Entrustment of Motor Vehicle to Unlicensed Driver*, 55 A.L.R. 4th 1100, § 9 at 1119 (1987)).

Here, plaintiff alleges that “[o]n or before March 8, 2011, Bernie Parrish obtained possession of the aforementioned handgun. Alternatively, prior to March 8, 2011, [d]efendants were aware that Bernie Parrish had possession of their handgun, and . . . failed to take reasonable and/or prudent steps to have said handgun removed from his possession and control.” The complaint fails to allege that defendants, expressly or impliedly, entrusted the handgun’s “operation” to Bernie at any time. *Tart*, 353 N.C. at 254, 540 S.E.2d at 334. Nor does plaintiff allege that defendants ever gave Bernie “permission to use” the handgun or any other guns at any time. *Hill*, 189 N.C. at 193, 657 S.E.2d at 697. In fact, plaintiff acknowledges in her brief that “[i]t is not yet known exactly how Bernie obtained the firearm from [d]efendants[.]”

Because plaintiff failed to allege that defendants expressly or impliedly consented to the use of the handgun, their alleged conduct does not rise to the level of “entrustment” under North Carolina law. Additionally, as in *Winters*, defendants here could not have reasonably foreseen that Bernie’s possession of the gun would cause plaintiff’s harm. 115 N.C. App. at 697, 446 S.E.2d at 126. Therefore, defendants owed no duty under the theory of negligent entrustment of the handgun.

[4] Defendants are not liable to plaintiff under the theory of negligent entrustment of defendants’ truck because the entrustment of the truck was not a cause, proximate or actual, of plaintiff’s harm. See *Mabrey*, 144 N.C. App. at 122, 548 S.E.2d at 186 (holding that necessary elements of a cause of action for negligence are proximate and actual causation). Furthermore, because plaintiff merely alluded to this theory in the “Issue Presented” section of her brief but did not support it with any substantive arguments, it is deemed waived on appeal. See N.C.R. App. P. 28(a).

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Conclusion

Because we conclude plaintiff failed to establish that defendants owed her a duty, the trial court did not err in granting defendants' motion to dismiss for plaintiff's failure to state a claim of negligence upon which relief can be granted. Therefore, we affirm the trial court's order.

Affirmed.

Judge BEASLEY concurs.

Judge GEER concurs in part and dissents in part by separate opinion.

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

I concur with the majority opinion except for the claim for negligent storage of a firearm, which I believe may also encompass the claim for negligent entrustment of a firearm. Our courts have not yet had an opportunity to address such a negligence claim.

I am persuaded by the reasoning in the following cases from other jurisdictions recognizing a claim for negligent storage of a firearm under circumstances similar to those alleged in the complaint. *See Irons v. Cole*, 46 Conn. Supp. 1, 8-9, 734 A.2d 1052, 1056 (1998) (upholding verdict against parents for negligent storage and maintenance of gun in connection with use of gun by adult child who abused alcohol and was violent towards domestic partners); *Foster v. Arthur*, 519 So. 2d 1092, 1095 (Fla. Dist. Ct. App. 1988) (upholding judgment in favor of plaintiff when defendant knew that housemate was not legally allowed to possess or use firearm and that he had previously murdered one man and been involved in another shooting, but still allowed him to know she stored her firearm under her mattress); *Edmunds v. Cowan*, 192 Ga. App. 616, 618, 386 S.E.2d 39, 41 (1989) (reversing summary judgment on claim for negligent storage of firearm claim against parent for adult child's use of parent's firearm); *Estate of Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265, 266-67 (Ind. 2003) (reversing summary judgment entered on claim against parents for negligent storage of handgun used by adult child to kill police officer); *Jupin v. Kask*, 447 Mass. 141, 143, 849 N.E.2d 829, 832-33 (2006) (reversing summary judgment granted to homeowner on claim for negligent firearm storage when she allowed unsupervised access to property by person with known history of violence and mental instability).

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Defendants argue that even under the standard set out in *Heck* and *Jupin*, plaintiff has not stated a claim for relief. Each of those cases, however, involved motions for summary judgment and not a motion to dismiss. While plaintiff may or may not be able to make the showing found sufficient in those cases to defeat summary judgment, I believe that she has included sufficient allegations in her complaint to set forth a claim for negligent storage of a firearm. Consequently, I would adopt the reasoning of the above cases and reverse the trial court's order granting the motion to dismiss as to plaintiff's claim for negligent storage of a firearm.

JAMES D. CREED, PLAINTIFF-APPELLANT v. BRETT A. SMITH AND CAROLYN
JEANETTE WYATT, DEFENDANTS-APPELLEES

No. COA11-1469

(Filed 21 August 2012)

Insurance—exhaustion of liability limits—tender rather than payment—motion to compel arbitration

The trial court erred by denying plaintiff's motion to compel arbitration in an action arising from an automobile accident where the issue was whether Nationwide's (the insurer of the other driver) liability insurance was exhausted when plaintiff requested arbitration. Exhaustion occurs upon tender rather than payment.

Appeal by Plaintiff from order entered by Judge Timothy S. Kincaid in Superior Court, Catawba County. Heard in the Court of Appeals 22 May 2012.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh; and Ramsay Law Firm, P.A., by Martha L. Ramsay, for Plaintiff-Appellant.

Davis and Hamrick, L.L.P., by H. Lee Davis, Jr.; and Frazier, Hill & Fury, R.L.L.P., by Torin Lane Fury, for Unnamed Defendants-Appellees Liberty Mutual Insurance Company and Integon National Insurance Company.

Brown, Moore & Associates, PLLC, by Jon R. Moore; and White & Stradley, LLP, by J. David Stradley, for North Carolina Advocates for Justice, amicus curiae.

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McAngus, Goudelock & Courie, PLLC, by John P. Barringer and Jeffrey B. Kuykendal, for North Carolina Association of Defense Attorneys, amicus curiae.

McGEE, Judge.

James D. Creed (Plaintiff) filed a complaint against Brett A. Smith (Mr. Smith) and Carolyn Jeanette Wyatt (Defendants) on 30 November 2010 in Catawba County Superior Court. Plaintiff amended his complaint on 4 February 2011. Plaintiff's complaint alleged that Mr. Smith negligently caused a motor vehicle collision that occurred on 2 February 2008. Plaintiff's underinsured motorist (UIM) insurance carrier, Integon National Insurance Company (Integon), filed an answer on 8 April 2011. Plaintiff's employer's UIM insurance provider, Liberty Mutual Insurance Company (Liberty), filed an answer on 15 June 2011. Plaintiff filed a motion to compel arbitration between himself, Integon and Liberty on 29 June 2011. The trial court heard Plaintiff's motion on 1 August 2011, and entered an order denying Plaintiff's motion on 15 August 2011. Plaintiff appeals.

I. Factual Background

Plaintiff was driving a vehicle owned by his employer on 2 February 2008 when he was involved in a collision with Mr. Smith. The record on appeal shows that Mr. Smith was insured under a \$50,000.00 insurance policy from Nationwide Mutual Insurance Company (Nationwide). Plaintiff's employer held a \$1,000,000.00 policy with Liberty that provided UIM coverage to Plaintiff because Plaintiff was operating the vehicle "in the course and scope of his employment." Plaintiff additionally held a \$50,000.00 UIM policy with Integon that was also in effect at the time of the accident.

The provisions of the Liberty UIM policy indicated that Liberty would pay UIM coverage if (1) "[t]he limit of any applicable liability bonds or policies have been exhausted by payments of judgments or settlements; or" (2) if "[a] tentative settlement has been made between an 'insured' and the insurer" of an underinsured vehicle, Liberty "[has] been given prompt written notice of such tentative settlement[,] and Liberty "[a]dvance[s] payment to the 'insured' in an amount equal to the tentative settlement within 30 days after receipt of notification." The Liberty UIM policy includes an exclusion provision that precludes coverage for "[a]ny claim settled by the 'insured' or any legal representative of the 'insured' without [Liberty's] consent." This

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exclusion does not apply, however, to settlements reached in compliance with the provision requiring notice and advance payment.

Finally, Liberty's UIM policy includes an arbitration provision governing when the insured may demand arbitration. The policy states that if Liberty and the insured (1) "disagree whether the 'insured' is legally entitled to recover damages from the owner or driver of an 'uninsured motor vehicle,'" or (2) "do not agree as to the amount of damages that are recoverable by that 'insured,' then matter may be arbitrated." The insured may demand arbitration, and if the insured decides not to arbitrate, "[Liberty's] liability will be determined only in an action against [Liberty]."

Integon's UIM policy is substantively the same as Liberty's UIM policy as it pertains to the present case. Integon's UIM policy states that Integon will pay UIM coverage "only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements," unless Integon is (1) "given written notice in advance of settlement between an insured and the owner or operator of the underinsured vehicle[,] and (2) Integon "[c]onsent[s] to advance payment to the insured in the amount equal to the tentative settlement." Integon's exclusion provision precludes UIM coverage if the insured settles a claim against the underinsured driver without consent from Integon. However, the exclusion does not apply if the underinsured motorist and the liability insurer reach a settlement following written notice to Integon and Integon does not "advance payment to the insured in an amount equal to the tentative settlement within thirty days[.]" Integon's UIM policy also includes an arbitration provision which states if Integon and the insured disagree on "[w]hether that insured is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle or underinsured motor vehicle[,] or "[a]s to the amount of such damages[,] the insured may demand arbitration.

Defendants' counsel notified Plaintiff's counsel on 26 April 2011 that Nationwide had tendered its liability limits of \$50,000.00 in return for a covenant not to enforce judgment with Plaintiff. Plaintiff's counsel notified Liberty and Integon of the tender on 12 May 2011. Six days later, on 18 May 2011, Plaintiff requested binding arbitration with Liberty and Integon. Liberty advanced \$50,000.00 to Plaintiff's counsel on 9 June 2011 to preserve its subrogation rights, and Plaintiff's counsel returned Nationwide's \$50,000.00 payment. Plaintiff filed his "motion to compel binding arbitration and stay further proceedings" on 29 June 2011. The trial court denied Plaintiff's

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motion on 15 August 2011, finding that the UIM policies were not applicable because the liability insurer's policy had not been "exhausted" under N.C. Gen. Stat. § 20—279.21.

II. Issue on Appeal

The sole issue raised on appeal is whether the trial court erred by denying Plaintiff's motion to compel arbitration on the basis of a determination that Nationwide's liability insurance limits had not been "exhausted" for the purposes of N.C. Gen. Stat § 20-279.21 and the UIM insurance policies of Liberty and Integon.

III. Standard of Review

We consider *de novo* the issue of whether Plaintiff's motion to compel arbitration was properly dismissed. See *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) ("[A] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court."); see also *Register v. White*, 358 N.C. 691, 693, 599 S.E.2d 549, 552 (2004) ("Questions concerning the meaning of contractual provisions in an insurance policy are reviewed *de novo* on appeal.").

IV. Exhaustion of Liability Insurance

Plaintiff argues that the trial court erred by denying his motion to compel arbitration. Plaintiff contends that Nationwide's liability insurance was exhausted on 26 April 2011, meaning that Liberty's and Integon's UIM coverage was applicable when Plaintiff requested binding arbitration. Upon review of the relevant law, we find that Nationwide's liability insurance was exhausted on 26 April 2011, and that the trial court improperly dismissed Plaintiff's motion to compel arbitration.

N.C. Gen. Stat. § 20-279.21(b)(4) states the following:

Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid.

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N.C. Gen. Stat. § 20-279.21(b)(4) (2011). In *Register*, our Supreme Court unambiguously interpreted N.C. Gen. Stat. § 20-279.21(b)(4) to mean that “[e]xhaustion occurs when [a] liability carrier has tendered the limits of its policy in a settlement offer or in satisfaction of a judgment.” *Register*, 358 N.C. at 698, 599 S.E.2d at 555. In considering the meaning of the word “tender,” this Court has previously relied upon *Black’s Law Dictionary*, which defines “tender” as “[a]n unconditional offer of money or performance to satisfy a debt or obligation[.]” *Black’s Law Dictionary* 1479 (7th ed. 1999); see also *Morrison v. Public Serv. Co. of N.C.*, 182 N.C. App. 707, 710-11, 643 S.E.2d 58, 61-62 (2007).

Further, the record on appeal in *Register* shows that our Supreme Court intended to indicate that exhaustion occurs upon tender, rather than upon payment, of a liability insurer’s policy limit. In *Register*, the Supreme Court indicated that the “liability carrier, State Farm, tendered its liability limits of \$50,000.00 on 8 August 2001.” *Register*, 358 N.C. at 692, 599 S.E.2d at 551. Then, “[i]n a letter to Farm Bureau dated 24 September 2001, plaintiff demanded arbitration pursuant to the UIM provision in Mr. Register’s insurance policy.” *Id.* From a review of the record in *Register*, it appears that actual payment by the liability insurer did not occur until at least 8 October 2001, when the plaintiff signed a “Settlement Agreement and Covenant Not To Enforce Judgment,” which was “[f]or and in consideration of the sum of \$50,000.00, the receipt of which [thereby was] acknowledged.” Nonetheless, the trial court found that “plaintiff’s right to demand arbitration of her UIM claim could not have arisen prior to 8 August 2001, when defendant White’s insurance company tendered the full limits of its policy[.]” meaning that the “plaintiff’s 24 September 2001 demand for arbitration fell within the three-year ‘time-limit’ referenced in the policy[.]” *Register*, 358 N.C. at 701, 599 S.E.2d at 556. Had the Supreme Court in *Register* held that exhaustion had occurred upon payment of the liability policy rather than tender, the plaintiff’s 24 September 2001 demand for arbitration would have occurred before exhaustion and would have been untimely.

We are bound by our Supreme Court’s interpretation of N.C. Gen. Stat. § 20-279.21(b)(4) and we therefore hold that the limits of Nationwide’s liability policy were exhausted on 26 April 2011, when Nationwide tendered payment of \$50,000.00 to Plaintiff. Accordingly, Plaintiff’s 18 May 2011 written request for binding arbitration occurred at a time when Plaintiff’s right to UIM arbitration was available under both N.C. Gen. Stat. § 20-279.21 and under the terms of Liberty’s and Integon’s UIM policies.

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V. Commitment to Follow Supreme Court Interpretation

Defendants correctly point out that our Supreme Court has interpreted “exhaustion” differently in previous decisions. *See Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 396, 390 S.E.2d 150, 155 (1990) (finding that if an insurer “merely tenders its limits without obtaining a settlement of any claim for its insured, a strong argument can be made that it has neither ‘exhausted’ its policy limits nor fulfilled its fiduciary duty to discharge its policy obligations[.]”). Defendants also assert that the plain language of N.C. Gen. Stat. § 20-279.21(b)(4) uses the word “paid” rather than “tendered” to define when exhaustion occurs for the purpose of determining when UIM insurance policies apply. *See* N.C. Gen. Stat. § 20-279.21(b)(4) (“Exhaustion . . . is deemed to occur when either (a) the limits of the liability per claim have been *paid* upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been *paid*.” (emphasis added)).

Nonetheless, a straightforward application of the Supreme Court’s unambiguous language in *Register* clearly demonstrates that N.C. Gen. Stat. § 20-279.21(b)(4) should be interpreted to mean that “[e]xhaustion occurs when [a] liability carrier has tendered the limits of its policy in a settlement offer or in satisfaction of a judgment.” *Register*, 358 N.C. at 698, 599 S.E.2d at 555. “[I]t is not our prerogative to overrule or ignore clearly written decisions of our Supreme Court.” *Kinlaw v. Long Mfg.*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630, *rev’d on other grounds*, 298 N.C. 494, 259 S.E.2d 552 (1979); *see also Bray v. N.C. Dep’t of Crime Control and Pub. Safety*, 151 N.C. App. 281, 285, 564 S.E.2d 910, 913 (2002) (holding that it is not the prerogative of the North Carolina Court of Appeals to reconsider the North Carolina Supreme Court’s application of a gross negligence standard for an officer in pursuit) (citations omitted).

Finding that Nationwide’s policy was exhausted at the time of Plaintiff’s request for binding arbitration, this Court need not consider the additional issues presented by Plaintiff. In accordance with the UIM policies and N.C. Gen. Stat. § 20-279.21, exhaustion of Nationwide’s liability policy allowed plaintiff to “make a written demand for arbitration” to resolve a disagreement with the UIM insurers over Plaintiff’s legal entitlement to recover or the amount of damages recoverable. We find, therefore, that the trial court erred by denying Plaintiff’s motion to compel arbitration.

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Reversed.

Judges STEELMAN and ERVIN concur.

DELHAIZE AMERICA, INC., PLAINTIFF v. KENNETH R. LAY, SECRETARY OF REVENUE OF
THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA11-868

(Filed 21 August 2012)

1. Taxation—combined corporate earnings—changes in guidelines—no due process violation

The trial court did not err by concluding that defendant Secretary of Revenue did not violate plaintiff's procedural due process rights by forcing a combination of plaintiff and FL Food Lion, Inc., pursuant to N.C.G.S. § 105-130.6, for tax purposes. Plaintiff, formerly known as Food Lion, Inc., a North Carolina corporation, had restructured and formed a wholly-owned subsidiary, FLI Holding Corp., which housed a Florida corporation known as FL Food Lion, Inc. As a part of the restructuring, plaintiff formulated a strategy to reduce its North Carolina tax obligation by a circular movement of assets to Florida and the return of cash to North Carolina through fees. Defendant concluded that plaintiff's income should be combined with the income of FL Food Lion, Inc. to reflect plaintiff's true net earnings in North Carolina and plaintiff contended that its due process rights were violated by defendant's failure to provide fair notice of changes in the guidelines regarding the combination of corporations for taxation. That argument is not supported by the record; furthermore, the facts of the case distinguish it from *Federal Communications Commission v. Fox Television Stations, Inc.*, 183 L.Ed. 2d 234 (2012).

2. Appeal and Error—decision of one panel of Court of Appeals—binding on subsequent panels

Wal-Mart Stores East v. Hinton, 197 N.C. App. 30, has not been overturned and remains binding on subsequent panels of the Court of Appeals, despite plaintiff's argument that it misread N.C.G.S. § 105-130.6

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3. Constitutional Law—North Carolina—retroactive taxes—no violation

The issue of whether the Department of Revenue violated the North Carolina constitutional prohibition on retroactive taxation in deciding to combine the income of two corporations for tax purposes was controlled by *Wal-mart Stores East v. Hinton*, 197 N.C. App. 30, which concluded that there was no violation.

4. Taxation—corporations—restructuring—true earnings—economic substance analysis

The Business Court did not apply an economic substance analysis in its determination that the income of two corporations should be combined to determine true earnings for tax purposes. A statement by the Business Court that a corporate restructuring lacked economic substance to the contrary was not referred to in the Business Court's conclusion; moreover, any error by the Business Court in making the statement had no bearing on whether the Department of Revenue erred by combining the corporate incomes because the Department of Revenue did not apply an economic substance analysis.

5. Taxation—penalty—notice of change in definition

The trial court erred by not granting defendant's motion for summary judgment on the issue of whether plaintiff was entitled to a refund of a tax penalty. Contrary to the statements of the trial court, the record contained documents that put plaintiff on notice of the definition of true earnings. Moreover, there was no genuine issue of material fact as to whether the penalty was due.

Appeal by plaintiff and defendant from order entered 17 February 2011 by Special Superior Court Judge for Complex Business Cases, Ben F. Tennille, in Wake County Superior Court. Heard in the Court of Appeals 7 February 2012.

Hunton & Williams LLP, by Richard L. Wyatt, Jr., and Joseph P. Esposito, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Reid L. Phillips, and Smith Moore Leatherwood LLP, by James G. Exum, Jr., Allison O. Van Laningham, and L. Cooper Harrell, for plaintiff.

Roy Cooper, Attorney General, by Kay Linn Miller Hobart, Special Deputy Attorney General, for defendant.

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Andy Ellen, for North Carolina Retail Merchants Association, and Troutman Sanders LLP, by William G. Scoggin, for North Carolina Chamber of Commerce, amici curiae.

Alston & Bird LLP, by Jasper L. Cummings, Jr., for Amicus Council on State Taxation, amici curiae.

THIGPEN, Judge.

Delhaize America, Inc., (“Plaintiff”) filed a tax refund action seeking approximately \$10 million in corporate income taxes and penalties from the State of North Carolina. The trial court entered an order on summary judgment upholding the decision of the North Carolina Department of Revenue (“Defendant”) to combine Plaintiff and Plaintiff’s Florida-based subsidiary for purposes of taxation, but invalidating the penalty imposed by Defendant. Plaintiff argues primarily on appeal that the Department of Revenue did not provide fair notice of an alleged change in the definition of “true earnings[,]” such that the corporate combination and the penalty imposed violated Plaintiff’s procedural due process rights. Defendant argues on appeal that fair notice of the definition of “true earnings” was sufficient to satisfy procedural due process for both the combination and the penalty. We affirm the trial court’s order, in part, and reverse, in part.

The facts of this case are largely undisputed. Plaintiff, formerly known as Food Lion, Inc. (“Food Lion”), a corporation having its principal place of business in Salisbury, North Carolina, restructured itself to accommodate growth, beginning in 1996 and continuing through 2004. During this time, Food Lion formed a wholly-owned subsidiary, FLI Holding Corp., which acquired Kash n’ Karry Food Stores, Inc., a corporation operating retail grocery stores primarily in Florida. Food Lion also formed FL Food Lion, Inc., a Florida corporation housed under FLI Holding Corp.

As part of restructuring, Plaintiff—with the aid of its external auditor, Coopers & Lybrand—formulated a strategy to reduce its North Carolina tax obligation, called the “Vision Project.” Coopers & Lybrand proposed creating interrelated companies to shift income from high tax jurisdictions to low or no tax jurisdictions. Specifically, the Vision Project strategy relied upon three elements: (1) Plaintiff would transfer assets to a related company not principally located in North Carolina; (2) Plaintiff would pay fees and royalties to the related company for use of the assets, which would create a tax deduction in North Carolina; and (3) the company would return cash to Plaintiff in

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the form of tax free dividends. By implementing this strategy, Coopers & Lybrand estimated that Plaintiff's North Carolina annual income tax liability would be reduced by \$9,579,848.00. Coopers & Lybrand also estimated that Plaintiff could save between \$60 million and \$75 million in North Carolina tax obligations over a five year period.

In December 1997, Plaintiff's board of directors approved the Vision Project, which was presented to the board of directors as the "State Tax Planning Project." After the Vision Project's approval and in accordance therewith, Plaintiff transferred assets to FL Food Lion, Inc., which was located in Florida. The transferred assets included, but were not limited to, the following: (1) ownership and operation of Food Lion stores located in Florida; (2) all Food Lion employees in Florida; (3) certain employees located in Salisbury, North Carolina; (4) services relating to Food Lion's national brand; and (5) its rights and interest in its private label trademarks and the Food Lion name and logo. Plaintiff conferred with Coopers & Lybrand to determine the appropriate amount that FL Food Lion, Inc., should charge its corporate grandparent for services, and Coopers & Lybrand compiled a range of fees that it believed complied with an arm's length standard. FL Food Lion, Inc., then charged Plaintiff fees for services, in accordance with the Vision Project. The cash flow between the entities was circular, and all of the royalties and fees Plaintiff paid to FL Food Lion, Inc., came back to Plaintiff in the form of tax free dividends. The payments for services Plaintiff made to FL Food Lion, Inc., and the dividend payments FL Food Lion, Inc., made to Plaintiff, had no impact on Plaintiff's actual cash flow. An objective of the Vision Project, according to a letter from Plaintiff's chief financial officer to the board of directors, was "the reduction of Food Lion's state income tax liability."

Plaintiff and FL Food Lion, Inc., did not file a consolidated tax return.¹ Plaintiff filed a North Carolina corporation tax return for the tax year ending 31 December 2000, reporting \$2,565,741,505.00 in total net State income. Plaintiff reported that \$25,485,927.00 was business income subject to apportionment. FL Food Lion, Inc., also filed a North Carolina corporation tax return for the same year, reporting \$271,390,464.00 in total net State income and \$271,390,464.00 as busi-

1. The Revenue Act forbade related corporations from filing a consolidated return with the Secretary of Revenue, unless specifically directed to do so in writing by the Secretary. N.C. Gen. Stat. § 105-130.14 (2009). N.C. Gen. Stat. § 105-130.14 was amended by 2010 N.C. Sess. Laws ch. 31, § 31.10.(e).

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ness income subject to apportionment. Taxable income for North Carolina corporate income tax purposes is determined by multiplying the income subject to apportionment by the apportionment factor. The apportionment factor applied to business income subject to apportionment for Plaintiff was 41.6511%; however, the apportionment factor applied to business income subject to apportionment for Florida-based FL Food Lion, Inc., was significantly lower—15.0839%. After this calculation, Plaintiff's business income allocated to North Carolina was \$10,615,169.00. The business income of FL Food Lion, Inc., allocated to North Carolina was \$40,936,266.00. Plaintiff also claimed a tax credit for creating new jobs in North Carolina.

The North Carolina Department of Revenue ("the Department") conducted an audit of Plaintiff for the tax years 1998 through 2000. On 28 September 2004, following Plaintiff's audit, the Department concluded that Plaintiff's income should be combined with the income of FL Food Lion, Inc., to reflect Plaintiff's true net earnings in North Carolina, and the Department issued a Notice of Corporate Income Tax Assessment of additional tax, with interest, against Plaintiff.² The Department also imposed a penalty upon Plaintiff pursuant to N.C. Gen. Stat. § 105-236(5).

On 20 March 2006, Plaintiff paid the Department \$4,387,164.00 in additional income taxes for the 2000 tax year, \$1,289,068.00 in interest, and \$1,188,088.00 in penalties. However, Plaintiff formally demanded a refund of the additional income tax, interest, and penalties in writing within the applicable protest period. The Secretary of Revenue, however, did not allow the refund.

On 28 December 2007, Plaintiff filed a complaint against the Secretary of Revenue alleging violations of N.C. Gen. Stat. § 105-130.6, N.C. Gen. Stat. § 105-130.16(b), the commerce clause, and due process. Plaintiff also alleged that by determining the assessment against Plaintiff, Defendant exercised an unconstitutional delegation of legislative power, imposed an unconstitutional retrospective taxation, violated the constitutional rule requiring uniformity, deprived Plaintiff of its constitutional rights pursuant to 42 U.S.C. § 1983, and violated the North Carolina Administrative Procedures Act. Plaintiff prayed for a refund of the amount of additional income tax, interest, and penalties paid by Plaintiff as a result of the audit and assessment of the Department.

2. Plaintiff was assessed approximately \$20.6 million in additional tax, interest, and penalties for the tax years 1998 through 2000, which included approximately \$6.8 million for the tax year 2000.

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Both parties filed motions for summary judgment on 20 April 2010. In an order entered 17 February 2011, the Court granted partial summary judgment for both parties. Specifically, the Court granted Defendant's motion on the issue of combination of Plaintiff and FL Food Lion, Inc., and the resulting additional taxes and interest. However, the Court granted Plaintiff's motion for a refund of the penalties, concluding that the Department's assessment of the penalty against Plaintiff was "unfair and . . . a violation of the Fourteenth Amendment's procedural due process protections." The Court further concluded that requiring Plaintiff to "pay this punitive penalty . . . [was] a violation of the power of taxation under Article V, Section 2(1) of the North Carolina Constitution." The Business Court also concluded the Secretary of Revenue abused his discretion in ordering the twenty-five percent penalty. We affirm in part and reverse in part.

From this order, both Plaintiff and Defendant appeal.

I. Standard of Review

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "A defendant may show entitlement to summary judgment by: (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 166, 684 S.E.2d 41, 46 (2009) (quotation omitted).

"An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law." *Id.* at 166, 684 S.E.2d at 46. (citation omitted). "We review a trial court's order granting or denying summary judgment *de novo*." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (quotation omitted). Our review, however, "is necessarily limited to whether the

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trial court's conclusions as to the[] questions of law were correct ones." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987).

This Court in *Wal-mart Stores East v. Hinton*, 197 N.C. App. 30, 50, 676 S.E.2d 634, 649 (2009), held that N.C. Gen. Stat. § 105-130.6 granted the Secretary of Revenue "discretionary authority to force combination of entities on a finding that a report does not disclose true earnings in North Carolina." Discretionary decisions of administrative agencies will not be disturbed by this Court absent an abuse of discretion. *Williams v. Burlington Indus.*, 318 N.C. 441, 446, 349 S.E.2d 842, 845 (1986).

II. Plaintiff's Appeal

A. Procedural Due Process

[1] In Plaintiff's first argument on appeal, it contends the Department of Revenue violated Plaintiff's protections of procedural due process by failing to provide fair notice of changes in its guidelines regarding combination of corporations for taxation pursuant to N.C. Gen. Stat. § 105-130.6³; concealing the new approach from taxpayers and auditors; and applying the new approach retroactively. Plaintiff contends the trial court erred in failing to grant Plaintiff summary judgment on this issue. We disagree.

The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." A similar requirement, that no "State [shall] deprive any person of life, liberty, or property without due process of law" is also comprised in the Fourteenth Amendment to the federal constitution. The Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. I, § 19, "is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quotation omitted).

"Procedural due process restricts governmental actions and decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321,

3. Subsequent to the *Wal-Mart* decision, the North Carolina General Assembly repealed N.C. Gen. Stat. § 105-130.6, effective for taxable years beginning on or after January 1, 2012, and amended the applicable revenue statutes to address the issue presented in this appeal. See N.C. Gen. Stat. §§ 105-130.6, 105-236(a)(5)(f) (2011); 2010 N.C. Sess. Laws 31.10(b), (d).

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507 S.E.2d 272, 277 (1998) (quotation omitted). “The fundamental premise of procedural due process protection is notice and the opportunity to be heard.” *Peace*, 349 N.C. at 322, 507 S.E.2d at 278 (citation omitted). More precisely, “[a]t a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard.” *In re Lamm*, 116 N.C. App. 382, 385-86, 448 S.E.2d 125, 128-29 (1994) (citations omitted). A deprivation of a property interest “fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *FCC v. Fox TV Stations, Inc.*, ___ U.S. ___, ___, 183 L. Ed. 2d 234, 246, 132 S. Ct. 2307, 2317 (2012) (quotation omitted).

“We examine procedural due process questions in two steps: first, we must determine whether there exists a liberty or property interest which has been interfered with by the State[;] . . . second, we must determine whether the procedures attendant upon that deprivation were constitutionally sufficient.” *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 49 (2010) (citations omitted). As a threshold matter, a State’s “exaction of a tax constitutes a deprivation of property” subject to the safeguards of the Due Process Clause.” *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36, 110 S. Ct. 2238, 2250, 110 L. Ed. 2d 17, 35-36 (1990) (citations omitted).

“In all tax cases, the construction placed upon the statute by the Commissioner of Revenue, although not binding, will be given due consideration by a reviewing court.” *Cape Hatteras Elec. Mbrshp. Corp. v. Lay*, ___ N.C. App. ___, ___, 708 S.E.2d 399, 404 (2011) (quotation omitted). “Ordinarily, the interpretation given to the provisions of our tax statutes by the Commissioner of Revenue will be held to be *prima facie* correct and such interpretation will be given due and careful consideration by this Court, though such interpretation is not controlling.” *In re Vanderbilt University*, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960).

At issue in this appeal are Defendant’s guidelines, or alleged lack thereof, regarding combination of corporations for taxation pursuant to N.C. Gen. Stat. § 105-130.6, which provides, in pertinent part, the following:

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The net income of a corporation doing business in this State that is a parent, subsidiary, or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent, subsidiary, or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever. If the Secretary finds as a fact that a report by a corporation does not disclose the *true earnings* of the corporation on its business carried on in this State, the Secretary may require the corporation to file a consolidated return of the entire operations of the parent corporation and of its subsidiaries and affiliates, including its own operations and income. The Secretary shall determine the true amount of net income earned by such corporation in this State. (emphasis added).

N.C. Gen. Stat. § 105-130.6 (emphasis added).

Plaintiff argues on appeal that the Department of Revenue's policy regarding the calculation of "true earnings" pursuant to N.C. Gen. Stat. § 105-130.6 changed after decades of "ordering a combination only in the exceptional circumstance when inter-affiliate transactions failed to reflect fair compensation, and only if adjustments could not be made to the transactions to yield the corporation's true earnings." Plaintiff further states that "'fair compensation' in inter-affiliate transactions" had been adequately evinced, prior to the standard shift, if corporations complied with "'arm[']s length' standards." According to Plaintiff, the Department of Revenue "abandoned" this longstanding policy and adopted an "ad hoc approach, under which [the Department of Revenue] did not apply any universal guidelines for determining whether to combine corporations and their affiliates." Under the new approach, Plaintiff argues, the Department of Revenue "ordered approximately 100 combinations from 2000 to May 2010" without notifying taxpayers that it "had abandoned the statutory fair compensation standard for an ad hoc approach to combination" or issuing guidelines to taxpayers outlining the new policy. Rather, Plaintiff states the Secretary of Revenue publicly refused requests for combination guidelines.

The crux of Plaintiff's argument on appeal is that Defendant's combination of Plaintiff and FL Food Lion, Inc., pursuant to N.C. Gen. Stat. § 105-130.6—in light of Defendant's alleged failure to notify corporate taxpayers or provide guidelines for the change in the calculation of "true earnings"—violated procedural due process.

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The United States Supreme Court recently addressed a similar procedural due process question in *Federal Communications Commission v. Fox Television Stations, Inc.*, ___ U.S. ___, 183 L. Ed. 2d 234, 132 S. Ct. 2307 (2012). In *Fox Television Stations*, the Court examined the Commission's indecency policy interpreting Title 18 U.S.C. § 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both." *Id.*, ___ U.S. at ___, 183 L. Ed. 2d at 240, 132 S. Ct. at 2312. The Commission's indecency policy, like many administrative policies interpreting statutes, evolved over time. In 1987, the Commission determined its application of the standard enunciated by the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978), was too narrow, and the Commission stated that in later cases its definition of indecent language would "appropriately includ[e] a broader range of material than the seven specific words at issue in [the Carlin monologue]." *Fox Television Stations*, ___ U.S. at ___, 183 L. Ed. 2d at 241, 132 S. Ct. at 2313. In 2001, the Commission issued a policy statement restating what constituted indecent material as measured by contemporary community standards for the broadcast medium and describing three factors that had proved significant to the determination of what is considered patently offensive. In orders issued between 1987 and 2001, and in the 2001 policy statement, the Commission noted that repetition of and persistent focus of indecent material exacerbated the potential offensiveness of a broadcast, whereas fleeting and isolated material may not be indecent.

The following incidents of alleged indecency were either at issue on appeal, or were pertinent to the Court's analysis, in *Fox Television Stations*: In 2002, a broadcast by Fox aired containing a fleeting expletive—the F-word. *Id.*, ___ U.S. at ___, 183 L. Ed. 2d at 242, 132 S. Ct. at 2314. Similarly, in 2003, another broadcast by Fox aired containing a fleeting expletive—the F-word. *Id.* On 25 February 2003, a broadcast by ABC aired containing seven seconds of fleeting nudity. *Id.* Subsequent to all of the foregoing incidents, a broadcast of the *Golden Globe Awards* by NBC aired containing a fleeting expletive—the F-word—for which the Commission issued a decision sanctioning NBC. In that decision (the "NBC *Golden Globes* Order"), the Commission reversed prior rulings regarding the fleeting and isolated nature of potentially indecent material and found that the use of the F-word was actionably indecent, explaining: "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to

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the broadcast medium is not indecent.” *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 243, 132 S. Ct. at 2314. The Commission then applied the new policy enunciated in the NBC *Golden Globes* Order, regarding fleeting expletives and fleeting nudity, to the 2002 and 2003 broadcasts of Fox and ABC, finding the material to be in violation of that standard. *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 238, 132 S. Ct. at 2311.

On appeal, Fox and ABC claimed they did not have sufficient fair notice from the Commission of what was proscribed by Title 18 U.S.C. § 1464, such that their procedural due process rights were violated by the Commission’s application of the new policy enunciated in the NBC *Golden Globes* Order to the broadcast incidents on Fox and ABC prior to the NBC *Golden Globes* Order. The Court stated that the “regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation.” *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 246, 132 S. Ct. at 2318. With regard to the Fox incidents, the Government conceded that “Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent.” *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 247, 132 S. Ct. at 2318. With regard to the ABC incident, the Government argued “that ABC had notice that the scene [of fleeting nudity] would be considered indecent in light of a 1960 decision where the Commission declared that the ‘televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464.’” *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 248, 132 S. Ct. at 2319. The Court pointed out, however, that a different “Commission ruling prior to the airing of [the incident at issue] had deemed 30 seconds of nude buttocks ‘very brief’ and not actionably indecent in the context of the broadcast.” *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 248, 132 S. Ct. at 2319-20.

The Court based its decision on the “record of agency decisions,” concluding that in “the absence of any notice in the 2001 Guidance that seven seconds of nude buttocks would be found indecent, ABC lacked constitutionally sufficient notice prior to being sanctioned.” *Id.*, ___ U.S. at ___, 183 L. Ed. 2d. at 248, 132 S. Ct. at 2320. The Court also concluded the Commission failed to give Fox fair notice that fleeting expletives could be found actionably indecent.

It is upon this most recent procedural due process opinion delivered from the United States Supreme Court, *Television Stations*, ___ U.S. ___, 183 L. Ed. 2d 234, 132 S. Ct. 2307, that we analyze

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Plaintiff's argument here—that Defendant did not supply Plaintiff with adequate fair notice of a change in the Department of Revenue's interpretation of "true earnings" pursuant to N.C. Gen. Stat. § 105-130.6. We believe *Fox Television Stations* is distinguishable from the present case as explained in further detail below.

Subsequent to the 2004 combination of Plaintiff and FL Food Lion, Inc., this Court analyzed the Department's interpretation of the meaning of "true earnings" in the context of N.C. Gen. Stat. § 105-130.6, in the opinion, *Wal-Mart Stores East v. Hinton*, 197 N.C. App. 30, 676 S.E.2d 634 (2009). In *Wal-mart*, this Court stated the following:

The language of the statute on its face does not limit the Secretary's authority to require combined reporting by mandating that he first find that the entity engaged in "non-arm's length dealings," that is, conducted intercompany transactions at amounts other than fair value. To the contrary, the language of the statute is broad, allowing the Secretary to require combined reporting if he finds as a fact that a report by a corporation does not disclose the true earnings of the corporation on its business carried on in this State. On its face, it does not restrict the Secretary to a finding of a particular type of transaction or dealing.

Id. at 39, 676 S.E.2d at 642 (citing N.C. Gen. Stat. § 105-130.6). The *Wal-mart* Court rejected the plaintiff's proposed definition of "true earnings"—that "true earnings" should be defined as "the taxpayer's income . . . if it had no affiliates and dealt with all parties on an arm's length basis[.]" *Id.* at 38, 676 S.E.2d at 642. This Court explained, "if the entire enterprise is a unitary business,⁴ true earnings in the State may be calculated by apportioning the earnings of the entire enterprise on the basis of sales and other indicia of activity in the State." *Id.* at 40, 676 S.E.2d at 643. We further explained:

If a taxpayer reports income based on the discrete enterprise method, then plaintiff is correct, absent any non-arm's length transactions the taxpayer's reported income will reflect its true earnings in the State. However, where a taxpayer's business is

4. The term unitary "is simply descriptive, and primarily means that the concern to which it is applied is carrying on one kind of business—a business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units. By contrast, a dual or multiform business must show units of a substantial separateness and completeness, such as might be maintained as an independent business (however convenient and profitable it may be to operate them conjointly), and capable of producing a profit in and of themselves." *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 369-370, 168 S.E. 397, 399 (1933).

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concededly unitary, and where, as here, the taxpayer attempts to reclassify income as nonbusiness or nonapportionable, the reclassification has the potential to distort true earnings in North Carolina even if all intercompany transactions are accounted for at arm's length, or fair value, prices.

Id. at 41, 676 S.E.2d at 643.

The *Wal-Mart* Court then defined "true earnings" in the context of N.C. Gen. Stat. § 105-130.6. "[E]ssential[ly][,]" the *Wal-mart* Court stated, the "meaning of the phrase 'true earnings' refers to the limit on state taxation found in the United States Constitution." *Id.* at 40, 676 S.E.2d at 643 (citing *Allied-Signal, Inc. v. Div. of Taxation*, 504 U.S. 768, 772-73, 119 L. Ed. 2d 533, 542, 112 S. Ct. 2251, 2255 (1992)).

Defendant argues in its brief that *Wal-mart* "governs this appeal" and the Court in *Wal-mart* "granted the Secretary discretionary authority to force combination of entities on a finding that a report does not disclose true earnings in North Carolina." *Id.* at 50, 676 S.E.2d at 649. We agree with Defendant's assertion that the *Wal-mart* Court held that the Secretary of Revenue has discretionary authority to force combination of corporations pursuant to N.C. Gen. Stat. § 105-130.6. Further, the *Wal-mart* Court defined "true earnings" broadly, limiting the Secretary of Revenue's discretion to determine whether a corporation has disclosed "true earnings" only to the extent the United States Supreme Court has limited state taxation of corporations. *Wal-mart*, 197 N.C. App. at 40, 676 S.E.2d at 643 ("The essential meaning of the phrase 'true earnings' refers to the limit on state taxation found in the United States Constitution") (citing *Allied-Signal*, 504 U.S. at 772-73, 119 L. Ed. 2d at 542, 112 S. Ct. at 2255).

Among the limitations the Constitution sets on the power of a single State to tax the multistate income of a nondomiciliary corporation are these: There must be a minimal connection between the interstate activities and the taxing State, and there must be a rational relation between the income attributed to the taxing State and the intrastate value of the corporate business. Under our precedents, a State need not attempt to isolate the intrastate income-producing activities from the rest of the business; it may tax an apportioned sum of the corporation's multistate business if the business is unitary. A State may not tax a nondomiciliary corporation's income, however, if it is derived from unrelated business activity which constitutes a discrete business enterprise.

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Allied-Signal, 504 U.S. at 772-73, 119 L. Ed. 2d at 542, 112 S. Ct. at 2255 (citations and quotations omitted).

The question in this case is not, however, whether Defendant erred by interpreting the definition of “true earnings” in the context of N.C. Gen. Stat. § 105-130.6 more broadly than the alleged historical definition—fair compensation gained through arm’s length transactions between corporations and their affiliates. *Walmart* foreclosed that question, affirmed the Department of Revenue, and defined “true earnings” broadly, limiting the Department of Revenue’s discretionary authority to force combination of entities upon a finding of nondisclosure of “true earnings” only to the extent that the United States Supreme Court has placed constitutional limits on state taxation of multi-state corporate transactions with their affiliates. The question in this case is whether Defendant violated Plaintiff’s procedural due process rights by allegedly failing to give Plaintiff notice that the definition of “true earnings” is not limited to a determination of whether corporations and their affiliates performed transactions at arm’s length. We must examine previous decisions and guidelines of the Department of Revenue to determine whether Plaintiff in this case received adequate fair notice of the definition of “true earnings” sufficient to satisfy due process.

The concept of corporate combination for purposes of taxation in North Carolina is not new. The Department of Revenue has published Technical Bulletins since 1964 providing guidance to corporate taxpayers on the subject of combination of corporations for the purpose of preventing a parent, subsidiary or affiliated corporation from reporting a distorted net income by siphoning off its income properly attributable to its operations in North Carolina to an out-of-state, affiliated corporation. The record in this case shows that Defendant has required combined reporting pursuant to N.C. Gen. Stat. § 105-130.6 as early as 1973.

Contrary to Plaintiff’s argument on appeal, Defendant posits, and we agree, that corporate combination—pursuant to N.C. Gen. Stat. § 105-130.6 and in scenarios other than those in which the definition of true earnings was limited to fair compensation gained through arm’s length transactions between corporations and their affiliates—is also not a novel concept. The record contains the following documents showing exactly such corporation combinations:

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An Attorney General's Opinion, dated 27 October 1987,⁵ addressed the following questions: (1) whether, in the context of "diversion of income producing property to a subsidiary corporation[.]" N.C. Gen. Stat. § 105-130.6 may be applied to require a consolidation of "the involved corporations"; and (2) whether the consolidation may be limited to "only those corporations which clearly affect the 'true earnings' of the taxpayer filing in this State[.]"⁶ In response to the first question, the opinion concludes, "[u]pon a finding that the corporation's report does not reflect taxable income attributable to this State, the Secretary may require a consolidated return. In my opinion, the evidence of diversion of income producing property to the subsidiary corporation outlined in your memorandum would be sufficient to support such a finding and the consequent requirement of filing a consolidated return." In response to the second question, the opinion concludes, "it appears to me that if inclusion of all related corporations would distort the true amount of net income taxable in this State under the Corporate Income Tax Act as interpreted by the Secretary, the Secretary may properly limit the consolidated return to only those corporations which affect the true amount of net income taxable by this State. Such a restriction would be consistent with the purpose of the statute." The opinion does not mention fair compensation for arm's length transactions but focuses instead upon "distort[ion]" of "true earnings[.]"

A final decision of the North Carolina Department of Revenue, 1997 N.C. Tax LEXIS 48 (No. 95-144) (No. 95-144) (August 26, 1997), stated that if the Secretary of Revenue "finds as a fact that the return as filed by the taxpayer does not disclose the true earnings of the corporation on its business carried on in the state, the Secretary may require the corporation to file a combined return of the taxpayer and those affiliated corporations necessary to determine the true amount of net income earned by the unitary group in the state." There was no reference to payments in excess of fair compensation or arm's length transactions.

5. An opinion of the Attorney General construing a tax statute is "advisory[.]" *In re Virginia-Carolina Chemical Corp.*, 248 N.C. 531, 538, 103 S.E.2d 823, 828 (1958); see N.C. Gen. Stat. § 114-2 (2011).

6. Opinions of the Attorney General "should be accorded some weight on the question presented, but they are not binding on this Court." *Delconte v. State*, 313 N.C. 384, 387, n.3, 329 S.E.2d 636, 639, n.3 (1985).

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In another final decision of the North Carolina Department of Revenue, 2000 N.C. Tax LEXIS 18 (No. 97-990) (September 19, 2000),⁷ the Department took the position that “related retail companies, . . . transferr[ed] their trademarks to Taxpayers for little or no consideration, then licens[ed] the trademarks they formerly owned back from the Taxpayers, who then recorded the payment of the required royalty fees in accounts receivable and never converted them into cash, shifted millions of dollars of income to Delaware that would normally have been taxable in North Carolina.” The taxpayer argued that “because the royalty rate they charged to the related retail companies was considered ‘arm[']s length’ under the standard set forth in I.R.C. § 482 according to [their expert witness], then no distortion of income occurred and the requirement of a combined report would be inappropriate.” The Assistant Secretary of Revenue concluded the following: “Although the Taxpayers insist that the trademarks originally owned and used by the related retail companies were transferred to them for legitimate business reasons other than tax avoidance, the fact remains that the profitability of the related retail companies decreased precipitously immediately subsequent to the trademark transfers. . . . In my judgment, the transactions entered into between the Taxpayers and their related retail companies arbitrarily shifted income between them, thereby improperly reflecting their true net income and providing a basis to require the filing of a combined return pursuant to G.S. 105-130.6 and 105-130.16.”

Plaintiff’s procedural due process argument hinges upon the alleged failure of the Department of Revenue to give Plaintiff notice that the definition of “true earnings,” for purposes of corporate combination with their affiliates for state taxation, had changed. Plaintiff’s argument, more specifically, is that Defendant deliberately concealed its criteria for corporate combination and that Defendant operated in an *ad hoc* manner without ascertainable standards. We do not believe this argument is supported by the evidence of record in this case. We further believe the facts of this case distinguish it from the recent United States Supreme Court decision, *Fox Television Stations*, ___ U.S. ___, 183 L. Ed. 2d. 234, 132 S. Ct. 2307, in which the only notice to ABC was “a 1960 decision where the Commission declared that the ‘televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464.’” *Id.*, ___ U.S. at

7. We recognize that this final decision has no bearing on notice with regard to Plaintiff’s 1998 and 1999 tax returns; however, Plaintiff’s tax returns for the tax year 2000 were signed by Plaintiff’s Corporate Tax Manager, Mr. Keith Cunningham, on 15 October 2001.

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_____, 183 L. Ed. 2d. at 248, 132 S. Ct. at 2319. The record here contains documents—some of which were final decisions of the Department of Revenue, available to Plaintiff at the precise time they were formulating and executing the Vision Project—which we believe served to put Plaintiff on notice that the definition of “true earnings” is not limited to a showing that all transactions were “arm’s length” and for “fair compensation.” Importantly, the record contains one final decision of the Department of Revenue dated 26 August 1997, which was less than three months prior to the 14 November 1997 submission by Coopers & Lybrand of a Vision Project report to Food Lion, on the specific question of “[w]hether there are legal barriers to the successful implementation and defense of the proposed structure.” The 26 August 1997 final decision of the Department of Revenue makes no reference to payments in excess of fair compensation or arm’s length transactions, instead focusing on language regarding the “disclos[ure]” of “the true earnings of the corporation on its business carried on in the state,” and stating that “the Secretary may require the corporation to file a combined return of the taxpayer and those affiliated corporations necessary to determine the *true amount of net income earned by the unitary group* in the state.” (emphasis added). The 26 August 1997 final decision of the Department of Revenue found the following as fact:

It is apparent that [Subsidiary Three Investment Company] was utilized during the tax year 1990 solely for the purpose of receiving the stock of [Subsidiary One Operating Company] and [Subsidiary Two Operating Company] from [Company A] and consummating the sales, thereby transferring the gain recognized on these sales from [Company A] to [Subsidiary Three Investment Company], the Delaware holding company. . . . [Taxpayer] reported dividend income from foreign subsidiaries and domestic affiliated corporations on its North Carolina 1990 return of approximately \$122 million. Of this amount, approximately \$107 million was from [Company A]. [Taxpayer] excluded the dividend income from its apportionable business income. . . . The substance of these transactions was that [Taxpayer] sold the [Industry Group], which included [Company A], [Subsidiary One Operating Company], [Subsidiary Two Operating Company] and [Joint-Venture Company], to [COMPANY D] for a total gain of \$60,357,349. . . . [Taxpayer] claimed a loss from the sale of [Company A], a wholly-owned subsidiary, as an apportionable business loss under N.C.G.S. § 105-130.4.

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In its final decision, the Department of Revenue explained:

[I]t is taxpayer's position, however, which ignores economic reality and distorts the true economic picture of [Taxpayer]'s ownership and disposition of the [Industry Group]. Through the various transactions taxpayer set in motion, most occurring on a single day, [Taxpayer] attempted to convert a profitable sale into a nonprofitable one. The economic reality, however, is not that taxpayer recognized a loss on the sale, and then, coincidentally, received a dividend; the economic reality is that [Taxpayer] recognized an ultimate gain on the series of sales. [The expert witness] states that, in order for a taxing scheme to be fair, a unitary business should be taxed "on an amount that... correspond[s] to its economic income." Here, the loss claimed by [Taxpayer] on its return bore no relation to the economic income it received from the sale of the [Industry Group], a gain of approximately \$60.4 million. Therefore, [Taxpayer]'s return did not reflect its true net income and its net income properly attributable to its business carried on in the state. . . . [I]mproperly isolating or "cherry picking" the gain from the foreign subsidiaries and "geographically sourcing" it to the Delaware holding company while "geographically sourcing" the manufactured loss to North Carolina distorts [Taxpayer]'s apportionable income from its unitary business carried on in the state. . . . When the Secretary of Revenue has reason to believe that any corporation so conducts its trade or business in such a manner as to either directly or indirectly distort its true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or other unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining the same, the Secretary of Revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business. . . . The unitary group effectively assigned the profit that [Taxpayer] would have recognized on the sale of the [Industry Group] to the Delaware holding company, where it was then returned to [Taxpayer] in the form of a dividend. This decision recognizes the substance of the gains recognized and not the mechanical form and labels attached to the realization of such profits.

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The Department of Revenue concluded that a combined return should be filed. Less than three months later, in the 14 November 1997 report, Coopers & Lybrand acknowledged that “the courts have not specifically addressed the issue of whether intercompany fees must reflect an arm’s length transaction in order to be valid as fair compensation.” Plaintiff, however, did not seek a private letter ruling⁸ from the Department of Revenue on this specific question presented by the Coopers & Lybrand report.⁹ The Coopers & Lybrand report also states multiple times a premise remarkably similar to this Court’s holding in *Walmart* more than one decade later: “the Secretary of Revenue may force combined filing of affiliate corporations if the Secretary finds that a corporation’s report does not disclose the true net earnings of the corporation[.]” The Coopers & Lybrand report cites a 1 July 1997 final decision of the Department of Revenue, which stated “the Department of Revenue has the statutory authority to force a combination of entities *if it finds that taxpayer corporation’s return does not disclose its true earnings in the state.*” (emphasis added).

We believe the trial court did not err by concluding Defendant did not violate Plaintiff’s procedural due process rights by forcing a combination of Plaintiff and FL Food Lion, Inc., pursuant to N.C. Gen. Stat. § 105-130.6, and therefore, we affirm this portion of the trial court’s order.

B. *Wal-mart* and N.C. Gen. Stat. § 105-130.6

[2] In Plaintiff’s second argument on appeal, it contends *Wal-mart*, 197 N.C. App. 30, 676 S.E.2d 634, misread N.C. Gen. Stat. § 105-130.6 when it defined “true earnings.” We find this argument unpersuasive. Regardless of whether there is merit to Plaintiff’s argument that

8. Numerous other corporate taxpayers sought private letter rulings from the Department of Revenue in the 1990s concerning corporate combination. These letters were included in the record and indicated that the definition of true earnings was not limited to a showing that all transactions were arm’s length and for fair compensation.

9. Although not dispositive on the issue of notice, we find the following evidence of record contrary to Plaintiff’s assertion that Defendant strategically and “deliberately concealed” information: In late 1997, a corporate taxpayer posed the exact question at issue in this litigation to the Secretary of Revenue in a private letter request: “If all intercompany transactions are conducted at arm[']s length, will the Secretary be precluded from requiring a consolidated or combined return?” The Department’s 1 October 1997 response, approximately one month before the Coopers & Lybrand Vision Project report to Plaintiff, was clear: “No. Under G.S. 105-130.6, the Secretary may at her discretion require a ‘consolidated return’ in order to determine the true net income attributed to this State. . . . The Secretary is not precluded from requiring a combined return even if dealings are conducted at ‘arm[']s length[.]’ ”

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Wal-mart misread N.C. Gen. Stat. § 105-130.6, we are bound by the decision of the *Wal-mart* Court. “[W]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *Wal-mart* has not been overturned; therefore, we are bound by the *Wal-mart* Court’s interpretation of N.C. Gen. Stat. § 105-130.6.

C. Constitutional Limitations on Taxing Power

[3] In Plaintiff’s third argument, it contends the trial court erred in failing to conclude the Department of Revenue violated North Carolina’s constitutional limitations on the taxing power. We disagree. Specifically, Plaintiff argues that Defendant violated the prohibition against retroactive taxation in Article I, Section 16 of the North Carolina Constitution.¹⁰ However, the Court in *Wal-mart* has already addressed this particular question and concluded that such a tax does not violate Article I, Section 16. *Wal-mart*, 197 N.C. App. at 48-49, 676 S.E.2d at 648 (holding that the tax did not violate Article I, Section 16, because a section of the North Carolina Administrative Code “spoke to [the] plaintiff’s situation[;]” citing 17 N.C.A.C. § 5C.0703 (2000), which provided that “[i]ncome is business income unless it is clearly classifiable as nonbusiness income[;] [a] taxpayer must establish that its classification of income as nonbusiness income is proper. . . . Dividend income is business income if . . . [t]he dividend is received from a unitary subsidiary of the taxpayer”).

D. “Economic Substance” Analysis

[4] In Plaintiff’s final argument on appeal, it contends the trial court erred in applying an “economic substance” analysis. We disagree. Plaintiff takes issue with the Business Court’s statement that “the Vision Project . . . part of Food Lion’s restructuring effort lacked economic substance.” While arguing that the Business Court erred by rendering the foregoing “conclusion,” Plaintiff simultaneously admits in its brief that the Department of Revenue “did not apply the economic substance doctrine in its audit of Delhaize.” The statement by the Business Court that the Vision Project lacked economic substance was not a legal conclusion, and was not referenced in the Business Court’s conclusion that the Department of Revenue did not abuse its discretion in determining that Plaintiff and FL Food Lion,

10. “No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.” N.C. Const. art. I, § 16.

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Inc., must be combined for purposes of calculating Plaintiff's true earnings pursuant to N.C. Gen. Stat. § 105-130.6. Moreover, assuming *arguendo* Plaintiff's argument—that the Business Court erred in stating that the Vision Project lacked economic substance—was valid, this would have no bearing on the question of whether the Department of Revenue abused its discretion by combining Plaintiff and FL Food Lion, Inc., for purposes of taxation, as Defendant did not apply an economic substance analysis.

III. Defendant's Appeal

A. Refund of Penalty

[5] In Defendant's first and only argument on appeal, Defendant contends the trial court erred by concluding Plaintiff was entitled to a refund of the penalty assessed by Defendant in the amount of \$1,188,008.00. We agree.

Defendant assessed penalties against Plaintiff pursuant to N.C. Gen. Stat. § 105-236(a)(5), because Plaintiff "understated its tax by more than 87% as a result of improper deductions." N.C. Gen. Stat. § 105-236(a)(5) provides, in pertinent part, the following:

(5) Negligence. –

a. Finding of negligence.—For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

...

c. Other large tax deficiency.—In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

N.C. Gen. Stat. § 105-236(a)(5) (2011).

The Court in *Wal-mart*, 197 N.C. App. 30, 676 S.E.2d 634, upheld the Department of Revenue's assessment of penalties against *Wal-mart* under similar circumstances:

[P]enalties were assessed under N.C. Gen. Stat. § 105-236(a)(5)(c), which does not require a finding of negligence as is necessary under N.C. Gen. Stat. § 105-236(a)(5)(a). Plaintiff does not appear to dispute that if the Secretary's assessment based on the com-

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bined returns is lawful, then plaintiff's income was understated by more than 25%, which operates to invoke the penalty provision of N.C. Gen. Stat. § 105-236(a)(5)(a) without a finding of negligence.

We determined above that the Secretary's assessment based on the combined returns was indeed lawful.

Id. at 58, 676 S.E.2d at 653-54.

The trial court in this case attempted to distinguish *Wal-mart* by stating the following:

[*Wal-mart*] held that the concept of "true earnings is a sufficiently definite standard" to allow the Secretary to order a combination and that the Secretary has "discretionary authority to force combination of entities" when it finds that a return does not disclose "true earnings in North Carolina." *Id.* at 50-1, 676 S.E.2d at 649. The Court made no mention, however, of whether the twenty-five percent (25%) penalty assessed in that case also could withstand constitutional scrutiny. . . . While the Department's assessment of an automatic penalty here does not rise to a level of oppression that would "shock the conscience," and thereby violate substantive due process, . . . the assessment does raise serious questions concerning its comportment with procedural due process. . . . When guidance from the Secretary is so elusive that the Department's own auditors do not know the conditions that will give rise to a twenty-five percent (25%) penalty, and when decisions about the imposition of the penalty are made by a guarded coterie applying unpublished criteria, who appear to revel in the criteria's mystery, then ordinary taxpayers "exercising ordinary common sense" cannot sufficiently understand or predict when a penalty will be assessed. Additionally, taxpayers cannot arrange their affairs to avoid punishment because no published criteria exists with which they can comply. . . . Here, the Department punished Delhaize for properly filing separate returns according to the only method permitted under North Carolina law. It assessed a substantial penalty for understating a tax obligation that Delhaize had no duty to pay when it filed its original return and could not have known it would be required to pay later. The tax structure resulting in this penalty assessment was fundamentally unfair and has been corrected by the Legislature. The Department's assessment of the penalty against Delhaize is unfair and is a violation of the Fourteenth Amendment's procedural due process protections.

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If the above statements by the trial court were supported by the evidence of record, we would agree with the trial court's conclusion. However, as we have previously stated, the record here contains documents that put Plaintiff on notice that the definition of "true earnings" is not limited to a showing that all transactions were "arm's length" and for "fair compensation." These documents, we believe, foreclose any genuine issue of material fact on the procedural due process issue: Plaintiff received fair notice of the definition of "true earnings," such that Plaintiff could expect combination for purposes of taxation. Therefore, we reverse the decision of the trial court granting Plaintiff's motion for summary judgment on the basis that "[t]he Department's assessment of the penalty against Delhaize is unfair and is a violation of the Fourteenth Amendment's procedural due process protections." Additionally, because the *Wal-mart* Court held that the "large tax deficiency" penalty pursuant to N.C. Gen. Stat. § 105-236(a)(5) is invoked if the taxpayer understates its tax by more than 25%, and because Plaintiff here—in a manner indistinguishable from *Wal-mart*, the corporate taxpayer in *Wal-mart*, 197 N.C. App. 30, 676 S.E.2d 634—understated its tax liability by more than 25% as a result of the Vision Project, we believe there is no genuine issue of material fact on this issue, and the penalty pursuant to N.C. Gen. Stat. § 105-236(a)(5)(c) is due. The trial court erred by not granting Defendant's motion for summary judgment on the issue of the tax penalty. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED, in part; REVERSED, in part.

Judges STROUD and McCULLOUGH concur.

DOE v. CHARLOTTE-MECKLENBURG BD. OF EDUC.

[222 N.C. App. 359 (2012)]

JANE DOE, PLAINTIFF v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
AND RICHARD PRIODE, INDIVIDUALLY AND AS AN EMPLOYEE OF THE CHARLOTTE-
MECKLENBURG BOARD OF EDUCATION, DEFENDANTS

No. COA11-1466

(Filed 21 August 2012)

1. Appeal and Error—interlocutory order—governmental immunity—abuse of student alleged as constitutional claim

In an action that rose from sexual abuse of a student by a teacher in which North Carolina constitutional claims were raised, the trial court order denying defendant's motion to dismiss for failure to state a claim was interlocutory but appealable because it affected defendant's substantial right to government immunity. The fact that plaintiff asserted that certain of her claims were constitutional did not automatically mean that she stated valid constitutional claims or that defendant was not entitled to avoid liability for those claims, properly understood, on governmental immunity grounds.

2. Immunity—governmental—common law and constitutional claims

In an action against a school board arising from the sexual harassment of a student by a teacher which involved constitutional and common law claims, *Craig v. New Hanover Cty. Bd. of Ed.*, 363 N.C. 334, was misapprehended by the trial court. In denying defendant's motion to dismiss plaintiff's constitutional claims in reliance on *Craig*, the trial court appeared to have concluded that *Craig* contained two separate holdings instead of a single holding to the effect that a common law claim that is barred by the doctrine of governmental immunity is not an adequate substitute for a constitutionally based claim.

3. Constitutional Law—North Carolina—educational rights—sexual harassment by teacher

Allegations that a teacher sexually harassed a student did not state a claim for relief under N. C. Const. art I, § 15 and art IX, § 1. The educational rights guaranteed by those provisions have not been extended past the nature, extent, and quality of the educational opportunities made available in the public school system.

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4. Constitutional Law—North Carolina—Due Process—sexual harassment by teacher

Assuming that N.C. Const. art. I, § 19 entitles plaintiff to an education free from abuse or physical harm, allegations in her complaint of sexual harassment by a teacher did not state a claim upon which relief could be recovered. Due Process is not implicated by the negligent act of an official causing unintended loss or injury to life, liberty, or property.

Judge STROUD dissenting.

Appeal by defendant Charlotte-Mecklenburg Board of Education from order entered 22 August 2011 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 April 2012.

Essex Richards, P.A., by Edward G. Connette and T. Patrick Matus and Karro, Sellers & Langson, by Seth Langson, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein L.L.P., by Anthony Fox and Benjamin Sullivan, for defendant-appellant the Charlotte-Mecklenburg Board of Education.

North Carolina Advocates for Justice, by David C. Pishko and Lauren Weinstein, amicus curiae.

ERVIN, Judge.

Defendant Charlotte-Mecklenburg Board of Education appeals from an order denying its motion to dismiss Plaintiff's complaint for failing to state a claim upon which relief could be granted. In its brief, the Board contends that (1) its appeal, although interlocutory, is properly before this Court because the trial court's order amounted to a rejection of the Board's governmental immunity claim; (2) the Supreme Court did not hold in *Craig v. New Hanover Cty. Bd. Of Educ.*, 363 N.C. 334, 338-42, 678 S.E.2d 351, 354-57 (2009), that state constitutional claims may rest solely upon allegations of negligence; and (3) Plaintiff had not asserted viable state constitutional claims against the Board in her complaint. After careful consideration of the Board'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 Mecklenburg

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County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

On or about 13 May 2011, Plaintiff Jane Doe filed a complaint seeking to recover damages from Defendants stemming from sexual abuse that she suffered at the hands of Defendant Richard Priode, her band teacher at South Mecklenburg High School. According to Plaintiff's complaint, Defendant Priode made sexual advances towards her and eventually induced her to engage in various types of sexual activity, including oral sex and vaginal intercourse, with him both on and off school grounds. Defendant Priode was later arrested, charged, and entered a plea of guilty to taking indecent liberties with a child as a result of his involvement with Plaintiff.

In her complaint, Plaintiff asserted claims against Defendant Board for negligent hiring, supervision, and retention; negligent infliction of emotional distress; and violation of Plaintiff's rights to an education and to proper educational opportunities as guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1, and her right to obtain a safe education as guaranteed by N.C. Const. art. I, § 19. According to Plaintiff, the Board should have recognized the signs that Defendant Priode posed a threat to her and taken action to prevent the sexual abuse which she suffered at his hands. More specifically, Plaintiff alleged, with respect to her constitutional claims, that:

40. As a separate and distinct cause of action, Plaintiff sues the Defendants for violating her constitutional rights pursuant to North Carolina State Constitution in the following particulars:

a. Violation of Article I[,] Section 15 on the grounds that the Defendant allowed the conduct as alleged in this complaint and that this conduct deprived the Plaintiff of her right to an education that is free from harm:

b. Violation of Article IX[,] Section 1 in that the Plaintiff was denied educational opportunities free from physical harm or psychological abuse; and

c. Violation of Article I[,] Section 19 in that the Plaintiff has been deprived of her liberty, interest and privilege in an education free from abuse or psychological harm as alleged in this complaint.

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41. This constitutional claim for damages is pled as an alternative remedy, should the court find that sovereign immunity or governmental immunity in any way of its various forms exists and, if it does exist, in that event Plaintiff has no adequate remedy at law and asserts the constitutional violations pursuant to the laws of North Carolina.

On 27 June 2011, the Board filed a partial motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), in which it sought the dismissal of Plaintiff's constitutional claims on the grounds that Plaintiff's complaint failed to allege facts which tended to establish the Board's liability to Plaintiff for violating the various constitutional provisions cited in her complaint. On the same date, the Board filed a second partial motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (2), in which it sought the dismissal of Plaintiff's negligent hiring, supervision, and retention and negligent infliction of emotional distress claims on the grounds that the Board "enjoy[ed] full governmental immunity[.]"

On 22 August 2011, the trial court entered an order granting the Board's motion to dismiss Plaintiff's claims for negligent hiring, supervision, and retention and negligent infliction of emotional distress, "since the Board ha[d] not waived immunity by the purchase of liability insurance." However, the trial court denied the Board's motion to dismiss Plaintiff's constitutional claims in reliance on *Craig*. After the trial court, at the Board's request, certified the order denying the Board's motion to dismiss Plaintiff's constitutional claims for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the Board noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Appealability

[1] As an initial matter, we must determine whether the Board's appeal is properly before us. Although the Board acknowledges that the trial court's order is interlocutory in nature and that the trial court's order did not constitute "a final judgment as to one or more but fewer than all of the claims or parties" that was immediately appealable pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), it contends that the trial court's refusal to dismiss Plaintiff's constitutional claims affected the Board's substantial right to governmental immunity. We believe that the Board's argument has merit.

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“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted), *r’hyg denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). As a general proposition, “there is no right of immediate appeal from interlocutory orders and judgments.” *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citation omitted).

Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal and our Court’s responsibility to review those grounds.

Bullard v. Tall House Bldg. Co., 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) (citations and quotation marks omitted).

According to well-established North Carolina law, governmental immunity is an “immunity from suit rather than a mere defense to liability[.]” *Craig*, 363 N.C. at 338, 678 S.E.2d at 354 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985)) (emphasis omitted). For that reason, “[t]his Court has held that denial of dispositive motions such as motions to dismiss . . . that are grounded on governmental immunity affect a substantial right and are immediately appealable.” *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185 (citation omitted), *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001); *see also Craig*, 363 N.C. at 337, 678 S.E.2d at 354 (stating that, although the “[d]enial of a summary judgment motion is interlocutory and ordinarily cannot be immediately appealed . . . the appeal [before the Court] is proper because the Board raises the complete defense of governmental immunity, and as such, denial of its summary judgment motion affects a substantial right”); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009) (recognizing that the

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denial of a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), based on a claim of sovereign or governmental immunity is immediately appealable because it affects a substantial right), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). The decisions allowing the immediate appeal of decisions addressing the availability of sovereign or governmental immunity hinge upon the fact that, were “ ‘the case to be erroneously permitted to proceed to trial, immunity would be effectively lost.’ ” *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993), *implicit overruling on other grounds recognized in Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470, 621 S.E.2d 1, 7, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 866 (2005)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009).

Although Plaintiff acknowledges that, in the event that “the trial judge [had] denied the Board’s motion to dismiss [P]laintiff’s negligence claims based on governmental immunity, that order would have been appealable immediately,” Plaintiff argues that, since *Craig* holds that governmental immunity is not a bar to constitutional claims such as those that Plaintiff has asserted in this case, the Board is not entitled to rely upon governmental immunity in response to Plaintiff’s constitutional claims and that any decision to review the denial of the Board’s dismissal motion on a “limited record” like that before the Court in this case would be tantamount to the unfair and prejudicial adoption of a heightened pleading standard. We do not find Defendant’s argument persuasive.

The record before us in this case clearly reflects that the Board asserted governmental immunity in its responsive pleading and argued that Plaintiff was not entitled to overcome a governmental immunity bar by asserting constitutional claims that rested solely upon allegations that the Board acted negligently. The fact that the trial court rejected the Board’s claim of governmental immunity means nothing more than that the trial court found that Plaintiff had stated one or more viable constitutional claims. Such a determination does not mean that the Board is not entitled to governmental immunity; instead, it means that the same determination must be made in order to both determine whether we are entitled to hear the Board’s appeal on an interlocutory basis and ascertain whether Plaintiff has, in fact, stated a claim for relief against the Board on the basis of the constitutional provisions upon which she relies. Thus, we cannot determine the extent to which the Board is entitled to appeal the trial

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court's order on an interlocutory basis without addressing the merits of its challenge to the trial court's determination that Plaintiff stated a claim for relief under the constitutional provisions upon which she relies. The mere fact that Plaintiff has asserted that certain of her claims are "constitutional" in nature does not automatically mean that she has stated one or more valid constitutional claims or that the Board is not entitled to avoid liability with respect to those claims, properly understood, on governmental immunity grounds. *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000) (stating that, in addressing motions filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), a party's "[l]egal conclusions . . . are not entitled to a presumption of truth"). A failure to evaluate the validity of Plaintiff's constitutional claims would allow Plaintiff to simply re-label claims that would otherwise be barred on governmental immunity grounds as constitutional in nature, effectively circumventing the Board's right to rely on a governmental immunity bar. In other words, in the event that we were to hold that the "Board cannot immediately appeal, it will have to litigate [Plaintiff's] negligence allegations," thereby forfeiting its substantial right to rely, in appropriate instances, on the doctrine of sovereign immunity in response to Plaintiff's claims. As a result, we conclude that the Board's appeal from the trial court's order is properly before this Court.

B. Plaintiff's Constitutional Claims

Secondly, the Board contends that the trial court erred by denying its motion to dismiss Plaintiff's constitutional claims on the grounds that "[n]one of the constitutional provisions cited by [Plaintiff] can be violated by negligence alone." Put another way, the ultimate issue raised by the Board's appeal is whether Plaintiff has stated a claim for relief based upon the relevant provisions of the state constitution. After careful consideration, we conclude that this question must be answered in the negative.

1. Standard of Review

"We review a motion to dismiss for failure to state a claim *de novo*." *Bobbitt ex. rel. Bobbitt v. Eizenga*, ___ N.C. App. ___, ___, 715 S.E.2d 613, 615 (2011) (citation omitted). In making that determination, we must ascertain "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 695, 625 S.E.2d 128, 133 (2006) (quoting *Harris v. NCNB Nat. Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d

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838, 840 (1987)). In conducting the required analysis, we must “consider the allegations in the [plaintiff’s] complaint [to be] true, construe the complaint liberally, and only reverse the trial court’s denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.” *Id.* (citing *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682, *disc. review denied*, 344 N.C. 734, 478 S.E.2d 5 (1996)).

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.”

Bobbitt, ___ N.C. App. at ___, 715 S.E.2d at 615 (quoting *Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (citation and quotation marks omitted)).

2. Applicability of *Craig*

[2] In determining that Plaintiff had, in fact, adequately stated a claim for relief under the relevant provisions of the North Carolina Constitution, the trial court appears to have concluded that the allegations underlying the constitutional claims that Plaintiff has asserted here are identical to those at issue in *Craig* and that the Supreme Court held in *Craig* that such allegations sufficed to state a claim for relief pursuant to the constitutional provisions upon which Plaintiff relies. We believe that the trial court’s decision, with which our dissenting colleague agrees, rests upon a misapprehension of the Supreme Court’s decision in *Craig*.

In *Craig*, the plaintiff sought to obtain a damage recovery against the New Hanover County Board of Education based upon its failure to protect him from sexual abuse that he allegedly suffered at the hands of one of the defendant’s employees. 363 N.C. at 335, 678 S.E.2d at 352. In his complaint, the plaintiff asserted various common law negligence claims against the defendant and also alleged that the defendant “deprived him of an education free from harm and psychological abuse” in violation of N.C. Const. art. I, §§ 15 & 19 and N.C. Const. art. IX, § 1. *Id.* After failing to persuade the trial court to grant summary judgment in its favor, the defendant appealed to this Court, which unanimously reversed the trial court’s decision with respect to the plaintiff’s common law claims on governmental immunity grounds. *Id.* at 335-36, 678 S.E.2d at 353. In addition, by a divided

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vote, we reversed the trial court's decision with respect to the plaintiff's constitutional claims on the grounds that the "plaintiff's common law negligence claim [was] an adequate remedy at state law." *Id.* In other words, a majority of this Court held that, even though the plaintiff's common law negligence claims were clearly barred by the doctrine of governmental immunity, that fact did not render those claims "inadequate" for purposes of determining whether the plaintiff was entitled to assert alternative constitutionally-based claims. On appeal, the Supreme Court held that the "[p]laintiff's common law cause of action for negligence [did] not provide an adequate remedy at state law when governmental immunity [stood] as an absolute bar to [that] claim," so that the plaintiff could alternatively advance "his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim." *Id.* at 340, 678 S.E.2d at 355.

In denying the Board's motion to dismiss Plaintiff's constitutional claims in reliance on *Craig*, the trial court appears to have concluded that *Craig* contained two separate holdings, one of which relates to the substantive merits of the plaintiff's constitutional claims, instead of a single holding to the effect that a common law claim which is barred by the doctrine of governmental immunity is not an adequate substitute for a constitutionally-based claim. The fundamental problem with the trial court's logic is that the Supreme Court simply declined to consider the substantive viability of the state constitutional claims that the plaintiff attempted to assert pursuant to N.C. Const. art. I, §§ 15 & 19 and N.C. Const. art. IX, § 1, in *Craig*, explicitly stating that its decision did not "predetermine the likelihood that [the] [p]laintiff [would] win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case" and that its holding "simply ensure[d] that an adequate remedy must provide the possibility of relief under the circumstances." *Id.* In other words, the Supreme Court simply held in *Craig* that the existence of common law claims that were barred by the doctrine of sovereign or governmental immunity did not operate to bar the plaintiff from attempting to assert any constitutional claims that he might have otherwise had against the defendant while expressly declining to address the extent to which his constitutional claims had substantive merit. *Fothergill v. Jones Cty. Bd. of Educ.*, ___ F. Supp. 2d ___, ___, 2012 WL 202777, *3, 2012 U.S. Dist. LEXIS 7570, *8 (E.D.N.C. Jan. 8, 2012) (holding that "the court in *Craig* expressly declined to rule on the merits of that constitutional claim . . ."); *Collum v. Charlotte-Mecklenburg Bd. of Educ.*, 2010 WL 702462, *2, 2010 U.S. Dist. LEXIS 15824, *7 (W.D.N.C.

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Feb. 23, 2010) (holding that the Supreme Court in *Craig* “simply stated that the plaintiff in that case was not precluded from asserting the state constitutional claim, without reaching the merits of that claim”).¹ As a result, contrary to the conclusion reached by the trial court and in the separate opinion submitted by our dissenting colleague, *Craig* does not control the substantive issue before us in this case, resulting in the necessity for us to independently determine whether Plaintiff has stated a claim for which “relief can be granted under some [constitutionally-based] legal theory.” *Bobbitt*, ___ N.C. App. at ___, 715 S.E.2d at 615 (citation and quotation marks omitted).²

In seeking to establish that the present case is factually and procedurally indistinguishable from *Craig* and that we are bound by what she perceives to be the holding in that case, *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36 (stating that “[t]his Court is bound by precedent of the North Carolina Supreme Court”), *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003), our dissenting colleague advances a number of different arguments. As an initial matter, our dissenting colleague contends that the only “dispositive difference between this case and *Craig* is that *Craig* was decided on a motion for summary judgment while here the trial court ruled upon [D]efendant[s] . . . 12(b)(6) motion.” Although we agree with our dissenting colleague that the factual allegations relied upon in *Craig* and those

1. Admittedly, the Supreme Court made several references to the “colorable” claims asserted by the plaintiff in its opinion in *Craig*, a fact which seems to lie at the heart of our dissenting colleague’s belief that *Craig* implicitly addresses substantive constitutional issues in addition to determining whether the existence of a common law claim that is clearly barred by governmental immunity precludes the assertion of a constitutionally-based claim. However, the absence of any substantive analysis of the viability of the plaintiff’s claims under the relevant provisions of the North Carolina constitution coupled with the Supreme Court’s explicit statement that its decision did not “predetermine the likelihood that [the] [p]laintiff [would] win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case,” *Craig*, 363 N.C. at 340, 678 S.E.2d at 355, indicates that the Supreme Court did not intend these references to the plaintiff’s “colorable” claims to be tantamount to a holding that the allegations in the plaintiff’s complaint stated a valid claim for relief. In order to reach a contrary determination, we would have to conclude that the Supreme Court recognized a constitutionally-based liability claim sounding primarily in negligence without engaging in any analysis of the extent to which that outcome was appropriate, an outcome which we believe to be unlikely.

2. Although Plaintiff argues that the effect of our decision is to impose a heightened pleading requirement upon claims such as those that she is attempting to assert here, the ultimate issue that we must address is, in reality, the exact contours of the substantive rights created by the constitutional provisions upon which Plaintiff relies rather than the manner in which claims arising under those constitutional provisions should be pled.

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relied upon in the present case are “substantially the same” and that this difference in the procedural context between the two cases does not justify a different outcome with respect to the merits of the two claims, that fact does not have any real bearing upon the proper resolution of the underlying dispute at issue here, which is whether *Craig* contains a single holding relating to the extent to which the existence of a common law claim that is barred by the doctrine of governmental immunity precludes the assertion of a constitutionally-based claim or whether *Craig* implicitly addresses substantive constitutional issues as well. Secondly, in concluding that *Craig* contains an implicit substantive constitutional holding, our dissenting colleague emphasizes the fact that the Supreme Court in *Craig* reversed our decision to the effect that summary judgment should have been granted in favor of the defendant with respect to the plaintiff’s constitutional claims. However, this argument overlooks the fact that we had held that summary judgment should have been awarded in favor of the defendant on the grounds that the availability of governmental immunity as an absolute bar to the plaintiff’s common law claims did not suffice to render those common law remedies inadequate for the purpose of determining whether a constitutionally-based claim arising out of the same alleged conduct should be recognized, not that the substantive allegations in the plaintiff’s complaint stated a valid claim for relief under the relevant constitutional provisions or that summary judgment could never be granted in that case under any theory. Thirdly, the fact that the Supreme Court, by essentially rejecting the defendant’s attempt to obtain an appellate decision which, in essence, would have recognized a governmental immunity defense to constitutionally-based claims which bore a resemblance to recognized common law claims, provided North Carolina trial courts with “jurisdiction to adjudicate plaintiff’s claims fully,” says nothing about the extent, if any, to which the Supreme Court implicitly held that the allegations set out in the complaints at issue in either this case or *Craig* stated a viable claim for relief based upon the relevant constitutional provisions. As a result, given that none of the arguments advanced by our dissenting colleague in support of the trial court’s interpretation of *Craig* strike us as persuasive, we will proceed to determine whether the allegations of Plaintiff’s complaint do, in fact, state valid claims for relief predicated upon the relevant constitutional provisions.

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3. N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1

[3] Initially, Plaintiff contends that the Board's negligent acts and omissions violated her "right to an education that [was] free from harm" and "psychological abuse" as guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1. N.C. Const. art. I, § 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Similarly, N.C. Const. art. IX, § 1 states that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." In giving content to these constitutional guarantees, the Supreme Court has held that North Carolina students are entitled to receive an education that satisfies certain qualitative standards. *Leandro v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). As a result, the Supreme Court has recognized that a student is entitled to receive "a sound basic education in our public schools," including:

(1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255.

To date, we are not aware of any decision by either this Court or the Supreme Court which has extended the educational rights guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1, beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system. Although the serious wrongfulness inherent in the actions in which Defendant Priode allegedly engaged should not be minimized in any way, we are unable to see how the allegations set out in Plaintiff's complaint state a claim for violating these constitu-

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tional provisions. Put another way, we are unable to discern from either the language of the relevant constitutional provisions or the reported decisions construing these provisions that North Carolina public school students have a state constitutional right to recover damages from local boards of education for injuries sustained as the result of a negligent failure to remain aware of and supervise the conduct of public school employees. As a result, Plaintiff's complaint "on its face reveals the absence of facts sufficient to make a good claim" under N.C. Const. art. I, § 15 or N.C. Const. art. IX, § 1, such that Plaintiff has failed to state a claim based on those constitutional provisions upon which relief may be granted. *Bobbitt*, ___ N.C. App. at ___, 715 S.E.2d at 615 (citation and quotation marks omitted).

4. N.C. Const. art. I, § 19

[4] Secondly, Plaintiff asserts that the Board "deprived" her of "her liberty, interest and privilege in an education free from abuse or psychological harm" as guaranteed by N.C. Const. art. I, § 19, which provides that:

[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

According to well-established North Carolina law, N.C. Const. art. I, § 19 "guarantees both due process rights and equal protection under the law" and has been interpreted as being similar to the due process clause of the Fourteenth Amendment to the Federal Constitution. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). As a general proposition, due process "is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662, 666 (1986) (emphasis omitted) (holding that the negligent act of a deputy sheriff which caused injury to the plaintiff did not support a finding of liability based upon the due process clause, so that the trial court correctly granted summary judgment in defendant's favor with respect to a due process claim that the plaintiff had asserted pursuant to 42 U.S.C. § 1983). "Where a government official's act causing injury to life, liberty, or property is merely negligent, 'no procedure for compensation is constitutionally required.'" *Id.* at 333, 106 S. Ct. at 666, 88 L. Ed. 2d at 669 (emphasis omitted)

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(quoting *Parratt v. Taylor*, 451 U.S. 527, 548, 101 S. Ct. 1908, 1919, 68 L. Ed. 2d 420, 437 (1981) (Powell, J., concurring in result)).³ As a result, assuming, without in any way deciding, that N.C. Const. art. I, § 19 entitles Plaintiff to an education free from abuse or physical harm, we do not believe that she is entitled to a damage recovery against the Board based upon the negligent conduct alleged in her complaint.⁴ As a result, we are compelled to conclude that “no law supports [Plaintiff’s] claim” for relief based upon N.C. Const. art. I, § 19, *Bobbitt*, ___ N.C. App. at ___, 715 S.E.2d at 615 (citation and quotation marks omitted), so that her complaint fails to state a claim for relief based upon that constitutional provision as well.

III. Conclusion

Thus, for the reasons set forth above, we hold that the Board’s appeal from the trial court’s order denying its motion to dismiss Plaintiff’s constitutional claims is properly before this Court and that Plaintiff has failed to state claims arising under various provisions of the North Carolina Constitution for which relief may be granted.⁵ As a result, the trial court’s order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Mecklenburg

3. As Plaintiff correctly notes, decisions construing the due process clause of the United States constitution are not dispositive of the proper interpretation of the “law of the land” clause of N.C. Const. art. I, § 19. *Bacon v. Lee*, 353 N.C. 696, 721, 549 S.E.2d 840, 856-57 (2001). However, we have not found any authority tending to suggest that the degree of inattention to Plaintiff’s safety alleged to have occurred in this case rises to the level of a violation of Plaintiff’s rights under N.C. Const. art. I, § 19 and do not believe that deficient supervision of the type alleged to have occurred here suffices to support a determination that Plaintiff is entitled to recover damages from the Board under the “law of the land” clause.

4. Our dissenting colleague does not appear to disagree with this understanding of the relevant federal decisions.

5. The fact that Plaintiff has failed to state a claim for relief pursuant to the constitutional provisions upon which she relies does not mean that she lacks an adequate remedy. “[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim.” *Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. As the record clearly reflects, Plaintiff had an opportunity to present her claims to the Court and obtain a determination as to whether those claims had any substantive merit without having to overcome any sovereign or governmental immunity bar. However, since Plaintiff has failed to state viable constitutional claims against the Board, such claims, to the extent that they have any viability under the common law, are barred by governmental immunity. Although our dissenting colleague disagrees with this assertion and argues that the plaintiff in *Craig* had no more opportunity to present his claims than Plaintiff has had in this case, we do not find this argument persuasive given that it rests solely upon her belief that *Craig* contains a substantive constitutional holding, an argument which we have not found persuasive for the reasons set forth above.

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County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JUDGE ROBERT C. HUNTER concurs.

JUDGE STROUD dissents by separate opinion.

STROUD, Judge dissenting.

Although I agree that defendant Board's interlocutory appeal affects a substantial right, I disagree that the trial court's order should be reversed and remanded. Based upon *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009), I believe this Court is required to affirm the order of the trial court denying defendants' motion to dismiss, and therefore I respectfully dissent.

The majority noted correctly that "the ultimate issue raised by the Board's appeal is whether Plaintiff has stated a claim for relief based upon the relevant provisions of the state constitution[.]" but answers this question "in the negative." The majority relies upon its analysis of *Craig*, determining

that the Supreme Court simply declined to consider the substantive viability of the state constitutional claims that the plaintiff attempted to assert pursuant to N.C. Const. art. I, §§ 15 & 19 and N.C. Const. art. IX, § 1, in *Craig*, explicitly stating that its decision did not "predetermine the likelihood that [the] [p]laintiff [would] win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case" and that its holding "simply ensure[d] that an adequate remedy must provide the possibility of relief under the circumstances." *Id.*

Although it is certainly true that the Supreme Court's decision in *Craig* did not mean that the plaintiff in that case would ultimately prevail, the Supreme Court did "affirm the trial court's denial of defendant's motion for summary judgment[.]" thus permitting the plaintiff to proceed with his "colorable constitutional claims" based upon allegations of negligence. *Id.* at 340-42, 678 S.E.2d at 355-57. If the Supreme Court did not consider *Craig's* "colorable constitutional claims" sufficiently viable to survive dismissal at the summary judgment stage, it would have reversed the trial court's order denying the defendant's motion for summary judgment since the constitutional claims were the only claims being considered in the *Craig* appeal. *See id.* at 336-

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42, 678 S.E.2d at 353-57. There was no dispute that the “negligence” claims were barred by governmental immunity, either in *Craig* or in this case, thus leaving only the constitutional claims for consideration. *See id.* at 338, 678 S.E.2d at 354. The difficulty with *Craig* is that the opinion provides no meaningful guidance on just what a “colorable constitutional claim[.]” based upon negligence is, *id.*, 363 N.C. at 334-42, 678 S.E.2d at 351-57, but whatever it may be, if one existed in *Craig*, the same claim exists in this case, and for that reason the trial court properly denied defendant Board’s motion to dismiss.

I. “Colorable Constitutional Claims”

The Supreme Court in *Craig* referred to the plaintiff’s claims as “colorable constitutional claims.” *Id.* at 342, 678 S.E.2d at 357. Defendant Board argues that “colorable constitutional claims[,]” *id.*, require something more than just an ordinary negligence claim which has been given an alternate title as a “constitutional claim” with some sections of the North Carolina State Constitution cited in support, but no factual allegations which would actually make the claim something more than an ordinary negligence claim. Allowing such a claim to proceed could, as a practical matter, essentially eliminate sovereign or governmental immunity in most, if not all, ordinary negligence cases. I have therefore examined *Craig*, and its predecessor *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L.Ed. 2d 431 (1992), to see if they support defendant Board’s argument that “colorable constitutional claims[,]” *Craig*, 363 N.C. at 342, 678 S.E.2d at 357, which may survive a motion to dismiss, require more than allegations of negligence coupled with the allegation that the defendant’s actions violate the North Carolina State Constitution.

1. *Craig’s* Reliance on *Corum*

I can find no definition of “colorable claim” in the context of a constitutional claim in our case law, but Black’s Law Dictionary defines it as “[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law[.]” Black’s Law Dictionary 282 (9th ed. 2009). As Black’s definition reveals nothing about what a “colorable constitutional claim[.]” is, *Craig*, 363 N.C. at 342, 678 S.E.2d at 357; Black’s Law Dictionary 282, I have sought guidance in *Corum*. In contrast to *Craig*, in *Corum*, the case upon which *Craig* relied, the plaintiff, formerly employed as a dean at Appalachian State University, alleged the “defendants discharged him from his deanship in retaliation for his speaking freely about the

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moving of the Appalachian Collection[.]” in violation of his free speech rights, including those under “North Carolina Constitution Article I, Sections 14, 19, and 35[.]” *Corum*, 330 N.C. at 766-70, 413 S.E.2d at 280-82; *see Craig*, 363 N.C. at 338-42, 678 S.E.2d at 354-57. The Supreme Court determined that

our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights. We conclude that plaintiff does have a direct cause of action under the State Constitution against defendant Durham in his official capacity for alleged violations of plaintiff’s free speech rights.

Corum, 330 N.C. at 783, 413 S.E.2d at 290 (citation omitted). Thus, in *Corum*, the constitutional claim was based upon specific factual allegations of an intentional act of the defendant alleged to be a violation of a constitutional right, the right to freedom of speech. *See id.* at 770, 413 S.E.2d at 282.

Yet *Corum* does not mention the concept of a “colorable claim.” *See id.*, 330 N.C. 761, 413 S.E.2d 276. In addition, the *Corum* Court cited ten cases in support of its statement that

authorities in North Carolina are consistent with the decisions of the United States Supreme Court and decisions of other state supreme courts to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated[;]

none of these ten cases address negligence claims and none define a “colorable claim.” *Id.* at 783-84, 413 S.E.2d at 290.

2. *Craig’s* Analysis

Turning back to *Craig*, I have been unable to discern any factual allegations which would establish that the plaintiff’s constitutional claim was a “colorable” claim based upon anything other than the exact same allegations which supported the negligence claims. *See Craig*, 363 N.C. 334, 678 S.E.2d 351. Legally, *Craig’s* analysis and holding relied specifically upon *Corum*. *See Craig* at 342, 678 S.E.2d at 356-57 (“In sum, we hold that plaintiff’s common law negligence claim is not an adequate remedy at state law because it is entirely precluded by the application of the doctrine of sovereign immunity. To hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring

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redress for every constitutional injury.” (quotation marks omitted)). The *Craig* Court also noted that

our holding here is likewise consistent with the spirit of our reasoning in *Sale v. State Highway & Public Works Commission*, 242 N.C. 612, 89 S.E.2d 290 (1955), and *Midgett v. North Carolina State Highway Commission*, 260 N.C. 241, 132 S.E.2d 599 (1963), *overruled on other grounds by Lea Co. v. North Carolina Board of Transportation*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983).

Id. at 341, 678 S.E.2d at 356. Both *Sale* and *Midgett* dealt with the taking of property for public use. *See Midgett*, 260 N.C. 241, 132 S.E.2d 599; *Sale*, 242 N.C. 612, 89 S.E.2d 290. Neither *Sale* nor *Midgett* provides any guidance as to the identification of a “colorable” constitutional claim in the context of negligence. *See Midgett*, 260 N.C. 241, 132 S.E.2d 599; *Sale*, 242 N.C. 612, 89 S.E.2d 290.

As to the factual allegations, in *Craig*, footnote four states that as to his constitutional claim the plaintiff alleged:

The constitutional claim for damages is plead [sic] as an alternative remedy, should the court find that sovereign immunity or governmental immunity in any of its various forms exists and, if it does exist, which the plaintiffs deny, then, in that event, plaintiffs have no adequate remedy at law and assert the constitutional violations pursuant to the laws of North Carolina.

Id. at 340 n.4, 678 S.E.2d at 355 n.4 (quotation marks omitted). It appears that no other facts or circumstances other than those of negligence were alleged which would lead to the conclusion that the plaintiff had made “colorable constitutional claims.” *See id.*, 363 N.C. at 334-42, 678 S.E.2d at 351-57. Although *Craig* did not explain what a “colorable constitutional claim[]” requires, *id.*, 363 N.C. at 334-42, 678 S.E.2d at 351-57, I note that in other cases, claims which have been treated as constitutional have truly been grounded in facts which demonstrate a violation of a constitutional right, and not mere negligence claims to which the heading “constitutional” has been appended. *See, e.g., Sanders v. State Personnel Com’n*, 183 N.C. App. 15, 644 S.E.2d 10, *disc. review denied*, 361 N.C. 696, 652 S.E.2d 653 (2007).

3. Federal Courts’ Approach

Given the lack of guidance in North Carolina cases as to a “colorable constitutional claim[,]” *Craig*, 363 N.C. at 342, 678 S.E.2d at 357, based upon allegations of negligence, I have reviewed federal cases addressing this issue. I find the United States Supreme Court’s

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treatment of governmental immunity in cases which allege constitutional violations based upon negligent conduct to be instructive, as the Court has determined that a mere negligence claim is not transformed into a constitutional claim merely by pleading it as such. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 88 L.Ed. 2d 662 (1986). In *Daniels*, the United States Supreme Court considered the personal injury claim of a prisoner who alleged he was injured when he slipped and fell on a pillow negligently left on the stairs by a deputy. *Id.* at 328, 88 L.Ed. 2d at 666. The Court noted that “in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim.” *Id.* at 330, 88 L.Ed. 2d at 667. The Court continued,

The Due Process Clause of the Fourteenth Amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. *E.g., Davidson v New Orleans*, 96 US 97, 24 L Ed 616 (1878) (assessment of real estate); *Rochin v California*, 342 U.S. 165, 96 L Ed 183, 72 S Ct 205 (1952) (stomach pumping); *Bell v Burson*, 402 US 535, 29 L Ed 2d 90, 91 S Ct 1586 (1971) (suspension of driver’s license); *Ingraham v Wright*, 430 US 651, 51 L Ed 2d 711, 97 S Ct 140, (1977) (paddling student); *Hudson v Palmer*, *supra* (intentional destruction of inmate’s property). No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and commonsense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv L Rev 366, 368 (1911), was “ ‘intended to secure the individual from the arbitrary exercise of the powers of government,’ ” *Hurtado v. California*, 110 US 516, 527, 28 L Ed 232, 4 S Ct 111 (1884) (quoting *Bank of Columbia v Okely*, 4 Wheat 235, 244, 4 L Ed 559 (1819)). *See also Wolff v McDonnell*, 418 US 539, 558, 41 L Ed 2d 935, 94 S Ct 2963 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v West Virginia*, 129 US 114, 123 [32 L Ed 623, 9 S Ct 231] (1889)”); *Parratt*, *supra*, at 549, 68 L Ed 2d 420, 101 S Ct 1908 (POWELL, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to “deprive any

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person of life, liberty, or property,” the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, *supra*, it serves to prevent governmental power from being “used for purposes of oppression,” Murray’s Lessee v Hoboken Land & Improvement Co., 18 How 272, 277, 15 L Ed 372 (1856) (discussing Due Process Clause of Fifth Amendment).

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate’s property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

Id. at 331-32, 88 L.Ed. 2d at 668.

Although the distinction between deliberate conduct and negligent conduct is not always obvious, the United States Court of Appeals, Fourth Circuit, has determined that there must be some element of intent, and more than negligence, for a constitutional claim to survive immunity. See *Lovelace v. Lee*, 472 F.3d 174, 201 (4th Cir. 2006). In *Lovelace*, the Fourth Circuit Court vacated summary judgment in favor of the defendants because there was a genuine issue as to the plaintiff’s allegations that the defendant’s actions were intentional; the Court noted:

The district court extended the analysis in *Daniels* and *Pink* to Lovelace’s First Amendment free exercise claim, reasoning that the operative word “prohibit” in the First Amendment likewise connotes a “conscious act” rather than a merely negligent one. J.A. 171. Accordingly, the district court held that negligent interference with free exercise rights is not actionable under § 1983. We agree and hold that negligent acts by officials causing unintended denials of religious rights do not violate the Free Exercise Clause. Accord *Lewis v. Mitchell*, 416 F.Supp.2d 935, 942–44 (S.D.Cal.2005); *Shaheed*, 885 F.Supp. at 868. Lovelace must assert conscious or intentional interference with his free exercise rights to state a valid claim under § 1983.

Although the district court imposed the proper state-of-mind requirement, it partially erred in finding that the defendants’

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actions “resulted from negligence and not from intentional action.” J.A. 171. The court correctly assessed the evidence against Shinault and Lee (in their individual capacities), but it underestimated the strength of the evidence against Lester. The facts, taken in the light most favorable to Lovelace, raise a genuine dispute whether Lester acted intentionally in depriving Lovelace of his free exercise rights. For this reason, summary judgment in favor of Lester on the First Amendment claim was error.

Id. at 201-02.

The Fourth Circuit has also noted that the rationale stated in *Daniels*, which arose under the 14th Amendment’s Due Process Clause, has been applied in cases arising under other constitutional provisions. *Id.* at 201; *see Daniels*, 474 U.S. at 331-32, 88 L.Ed. 2d at 668. The Fourth Circuit stated in *Pink v. Lester*,

Daniels’ rejection of a theory of actionable negligence under the Due Process Clause is consistent with Supreme Court cases interpreting other provisions of the Constitution. For instance, *Estelle v. Gamble* held that only conduct rising to the level of “deliberate indifference” constitutes “infliction” of cruel and unusual punishment for purposes of the Eighth Amendment. 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). Similarly, *Arlington Heights v. Metropolitan Housing Dev. Corp.* requires discriminatory purpose in order to establish a “denial” of Equal Protection. 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

The language and the purpose of the Due Process Clause thus restrict violations thereof to official conduct that entails some measure of deliberateness. Absent such limitation, the Fourteenth Amendment would be demeaned, and federal courts would adjudicate claims that lacked connection to federal law. In our system of governance, the Constitution is revered but not ubiquitous, and federal courts sit as courts of limited jurisdiction. Thus, as *Daniels* underscores, not all undesirable behavior by state actors is unconstitutional. *See Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976) (the Fourteenth Amendment is not “a font of tort law to be superimposed upon whatever systems may already be administered by the States”).

Pink v. Lester, 52 F.3d 73, 75 (4th Cir. 1995). Thus, in my view, the federal courts’ requirement of some element of intent or deliberate indif-

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ference in constitutional claims, *see, e.g., Lovelace*, 472 F.3d at 201-02, at the very least, should be necessary for a negligence-based “colorable constitutional claim[.]” *Craig*, 363 N.C. at 342, 678 S.E.2d at 357, under North Carolina law as well, but I also recognize that *Craig* does not appear to impose such a requirement. *See id.*, 363 N.C. 334, 678 S.E.2d 351.

II. Interpretations of *Craig*

The trial court, the majority, and I in this dissent all agree that *Craig* is the controlling case; unfortunately, we disagree on what it means and its application to this case. I will therefore attempt to address our areas of disagreement. The majority summarized,

In *Craig*, the plaintiff sought to obtain a damage recovery against the New Hanover County Board of Education based upon its failure to protect him from sexual abuse that he allegedly suffered at the hands of one of the defendant’s employees. 363 N.C. at 335, 678 S.E.2d at 352. In his complaint, the plaintiff asserted various common law negligence claims against the defendant and also alleged that the defendant “deprived him of an education free from harm and psychological abuse” in violation of N.C. Const. art. I, §§ 15 & 19 and N.C. Const. art. IX, § 1. *Id.*

“The Board moved for summary judgment” which the trial court subsequently denied; the Board appealed. *Id.* at 335, 678 S.E.2d at 352-53. This Court issued an opinion by a divided panel as to the plaintiff’s constitutional claims. *Id.* at 336, 678 S.E.2d at 353. The Supreme Court granted certiorari to consider plaintiff’s constitutional claims, noting that this Court’s

majority concluded that plaintiff’s common law negligence claim is an adequate remedy at state law, and thus, the constitutional claims are barred. The dissenting opinion contended that plaintiff’s negligence claim cannot be an adequate state remedy since governmental immunity completely defeats the claim. By an order dated 6 March 2008, we granted certiorari to review the Court of Appeals decision only as the issue raised in the dissenting opinion.

Id. (citation and quotation marks omitted).

Before the Supreme Court the

[p]laintiff argue[d] that his common law negligence claim [wa]s not an adequate remedy at state law because the doc-

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trine of governmental immunity prevails against it. Consequently, he assert[ed] that per this Court's decision in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), he should be allowed to bring claims directly under our State Constitution that will not be susceptible to an immunity defense.

Id. at 338, 678 S.E.2d at 354.

The Supreme Court noted only one specific allegation made by the plaintiff which mentions a constitutional claim:

The constitutional claim for damages is plead [sic] as an alternative remedy, should the court find that sovereign immunity or governmental immunity in any of its various forms exists and, if it does exist, which the plaintiffs deny, then, in that event, plaintiffs have no adequate remedy at law and assert the constitutional violations pursuant to the laws of North Carolina.

Id. at 340 n.4, 678 S.E.2d at 355 n.4 (quotation marks omitted). No other facts or circumstances were alleged or forecast which could support the conclusion that the plaintiff had made a "colorable constitutional claim[]." *See id.* at 334-42, 678 S.E.2d at 351-57. Nonetheless, the Supreme Court held "that plaintiff's common law negligence claim is not an adequate remedy at state law because it is entirely precluded by the application of the doctrine of sovereign immunity." *Id.* at 342, 678 S.E.2d at 356-57 (quotation marks omitted). The Court explained that the

[p]laintiff's remedy cannot be said to be adequate by any realistic measure. Indeed, to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim. Under the facts averred by plaintiff here, the doctrine of sovereign immunity precludes such opportunity for his common law negligence claim because the defendant Board of Education's excess liability insurance policy excluded coverage for the negligent acts alleged. Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But as we held in *Corum*, plaintiff may move forward in the alternative, bringing his colorable

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claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.

Id. at 339-40, 678 S.E.2d at 355 (footnote omitted).

In *Craig*, the plaintiff alleged he was sexually assaulted at school. 363 N.C. at 335-36, 678 S.E.2d at 352-53. Here too, the plaintiff's complaint alleges sexual misconduct at school. In *Craig*,

[t]he first [claim] was based on common law negligence. His other claims asserted that the Board deprived him of an education free from harm and psychological abuse, thereby violating three separate provisions of the North Carolina State Constitution: Article I, Section 15 (right to the privilege of education); Article I, Section 19 (no deprivation of a liberty interest or privilege but by the law of the land); and Article IX, Section 1 (schools and means of education shall be encouraged).

Id. at 335, 678 S.E.2d at 352. Here too, plaintiff brought negligence-based claims against her school board based upon allegations of negligent hiring, supervision, and retention and negligent infliction of emotional distress. Plaintiff here also brought causes of action under the exact same three constitutional provisions as the plaintiff in *Craig*. *See id.* In *Craig*, the plaintiff's constitutional claims were based on the same facts as the negligence claims without any additional allegations, as was specifically noted in *Craig's* holding. *See id.*, 363 N.C. at 340, 678 S.E.2d at 355 ("But as we held in *Corum*, plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution *based on the same facts that formed the basis for his common law negligence claim.*" (emphasis added)). Here too, plaintiff makes no factual allegations beyond those made in her negligence-based claims.

In *Craig*, the Supreme Court addressed the question of "whether plaintiff's common law negligence claim, which will ultimately be defeated by governmental immunity because of its exclusion from defendant Board of Education's insurance coverage, provides an adequate remedy at state law[;]" and the Supreme Court held "that it does not and that plaintiff may therefore bring his colorable claims directly under the North Carolina Constitution." *Id.* at 352, 678 S.E.2d at 335. The Supreme Court thus "affirm[ed] the trial court's denial of defendant's motion for summary judgment on plaintiff's direct colorable constitutional claims." *Id.* at 342, 678 S.E.2d at 357. Accordingly, I believe this Court is required here to also "affirm the trial court's

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denial of defendants' motion" to dismiss as I am unable to distinguish *Craig* from this case in any meaningful way. *Id.*

1. Motion for Summary Judgment Versus 12(b)(6) Motion

The only potentially dispositive difference between this case and *Craig* is that *Craig* was decided on a motion for summary judgment while here the trial court ruled upon defendant Charlotte-Mecklenburg Board of Education's ("Board") 12(b)(6) motion. *See id.* A motion to dismiss is determined upon a different standard than a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (stating standard as "[f]ailure to state a claim upon which relief can be granted"), 56(c) (2011) (noting that a motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law"). Considering these different standards, the fact that the Supreme Court found that the allegations in *Craig* were sufficient to survive defendant's motion for summary judgment necessarily means it found such allegations would survive a 12(b)(6) motion. *See Craig*, 363 N.C. 334, 678 S.E.2d 351; *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), 56(c). After all, if the plaintiff had "fail[ed] to state a claim upon which relief [could] be granted" then the defendant necessarily would be "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), 56(c).

In addition, even though *Craig* was decided at the summary judgment stage, when the Court may consider factual allegations beyond the pleadings, *see* N.C. Gen. Stat. § 1A-1, Rule 56(c), the *Craig* opinion is not based upon any factual allegations of this type. *See Craig*, 363 N.C. 334, 678 S.E.2d 351. The allegations upon which the Supreme Court relied in *Craig* appear to be solely from the complaint and are substantially the same as in this case. *See id.* As the Supreme Court determined that the plaintiff's allegations in *Craig* were adequate to survive summary judgment under Rule 56(c), I believe we must conclude that these same claims based upon such similar facts must also survive defendant Board's Rule 12(b)(6) motion to dismiss. *See id.*; *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), 56(c).

2. Merits of the Plaintiff's Case in *Craig*

The majority's decision seems to rely primarily upon language in *Craig* which acknowledges that although the plaintiff had brought a "colorable constitutional claim[]" which was not barred by govern-

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mental immunity, the plaintiff in *Craig* may not ultimately prevail in his claim. *Craig*, 363 N.C. at 340-42, 678 S.E.2d at 355-57. The majority states,

The fundamental problem with the trial court's logic is that the Supreme Court simply declined to consider the substantive viability of the state constitutional claims that the plaintiff attempted to assert pursuant to N.C. Const. art. I, §§ 15 & 19 and N.C. Const. art. IX, § 1, in *Craig*, explicitly stating that its decision did not "predetermine the likelihood that [the] [p]laintiff [would] win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case" and that its holding "simply ensure[d] that an adequate remedy must provide the possibility of relief under the circumstances." *Id.* In other words, the Supreme Court simply held in *Craig* that the existence of common law claims that were barred by the doctrine of sovereign or governmental immunity did not operate to bar the plaintiff from attempting to assert any constitutional claims that he might have otherwise had against the defendant while expressly declining to address the extent to which his constitutional claims had substantive merit.

The majority notes that *Craig* was not a decision on the merits of the plaintiff's case. Obviously *Craig* was not a decision on the merits and simply affirmed the denial of defendant's motion for summary judgment. *See id.* at 342, 678 S.E.2d at 357. Not even plaintiff argues that the absence of governmental immunity means that she will ultimately prevail on the merits of her claim; she claims only that she has a right to proceed with her constitutional claims. The pivotal holding in *Craig* is that governmental immunity did not bar the plaintiff's claim from proceeding past the summary judgment stage. *See id.* at 342, 678 S.E.2d at 356-57. In fact, as the trial court would have no jurisdiction to consider a claim barred by governmental immunity, *see Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009) (noting that while it may be unsettled whether sovereign immunity is based upon subject matter or personal jurisdiction, it is a jurisdictional issue), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010), *Craig's* holding that "plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim" meant that the trial court did have jurisdiction to adjudicate plaintiff's claims fully. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

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I entirely agree with the majority's analysis of plaintiff's constitutional claims under N.C. Constitution Article I, Section 15; Article IX, Section 1; and Article I, Section 19; I simply disagree that this Court is at liberty to make this analysis of the claims based upon *Craig*. See *id.*, 363 N.C. 334, 678 S.E.2d 351. *Craig* posed the question of whether the plaintiff's claim should survive a motion for summary judgment, and the Supreme Court answered this question affirmatively without a discussion of the actual merits of the case. See *id.* As the majority points out,

According to well-established North Carolina law, governmental immunity is an "immunity from suit rather than a mere defense to liability[.]" *Craig*, 363 N.C. at 338, 678 S.E.2d at 354 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985)).

As such, if a claim properly barred by immunity is allowed to proceed beyond a motion to dismiss or for summary judgment, a major part of the rationale for immunity has been eliminated. See *id.* at 338, 678 S.E.2d at 354. If a case is allowed to proceed past a motion to dismiss or for summary judgment, a substantial part of the protection provided by governmental immunity has been lost as the governmental entity must incur the costs, both direct financial costs as well as the expenditure of government personnel time and effort, to defend the case, regardless of whether the plaintiff ultimately wins or loses. See *id.* Based on the strikingly similar facts and the same legal posture as in *Craig*, we too are asked to determine whether plaintiff's constitutional claims should survive a pre-trial motion; in light of *Craig*, I would also answer the question affirmatively. See *id.*, 363 N.C. 334, 678 S.E.2d 351.

3. Opportunity to Present Claim

Furthermore, the majority determines that plaintiff here, by virtue of bringing her claim before the trial court and this Court "had an opportunity to present her claims to the Court and obtain a determination as to whether those claims had any substantive merit without having to overcome any sovereign or governmental immunity bar" and thus had an adequate remedy. But the plaintiff in *Craig* had exactly the same opportunity, and our Supreme Court determined that "[p]laintiff's remedy cannot be said to be adequate by any realistic measure." *Id.* at 340, 678 S.E.2d at 355. The Supreme Court went on to explain that due to the inadequate remedy and "opportunity" provided by the plaintiff's negligence claim, the plaintiff could bring

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a constitutional claim “based on the same facts that formed the basis for his common law negligence claim.” *Id.* Thus, the Supreme Court did not consider the plaintiff’s remedy to be “adequate” nor did it determine that an “opportunity” was properly provided for the plaintiff “to enter the courthouse doors and present his claim.” *Id.* Under the similar facts and procedural posture presented in this case, I do not see how we can claim that plaintiff here had a realistic “opportunity to enter the courthouse doors” or an adequate remedy. *Id.*

III. Conclusion

“This Court is bound by precedent of the North Carolina Supreme Court[,]” *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36, *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003), and that Court has determined that governmental or sovereign immunity may not serve as a bar to a properly pled negligence claim which the plaintiff has also labeled as a constitutional claim, albeit without alleging any facts in addition to those which support the negligence claim or make the constitutional claim “colorable;” for this reason, I believe we are bound to affirm the trial court’s order denying defendant Board’s motion to dismiss. *See Craig*, 363 N.C. 334, 678 S.E.2d 351. Because I believe that the trial court properly denied defendant Board’s motion to dismiss plaintiff’s constitutional claims based upon *Craig*, I would affirm, and I respectfully dissent.

GROVER M. ENSLEY, EMPLOYEE, PLAINTIFF v. FMC CORPORATION, EMPLOYER,
SELF-INSURED (BROADSPIRE, A CRAWFORD COMPANY, SERVICING AGENT),
DEFENDANT

No. COA12-255

(Filed 21 August 2012)

1. Workers’ Compensation—attorney fees—defending without reasonable grounds

The Industrial Commission did not err by finding and concluding that defendant had defended a workers’ compensation claim without reasonable grounds and awarding attorney fees where defendant contended that none of plaintiff’s experts had given an opinion on whether plaintiff was disabled, but the record showed that one of plaintiff’s medical experts and defendant’s

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medical expert testified that plaintiff was disabled as a result of asbestosis.

2. Workers' Compensation—disability award—beginning date—clerical error

A workers' compensation disability award for asbestosis was remanded for correction of a clerical error regarding the date from which disability benefits were awarded.

3. Workers' Compensation—unreasonable defense—attorney fee award—reduced on remand

The Industrial Commission did not err in a workers' compensation case after remand from the Court of Appeals by reducing the amount of attorney fees awarded as a sanction for defending the claim without reasonable grounds. The remand required findings and conclusions on whether defendant acted without reasonable grounds and an award of attorney fees if the Commission saw fit. The Commission made the necessary findings and then concluded in its discretion that an award of attorney fees pursuant to N.C.G.S. § 97-88.1 was appropriate.

Appeal by plaintiff and defendant from the Amended Opinion and Award entered 19 October 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2012.

Wallace & Graham, P.A., by Edward L. Pauley, for the plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Deepa P. Tungare and M. Duane Jones, for the defendant.

THIGPEN, Judge.

Grover M. Ensley ("Plaintiff") and FMC Corporation ("Defendant") appeal from an Amended Opinion and Award of the North Carolina Industrial Commission ("the Commission"). We must decide whether (I) the Commission erred by awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2011); (II) the Commission erred by reducing the amount of the attorney's fees awarded; and (III) the Amended Opinion and Award contains a clerical error with respect to the date from which ongoing disability benefits were awarded to Plaintiff. Because the Commission did not err by finding and concluding that Defendant defended this claim without reasonable grounds, we affirm the Commission's award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. Additionally, we hold the Commis-

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sion was not precluded from altering the amount of attorney's fees awarded in its original opinion. Finally, we remand the portion of the Amended Opinion and Award awarding benefits "beginning January 30, 2006" and direct the Commission to correct this clerical error to award disability benefits to begin as of 18 June 2006.

I. Factual and Procedural History

This case is back before this Court after being reversed and remanded in part to the Commission. Specifically, this Court (I) remanded to the Commission for additional findings of fact and conclusions of law regarding whether Defendant brought, prosecuted, or defended this action without reasonable grounds and (II) reversed and remanded with instructions for the Commission "to order disability benefits to begin as of 18 June 2006." *Ensley v. FMC Corp.*, No. COA10-522, 2011 N.C. App. LEXIS 494, 2011 WL 883638 (filed 15 March 2011) (unpublished) ("*Ensley I*"). For a summary of the facts giving rise to the workers' compensation claim, reference is made to this Court's prior opinion. *See id.*

Following this Court's opinion reversing and remanding this case in part,¹ the Commission filed an Amended Opinion and Award on 19 October 2011. In the Amended Opinion and Award, the Commission made the following pertinent findings of fact and conclusion of law:

Findings of Fact

21. The Full Commission finds based upon the greater weight of the credible evidence that Plaintiff suffers from asbestosis and silicosis as a result of his employment with Defendant-Employer. The Full Commission further finds that as of June 18, 2006, Plaintiff is permanently and totally disabled as a result of his asbestosis.

22. Based on the foregoing findings, the Full Commission finds that Defendants defended this claim without reasonable grounds.

Conclusions of Law

7. As Defendants defended this claim without reasonable grounds, Plaintiff is entitled to have Defendants pay for the costs of this action including reasonable attorney's fees. N.C.

1. Following *Ensley I*, Defendant filed petitions for Writ of Supersedeas and for discretionary review of this Court's opinion. The North Carolina Supreme Court denied the petitions on 15 June 2011.

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Gen. Stat. § 97-88.1. The Full Commission finds that \$12,000.00 is a reasonable attorney[']s fee for Plaintiff's counsel to be charged to Defendants.

The Commission awarded the following:

1. Subject to the attorney's fees hereinafter approved, Defendants shall pay to Plaintiff permanent total disability benefits at the rate of \$730.00 per week beginning January 30, 2006 and continuing for the remainder of Plaintiff's life. . . .

. . .

3. A reasonable attorney[']s fee in the amount of 25 percent of the compensation approved and awarded for Plaintiff is approved and allowed for Plaintiff's counsel. In addition, Defendants shall pay to Plaintiff's counsel a reasonable attorney's fee of \$12,000, not to be deducted from the sums due to Plaintiff, pursuant to N.C. Gen. Stat. § 97-88.1 as part of the cost of this action. The attorney's fee shall be paid directly to Plaintiff's attorney.

Plaintiff and Defendant appeal from the Amended Opinion and Award. Defendant contends (I) the Commission erred by awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 and (II) the Amended Opinion and Award contains a clerical error with respect to the date from which ongoing disability benefits were awarded to Plaintiff. Plaintiff contends the Commission erred by reducing the amount of attorney's fees awarded. We will address each appeal in turn.

II. Standard of Review

"[O]n appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted).

III. Defendant's Appeal

A. Attorney's Fees

[1] Defendant first contends that the Commission erred in awarding Plaintiff attorney's fees under N.C. Gen. Stat. § 97-88.1 because Defendant had reasonable grounds to defend Plaintiff's claim. We disagree.

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N.C. Gen. Stat. § 97-88.1 provides that “[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant’s attorney or plaintiff’s attorney upon the party who has brought or defended them.”

The standard of review for an award or denial of attorney’s fees under N.C. Gen. Stat. § 97–88.1 is a two-part analysis:

First, whether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*. If this Court concludes that a party did not have reasonable ground to bring or defend a hearing, then we review the decision of whether to make an award and the amount of the award for an abuse of discretion. In conducting the first step of the analysis, the reviewing court should consider the evidence presented at the hearing to determine reasonableness of a defendant’s claim. As such, the burden is on the defendant to place in the record evidence to support its position that it acted on reasonable grounds.

Blalock v. Southeastern Material, ___ N.C. App. ___, ___, 703 S.E.2d 896, 899 (2011) (internal citations and quotation marks omitted). “The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.” *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998) (quotation and quotation marks omitted).

Here, Defendant challenges finding of fact number 22 and conclusion of law number 7 which both state that “Defendants defended this claim without reasonable grounds.”² Although Defendant does not dispute that four doctors testified that Plaintiff had asbestosis as a result of his employment with FMC Corporation, Defendant contends that none of the doctors or the vocational counselor testified that Plaintiff was actually disabled as a result of his asbestosis. Plaintiff contends that Defendant’s denial of the claim was unreasonable because Defendant’s medical expert, Dr. Selwyn Spangenthal, “determined that Plaintiff was disabled due to the asbestosis.” We agree with Plaintiff.

2. Defendant also challenges “all the Findings of Fact to the extent they imply Defendants’ defense of the matter was unreasonable or omit relevant testimony establishing that Defendants’ defense was in fact reasonable[.]”

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Defendant first contends that none of Plaintiff's three medical experts—Drs. Jill Ohar, Fred Dula, and Stephen Proctor—gave an opinion on whether Plaintiff was disabled. Although Dr. Dula testified that he did not make a disability determination in this case, the record shows that Drs. Ohar and Proctor did testify regarding Plaintiff's disability. Dr. Proctor stated that although he did not do a disability evaluation, he agreed that the results of Plaintiff's breathing tests would "be consistent with someone who's disabled because of their breathing problems[.]" Moreover, when Dr. Ohar was asked whether she agreed that Plaintiff "is disabled from working" based upon "vocational findings and his physical defects, including the breathing impairments" caused by asbestosis and silicosis, Dr. Ohar stated, "Yeah, I would believe that. I agree with that."

Defendant also points to Dr. Spangenthal's statement that Plaintiff "might be comfortable sitting at a desk" but could not do any physical activity, as evidence that Plaintiff was not disabled from all activity. However, Dr. Spangenthal, who performed an independent medical evaluation at Defendant's request, also testified as follows regarding Plaintiff's disability:

Q. And you had talked about, you were talking about disability and I think on your report you put he is disabled as a result of his lung disease.

A. That's correct.

Q. And you are saying that he's disabled from doing any work, any type of work?

A. Right. So the thing is that when he spoke to me and he gave me the history, he said that over the past ten years he had noticed a gradual worsening of shortness of breath. . . . The other problem that he did have was that he had a chronic cough that was irritating and occurred throughout the day. And so that might limit his ability to work as well. So both of those factors would play a role. So in terms of doing any type of physical activity in his employment, I think he would be disabled.

Dr. Spangenthal further stated:

Q. Finally, Doctor, it is plaintiff's position that Mr. Ensley was exposed to various dust, including asbestos, during his employment with FMC, and as a result of that exposure he developed [the] lung disease of asbestosis, that the lung disease is severe

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and has rendered him unable to work in any employment. Do you agree with the plaintiff's argument in this case?

...

A. Yes, I do.

In direct contradiction to Defendant's arguments, the record shows that Dr. Ohar and Dr. Spangenthal each testified that Plaintiff is disabled as a result of asbestosis. Defendant presented no evidence to the contrary. Thus, the expert medical testimony in this case demonstrates that there was no genuine basis for Defendant's denial or defense of Plaintiff's claim. *See Blalock*, ____ N.C. App. at ____, 703 S.E.2d at 902 (stating that "Defendants' ignorance, or affirmative disregard, of these longstanding opinions [of three medical experts] directly contradicting their position renders their defense unreasonable and unfoundedly litigious under N.C. Gen. Stat. § 97-88.1") (citation omitted). We hold the Commission did not err by finding and concluding that Defendant defended this claim without reasonable grounds. Accordingly, we reject Defendant's argument that the Commission erred in awarding Plaintiff attorney's fees under N.C. Gen. Stat. § 97-88.1.

B. Clerical Error

[2] Defendant next contends the Amended Opinion and Award contains a clerical error with respect to the date from which ongoing disability benefits were awarded to Plaintiff. Specifically, Defendant argues the date from which ongoing disability benefits should be awarded is 18 June 2006, rather than 30 January 2006. We agree.

In *Ensley I*, this Court held that because Plaintiff was not diagnosed with asbestosis until 18 June 2006, "the Commission erred by ordering disability benefits to begin on 30 January 2006. This ruling is reversed and remanded to the Commission with instructions to order disability benefits to begin as of 18 June 2006." *Ensley*, 2011 N.C. App. LEXIS 494 at *20, 2011 WL 883638 at *7. Accordingly, in its Amended Opinion and Award, the Commission found as fact that "as of June 18, 2006, Plaintiff is permanently and totally disabled as a result of his asbestosis." The Commission also concluded that "as a result of Plaintiff's asbestosis, Plaintiff is permanently and totally disabled from any employment and is entitled to receive permanent total disability compensation . . . beginning June 18, 2006." However, the Commission awarded Plaintiff permanent total disability benefits "beginning January 30, 2006[.]"

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Considering this Court's holding in *Ensley I* and the Amended Opinion and Award as a whole, the Commission's language awarding benefits "beginning January 30, 2006" appears to be a clerical error. Thus, we remand the portion of the Amended Opinion and Award awarding benefits "beginning January 30, 2006[,]" and we direct the Commission to correct this error to award disability benefits to begin as of 18 June 2006.

IV. Plaintiff's Appeal

[3] Plaintiff's sole argument on appeal is that the Commission erred by reducing the amount of the attorney's fee sanction from 25 percent of the compensation awarded to Plaintiff to \$12,000. We disagree.

A. Summary of the Original and Amended Opinion and Award

In its Opinion and Award filed 29 December 2009 ("2009 Opinion and Award"), the Commission, citing N.C. Gen. Stat. § 97-88, entered the following award:

3. A reasonable attorney[s] fee in the amount of 25 percent of the compensation approved and awarded for [P]laintiff is approved and allowed for [P]laintiff's counsel. The attorney's fee shall not be deducted from the compensation due [P]laintiff but paid as a part of the cost of this action. The attorney's fee shall be paid directly to [P]laintiff's counsel.

In *Ensley I*, this Court noted that the reference to section 97-88, rather than section 97-88.1, was likely a typographical error. *Ensley I*, 2011 N.C. App. LEXIS 494 at *18, 2011 WL 883638 at *7. We then held:

The Opinion and Award is devoid of any findings of fact or conclusions of law regarding whether defendants brought, prosecuted, or defended this action without reasonable grounds. This issue must be remanded to the Commission for further findings of fact and conclusions of law. Upon remand, the Commission should make certain that it cites the statutory provision upon which any award of attorney's fees is based.

Id. (citation omitted). *Ensley I* did not require the Commission to make findings of fact and conclusions of law *in support of* its award of attorney's fees in the 2009 Opinion and Award, but rather instructed the Commission to make findings and conclusions on the question of the reasonableness of Defendant's defense of Plaintiff's claim, and additionally, to cite the statute under which "any award of attorney's fees is based." *Id.* Thus, on remand, the Commission's task

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was to make findings of fact and conclusions of law on the question of whether Defendant acted without reasonable grounds, and in turn, to award attorney's fees *if and as it saw fit*.³

In its Amended Opinion and Award entered 19 October 2011, the Commission made findings of fact about the unreasonableness of Defendant's action in defending Plaintiff's claim and concluded, *inter alia*,

7. As defendants defended this claim without reasonable grounds, Plaintiff is entitled to have Defendants pay for the costs of this action including reasonable attorney's fees. N.C. Gen Stat. § 97-88.1. The Full Commission finds that \$12,000.00 is a reasonable attorney[']s fee for Plaintiff's counsel to be charged to Defendant.

Based on its findings of fact and conclusions of law, the Commission entered the following award:

3. A reasonable attorney[']s fee in the amount of 25 percent of the compensation approved and awarded for Plaintiff is approved and allowed for Plaintiff's counsel. In addition, Defendants shall pay to Plaintiff's counsel a reasonable attorney's fee of \$12,000.00, not to be deducted from the sums due Plaintiff, pursuant to N.C. Gen. Stat. § 97-88.1 as a part of the cost of this action. The attorney's fee shall be paid directly to Plaintiff's attorney.

The attorney's fee award in the Amended Opinion and Award thus differs in three respects from the award in the 2009 Opinion and Award: First, the Commission awarded Plaintiff's counsel attorney's fees of *both* 25 percent of the compensation awarded to Plaintiff, and, "[i]n addition," \$12,000.00 pursuant to section 97-88.1. Second, the Commission chose to award Plaintiff's counsel an attorney's fee of \$12,000.00 from Defendant, "not to be deducted from the sums due Plaintiff." Finally, in awarding an attorney's fee of 25 percent of Plaintiff's compensation, the Commission chose not to provide that this award should not be deducted from the compensation due Plaintiff. Thus, this portion of the award of the attorney's fee will

3. Even where a defendant is found to have acted unreasonably in defending an action, the Commission has the discretion to award or not to award attorney's fees under the statute. *See Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 397, 298 S.E.2d 681, 684 (1983) (stating that "[t]he language of . . . G.S. 97-88.1 clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission.").

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come out of Plaintiff's compensation award, rather than be paid in addition to it.

B. Analysis

On appeal, Plaintiff essentially argues that, on remand from this Court, the Commission was precluded from altering the amount of attorney's fees awarded in its original opinion and was limited to making findings of fact and conclusions of law in support of its 2009 Opinion and Award. We disagree.

"Under [section 97-88.1], *before making an award*, the Commission must determine that a hearing "has been brought, prosecuted, or defended without reasonable ground.'" *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 143, 620 S.E.2d 533, 539 (2005) (quoting N.C. Gen. Stat. § 97-88.1) (emphasis added), *disc. review denied*, 360 N.C. 545, 635 S.E.2d 60 (2006). Accordingly, any award of attorney's fees pursuant to section 97-88.1 must be supported by findings of fact and conclusions of law. *Id.*; *see also Price v. Piggy Palace*, 205 N.C. App. 381, 391, 696 S.E.2d 716, 723 (2010) ("An award of attorney's fees under this section [97-88.1] requires the Commission to find that the original hearing 'has been brought, prosecuted, or defended without reasonable ground.'").

Without such findings of fact and conclusions of law, an award of attorney's fees under the statute cannot stand and is, in effect, a nullity. Put another way, the competent evidence before the Commission dictates its findings of fact which in turn lead to its conclusions of law, upon which basis the Commission then makes its award, if any. The Commission does not determine an award and then work backward to the necessary findings of fact. To hold, as Plaintiff would have this Court do, that an award of attorney's fees, unsupported by statutorily-required findings of fact and conclusions of law, cannot be altered on remand would be to render the Commission's failure to make findings of fact and conclusions of law nothing more than a clerical error.

On remand, the Commission could have made findings of fact and conclusions of law which led it to award attorney's fees under section 97-88.1, or under section 97-88, or under both statutes, or under neither statute. Here, after making the findings of fact necessary to "determine that any hearing has been brought, prosecuted, or defended without reasonable ground," the Commission concluded in its discretion that an award of attorney's fees pursuant to section

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97-88.1 was appropriate as described in its Amended Opinion and Award. This the Commission was entitled to do under our statutory and case law. Accordingly, we reject Plaintiff's argument.

AFFIRMED IN PART, REMANDED IN PART.

Judges BRYANT and STEPHENS concur.

ESTATE OF PHYLLIS REYNOLDS WOODEN, BY AND THROUGH ITS EXECUTRIX,
ANDREA WOODEN JONES, PLAINTIFF V. HILLCREST CONVALESCENT
CENTER, INC. AND DUKE UNIVERSITY HEALTH SYSTEM, INC. INDIVIDUALLY AND
D/B/A DUKE UNIVERSITY MEDICAL CENTER, DEFENDANTS

No. COA12-216

(Filed 21 August 2012)

1. Appeal and Error—Rule 9(j)—no written findings and conclusions—no appellate review

In a wrongful death action alleging medical malpractice, the trial court's failure to make written findings and conclusions when dismissing plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 9(j) meant that there could be no appellate review of the basis for the trial court's ruling.

2. Medical Malpractice—Rule 9(j)—area of expert expertise

In a wrongful death action arising from alleged medical malpractice that was remanded on other grounds, the inadequacy of plaintiff's expert nursing witness on claims against non-nursing healthcare professionals could not have properly served as a basis for the trial court's decision to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rule 9(j).

3. Medical Malpractice—Rule 9(j)—partial dismissal of complaint

N.C.G.S. § 1A-1, Rule 9(j) allows for partial dismissal of a complaint alleging medical malpractice. That Rule does not provide a procedural mechanism by which a defendant may file a motion to dismiss, and each of the procedural mechanisms provided by the Rules of Civil Procedure permits judgment on less than the entire complaint.

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4. Medical Malpractice—extension of time—physician’s willingness to testify

In a medical malpractice case remanded on other grounds, defendants’ assertion that an extension of time was void because it was requested for an improper purpose was not supported by precedent concerning an expert’s willingness to testify where no affidavits were included in the record.

5. Medical Malpractice—extension of time—timing of expert opinion

The trial court did not abuse its discretion in a medical malpractice case by allowing defendants to amend their answers after they learned that plaintiff’s expert rendered a Rule 9(j) opinion before plaintiff’s request for an extension of the statute of limitations.

Appeal by Plaintiff from orders entered 28 July 2011, 12 August 2011, and 24 August 2011 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 5 June 2012.

Wait Law, P.L.L.C., by John L. Wait, for Plaintiff-appellant.

Brown, Crump, Vanore & Tierney, L.L.P., by Andrew A. Vanore, III and W. John Cathcart, Jr., for Defendant-appellee Hillcrest Convalescent Center, Inc.

McGuireWoods LLP, by Mark E. Anderson, Heather R. Wilson, and Monica E. Webb, for Defendant-appellee Duke University Health System, Inc. d/b/a Duke University Medical System.

HUNTER, JR., Robert N., Judge.

This is a wrongful death action alleging medical malpractice. Andrea Wooden Jones, executrix of Phyllis Reynolds Wooden’s estate, (“Plaintiff”) filed this action during a 120-day extension of the applicable statute of limitations for filing a medical malpractice action in North Carolina. Rule 9(j) of the North Carolina Rules of Civil Procedure establishes a heightened pleading requirement for medical malpractice actions and affords a plaintiff the opportunity to extend the statute of limitations to provide additional time to comply with the Rule. Plaintiff appeals from the trial court’s orders dismissing the case with prejudice, denying Plaintiff’s motions for findings of fact and conclusions of law, and granting both the defendants’ motions to

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amend their answers to add a limitations defense. We affirm in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

This result is dictated by our Supreme Court's recent opinion in *Moore v. Proper*, ___ N.C. ___, 726 S.E.2d 812 (2012), which requires trial courts in dismissing complaints under Rule 9(j) to make findings of fact and conclusions of law. *Id.* at ___, 726 S.E.2d at _____. We realize that at the time the trial court's decision was reached and this appeal was argued, neither the parties nor the trial judge had the benefit of this decision.

I. Factual & Procedural Background

In May 2008, Phyllis Reynolds Wooden was diagnosed with thoracic myelopathy, a disc herniation with spinal cord compression. Ms. Wooden elected to undergo surgery to correct this problem, and a physician from Defendant Duke University Health System, Inc. ("Duke") performed the surgery on 27 June 2008. On 30 June 2008, Ms. Wooden was released for home recovery, but was readmitted to Duke ten days after her surgery with an elevated white blood cell count, a sign of a post-operative infection. Ms. Wooden then underwent a second surgery to reopen, irrigate, and debride the wound from the previous surgery. Ms. Wooden was prescribed a six-week course of antibiotics and rehabilitative physical therapy and was subsequently transferred to and placed in the care of Defendant Hillcrest Convalescent Center, Inc. ("Hillcrest"). It was anticipated that the staff at Hillcrest would be able to closely monitor Ms. Wooden for signs of further infection.

Ms. Wooden complained of nausea and diarrhea soon after her arrival at Hillcrest. As these symptoms persisted, Ms. Wooden developed additional symptoms indicative of dehydration. For example, her skin became swollen and fragile, with multiple areas of dark pigmentation on her arms, and her legs swelled with fluid, a condition known as edema. Ms. Wooden's strength waned, and she had difficulty completing her physical therapy sessions. Aside from her physical therapy sessions, Ms. Wooden spent most of her time in bed, ultimately resulting in a back ulcer. Ms. Wooden left Hillcrest on 3 August 2008 when her daughter placed an emergency call to Duke because Ms. Wooden was having difficulty breathing. Ms. Wooden was transported to Duke's emergency department, where she was admitted and diagnosed with a pulmonary embolism, a condition known to result from dehydration.

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Ms. Wooden's health continued to decline. One day after being admitted at Duke, an ultrasound revealed that she had developed gallstones. Six days later, the staff noted that Ms. Wooden's urine was orange, a sign of jaundice and dehydration. Ms. Wooden had difficulty eating, but she nevertheless gained forty pounds as a result of the edema. She grew increasingly weak and began suffering from hearing loss. On 26 August 2008, Duke's wound care team determined that Ms. Wooden was too malnourished to undergo additional surgery to treat her infected wound. As of 31 August 2008, Ms. Wooden had suffered a massive pulmonary embolism, acute renal failure, anasarca (generalized edema), a surgical wound infection, and physical deconditioning. By 11 September 2008, the surgical hardware that had been placed in Ms. Wooden's back was visible (due to her emaciation), and she was noticeably jaundiced. Ms. Wooden was transferred to hospice care on 16 September 2008. On 27 September 2008, she received morphine to relieve her pain and fell into a comatose state. Ms. Wooden passed away on the morning of 30 September 2008.

Plaintiff's original counsel was retained to represent the estate in the middle of August 2010. On 17 September 2010, Plaintiff moved for a 120-day extension of the statute of limitations to file a medical malpractice action pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Absent this extension, the statute of limitations on Plaintiff's claim would have run on 30 September 2010, two years after Ms. Wooden's death. *See* N.C. Gen. Stat. § 1-53(4) (2011). In support of her motion for an extension, Plaintiff's counsel represented that the additional time would permit her to gather all relevant medical records; to locate experts willing to testify to Defendants' alleged medical negligence; and to provide such experts with adequate time to complete their reviews of the medical records. In sum, Plaintiff asserted that the extension would allow Plaintiff time to comply with the requirements of Rule 9(j) when bringing her complaint. Judge James E. Hardin, Jr. granted Plaintiff's extension by order entered on 17 September 2010, effectively extending the statute of limitations on Plaintiff's claim through 28 January 2011.

Plaintiff filed her complaint on 25 January 2011, after the original statute of limitations would have expired but prior to expiration of the 120-day extension. Plaintiff's complaint named Duke and Hillcrest (collectively, "Defendants") as defendants and set forth the requisite Rule 9(j) certification. Plaintiff's complaint set forth broad allegations of negligence against a range of healthcare professionals employed by each defendant. Defendants filed their answers on 18

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April 2011, denying all allegations of liability. That same day, Duke served Plaintiff with interrogatories pursuant to Rule 9(j).¹ Duke's interrogatories asked Plaintiff to identify its Rule 9(j) expert(s), the date on which Plaintiff first contacted each expert, and the date on which each expert first rendered an opinion that Defendants had breached the applicable standard of care. Plaintiff responded that it had first contacted Dr. Frances Eason ("Dr. Eason"), its sole Rule 9(j) expert witness, in July 2010 and that Dr. Eason first rendered her opinion in August 2010. At the time the complaint was filed, Dr. Eason was a professor of adult health nursing at East Carolina University and a North Carolina-licensed registered nurse.

Defendants, noticing that Dr. Eason had rendered an opinion prior to Plaintiff's request for an extension of the statute of limitations, filed motions to dismiss and to amend their answers to raise the applicable statute of limitations as a defense to Plaintiff's claims and filed motions to dismiss on this new basis. In addition, Duke also asserted that Plaintiff's counsel could not have reasonably expected Dr. Eason, a nursing expert, to qualify as an expert witness to render an opinion on the professional standards of care regarding physicians.

On 11 July 2011, Defendants' motions to amend and motions to dismiss came on for hearing in Durham County Superior Court, Judge Orlando F. Hudson, Jr. presiding. The trial court granted Defendants' motions to amend and motions to dismiss in open court, effectively dismissing the case in its entirety. On 27 July 2011, before the trial court had entered its judgment, Plaintiff filed a motion requesting the court to include in its order findings of fact and conclusions of law. Plaintiff included in this motion a draft motion for the court containing proposed findings of fact and conclusions of law, which the court did not adopt. On 28 July 2011, the trial court entered its order dismissing the case without making specific findings of fact or conclusions of law. An order denying Plaintiff's motion for findings of fact and conclusions of law was filed on 24 August 2011. Plaintiff timely filed notices of appeal from the trial court's order of dismissal and order denying Plaintiff's motion for findings of fact and conclusions of law with this Court on 24 August 2011.

II. Jurisdiction

Jurisdiction over the 28 July 2011 order dismissing the complaint and the 24 August 2011 order denying Plaintiff's motion for findings

1. Rule 9(j) affords a medical malpractice defendant ten interrogatory questions in addition to the general discovery interrogatory limit in order to verify the plaintiff's 9(j) certification. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j) (2011).

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of facts and conclusions of law lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Plaintiff appeals from final orders of the superior court as a matter of right. Jurisdiction over Plaintiff's appeal from the trial court's 21 September 2011 order granting Defendants' motions to amend lies in this Court pursuant to N.C. R. App. P. 21(a)(1), as this Court granted Plaintiff's petition for writ of certiorari to review that order by order entered 5 June 2012.

III. Analysis

[1] Rule 9(j) of the North Carolina Rules of Civil Procedure dictates the pleading requirements for bringing a medical malpractice action. "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore*, ___ N.C. at ___, 726 S.E.2d at ___. Rule 9(j) requires that a medical malpractice complaint meet one of the following three conditions at the time it is filed: (1) the claim has been reviewed by an expert reasonably expected to qualify under Rule 702 of the Rules of Evidence; (2) the claim has been reviewed by an expert that the plaintiff will move the court to qualify as an expert under Rule 702(e); or (3) the claim is based on the *res ipsa loquitur* doctrine. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009).² Rule 9(j)(1) applies in the instant case and requires the complaint to "specifically assert[] that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2009). Rule 702 of the Rules of Evidence, in turn, provides:

(b) In a medical malpractice action[,]. . . a person shall not give expert testimony on the appropriate standard of health care . . . unless the person is a licensed health care provider in this State or another state and meets the following criteria:

. . . .

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness

2. Rule 9(j) was amended subsequent to Plaintiff filing her complaint. *See* An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability, 2011 N.C. Sess. Laws 400. Effective 1 October 2011, both 9(j)(1) and 9(j)(2) require an expert to review not just the medical care but also "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry." *Id.* We will refer to the version of Rule 9(j) applicable at the time Plaintiff's complaint was filed.

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must have devoted a majority of his or her professional time to either or both of the following:

- a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
- b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2011). Rule 9(j)'s requirements are strictly enforced, and a court must dismiss a complaint if it fails to meet the requirements. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002).

“To lessen the additional burden of this special procedure, the legislature permitted trial courts to extend the statute of limitations” on medical malpractice claims. *Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 364 N.C. 76, 80, 692 S.E.2d 87, 89 (2010). In pertinent part, Rule 9(j) provides:

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j). “The extension of the statute of limitations is not automatic” but instead is left to the discretion of a

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superior court judge. *Thigpen*, 355 N.C. at 202, 558 S.E.2d at 165. The superior court judge may grant an extension after determining “that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.” *Id.* (quoting Rule 9(j)). In addition, the trial court may allow a motion to extend only if the motion is made “in order to comply with” Rule 9(j). N.C. Gen. Stat. § 1A-1, Rule 9(j).

“[A] plaintiff’s compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury.” *Phillips v. A Triangle Women’s Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002). Because it is a question of law, this Court reviews a complaint’s compliance with Rule 9(j) *de novo*. *Id.* When ruling on a motion to dismiss pursuant to Rule 9(j), “a court must consider the facts relevant to Rule 9(j) and apply the law to them.” *Id.* “[A] complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable.” *Moore*, ___ N.C. at ___, 726 S.E.2d at ___ (internal citations omitted). When a trial court determines a Rule 9(j) certification is not supported by the facts, “the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court’s ultimate determination.” *Id.* at ___, 726 S.E.2d at ___.

Plaintiff argues the trial court erred in dismissing its complaint. Defendants offer two arguments on appeal in an effort to justify the dismissal, both of which assert Plaintiff’s failure to comply with Rule 9(j). Because the trial court did not specify its basis for dismissing Plaintiff’s complaint in its 28 July 2011 order, we cannot evaluate the basis on which the court ruled; however, we can briefly address the arguments tendered by Defendants in the event that they are presented to the trial court on rehearing.

[2] Defendants first contend Plaintiff’s complaint was properly dismissed because it presented claims against physicians and other non-nursing healthcare professionals, for which Plaintiff failed to offer a Rule 9(j) expert witness. The parties do not dispute that Dr. Eason was qualified as an expert witness to testify concerning the standard of care applicable to nursing-related claims; rather, the parties dis-

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pute only whether the complaint presented claims against physicians and other non-nursing healthcare professionals who fall outside the purview of Dr. Eason's expertise. The trial court neglected to enter findings of fact and conclusions of law with respect to this issue, however; and, in the absence of such findings and conclusions, we conclude that this alleged failure to comply with Rule 9(j), *i.e.*, the inadequacy of Dr. Eason's testimony, could not properly have served as a basis for the trial court's decision to dismiss Plaintiff's complaint. Furthermore, as discussed below, we conclude that even if Plaintiff's complaint presented claims against non-nursing healthcare professionals, this fact alone would not necessarily justify the trial court's dismissal of the entire complaint.

[3] The question whether a medical malpractice complaint partially in compliance with Rule 9(j) should be dismissed in its entirety is one of first impression in North Carolina, and we therefore consider Rule 9(j) *in pari materi* with other Rules of Civil Procedure in an effort to harmonize Rule 9(j) with those Rules. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000). As this Court has previously noted, Rule 9(j) "does not provide a procedural mechanism by which a defendant may file a motion to dismiss a plaintiff's complaint." *Barringer v. Forsyth Cnty. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477 (2009). Instead, "[t]he Rules of Civil Procedure provide other methods by which a defendant may file a motion alleging a violation of Rule 9(j)." *Id.* (referencing Rules 12, 41 and 56 of the North Carolina Rules of Civil Procedure). A motion to dismiss under Rule 12(b)(6) allows for dismissal of less than all of a party's claims. *Morrow v. Kings Dep't Stores, Inc.*, 57 N.C. App. 13, 16, 290 S.E.2d 732, 734 (1982). Likewise, Rule 41 allows for partial dismissals, *see* N.C. Gen. Stat. § 1A-1, Rule 41 (allowing voluntary or involuntary dismissal of "an action or any claim therein"), and Rule 56 allows for partial summary judgments, *see* N.C. Gen. Stat. § 1A-1, Rule 56(a)-(b) (allowing the claimant or defending party to "move . . . for a summary judgment in his favor upon all or any part" of a claim). Thus, each of the procedural mechanisms through which Rule 9(j) is raised permits judgment on less than the entire complaint, and we accordingly conclude that Rule 9(j) allows for partial dismissal of a complaint alleging medical malpractice.

[4] We now turn to Defendants' second contention in support of the trial court's order dismissing Plaintiff's complaint. Defendants assert that Plaintiff requested an extension of the statute of limitations for

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an improper purpose and, consequently, the extension was voided such that Plaintiff filed its complaint after the (original) statute of limitations had expired. Specifically, Defendants insist that an extension was unnecessary in that Plaintiff's sole expert, Dr. Eason, was capable of satisfying Rule 9(j)'s requirements at the time Plaintiff requested the extension. In making this contention, Defendants rely on a footnote in a decision from this Court, which stated: "Although not raised as an issue by either party, we note this Court holds that Rule 9(j)'s 'willingness to testify' requirement is met when a medical expert opines during a telephone conversation that the applicable standard of care was breached." *Phillips*, 155 N.C. App. at 376 n.2, 573 S.E.2d at 603 n.2. Their reliance on this case is misplaced because under the facts of that case, the physician-witness tendered an affidavit to the court stating that he was "willing" to testify before the complaint was filed. *Id.* at 377, 573 S.E.2d at 603. Furthermore, in order for a trial court to void an extension of time, the court must indicate its basis—such as Rule 11's "improper purpose" provision. As no affidavits were included in the record on this issue, it is difficult to understand how Defendants could establish the factual predicate for Rule 11. Absent such findings or record evidence, we decline to presume that the trial court intended to void an order entered by another superior court judge to afford Plaintiff sufficient time to comply with Rule 9(j)'s requirements.

[5] Finally, we address Plaintiff's contention that the trial court erred in granting Defendants' motions to amend. A motion to amend made more than thirty days after a pleading has been served must be consented to by the opposing party or be permitted by the trial court. N.C. Gen. Stat. § 1A-1, Rule 15(a) (2011). A trial court's decision to allow a motion to amend "will not be reversed on appeal absent a showing of abuse of discretion." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986). The party opposing a motion to amend has the burden to demonstrate that allowing the amendment would be prejudicial. *Id.* Here, Defendants learned through Plaintiff's responses to their Rule 9(j) interrogatories that Dr. Eason rendered an opinion prior to Plaintiff's request for an extension of the statute of limitations. In light of this new information, Defendants moved to amend their answers to assert the statute of limitations as a defense. We reject Plaintiff's argument that Defendants' assertion of a viable defense was futile whether or not the defense ultimately proves successful. Moreover, Plaintiff has failed to offer any argument as to how it was prejudiced by the amendments. We accordingly conclude that

the trial court did not abuse its discretion in allowing Defendants to amend their answers.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's 21 September 2011 order granting Defendants' motions to amend, and we vacate and remand the trial court's 28 July 2011 order for further proceedings consistent with this opinion. We leave to the trial court's discretion whether to allow the parties to present any additional evidence.

Affirmed in part; Vacated in part and remanded.

Chief Judge MARTIN and Judge ELMORE concur.

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS, AND ASHEVILLE CITY BOARD OF EDUCATION, ET AL., PLAINTIFF-INTERVENORS V. STATE OF NORTH CAROLINA; STATE BOARD OF EDUCATION, DEFENDANTS

No. COA11-1545

(Filed 21 August 2012)

1. Constitutional Law—sound basic education—pre-kindergarten—restricted admission

A trial court order mandating that the State not deny any eligible four-year-old admission to the North Carolina Pre-Kindergarten Program was within the court's authority and was affirmed. Pre-kindergarten is the method by which the State has decided to meet its constitutional duty to prepare all at-risk students to avail themselves of the opportunity to obtain a sound basic education; the State has not produced or developed any alternative plan or method.

2. Constitutional Law—sound basic education—remedy—pre-kindergarten—jurisdictional basis

Although the State argued that the trial court did not have a jurisdictional basis to mandate the provision of pre-kindergarten services on a state-wide basis, that was not what the court ordered. The court rejected only the parts of proposed legislation that would deny an at-risk four-year-old an opportunity to obtain a sound basic education by denying admission to an existing program in his or her county.

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3. Constitutional Law—North Carolina—sound basic education—remedy—pre-kindergarten statewide

The trial court acted within its authority by mandating the unrestricted acceptance of all at-risk four-year-olds seeking enrollment in existing pre-kindergarten programs across the state. The record was replete with evidence that the State's preferred and only remedial aid to at-risk prospective enrollees was a combination of early childhood and pre-kindergarten services as its means of achieving constitutional compliance. Finally, although the State argued that the trial court's authority to order unrestricted admission of at-risk four-year-olds should extend only to Hoke County, the State offered evidence of the implementation and efficacy of pre-kindergarten programs statewide.

4. Appeal and Error—injunction against enforcement of bill—bill revised—issue dismissed

An issue on appeal concerning the trial court's injunction against enforcement of a section of a bill involving pre-kindergarten was dismissed where that section of the bill was subsequently rewritten in another bill that was signed into law.

5. Judgments—findings and conclusions—articulation of court's rationale—specific

A trial court order concerning pre-kindergarten programs contained sufficient findings and conclusions where the order provided a detailed summary or findings section, followed by a separate section of conclusions. The trial court's rationale was specifically articulated.

6. Constitutional Law—North Carolina—sound basic education—remedy—not necessarily permanent

The More at Four (MAF) pre-kindergarten program was the remedy chosen in 2001 to deal with the problem of at-risk four-year-olds, but was not necessarily a permanent solution. The State should be allowed to modify or eliminate MAF by means of a motion filed with the trial court setting forth the basis and manner of any proposed modification.

Appeal by the State from order entered 18 July 2011 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 5 June 2012.

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Attorney General Roy Cooper, by Solicitor General John F. Maddrey, for the State.

Robert W. Spearman, Melanie Black Dubis, Scott E. Bayzle of PARKER POE ADAMS & BERNSTEIN, LLP, H. Lawrence Armstrong Jr., of ARMSTRONG LAW, PLLC, and Christine Bischoff of North Carolina Justice Center, attorneys for Hoke County Board of Education, et al.

*James G. Exum, Jr. and Matthew N. Leerberg of SMITH, MOORE, LEATHERWOOD, attorneys for State Board of Education.*¹

ELMORE, Judge.

The State appeals from an order titled “Memorandum of Decision and Order Re: Pre-Kindergarten Services of At-Risk Four Year Olds” which mandates, in sum, that the State 1) not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program and 2) not enforce specific provisions of the 2011 Budget Bill. We affirm in part, and dismiss in part.

I. Background

The dispute between the parties of this appeal began in 1994, when plaintiffs sought a declaratory judgment regarding the state constitutional requirements of “all North Carolina children to receive adequate and equitable educational opportunities[.]” Since that time, the parties have debated the scope of such constitutional requirements, and the dispute between them has fluctuated through the many levels of our court system.

However, the primary dispute relevant to this appeal began on 4 May 2011, when the North Carolina House of Representatives adopted a budget bill titled “Current Operations and Capital Improvements Appropriations Act of 2011” (the bill). The bill provided “[a]ppropriations from the General Fund of the State for the maintenance of the State departments, institutions, and agencies, and for other purposes as enumerated . . . for the fiscal biennium ending June 30, 2013.” See 2011 N.C. Sess. Laws 145 § 2.1.

A section of the bill addressed a program called “More at Four (MAF).” MAF was established by the General Assembly in 2001, to provide pre-kindergarten services to at-risk children in order to enhance their kindergarten readiness. The program was established,

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in part, as a reaction to a pair of rulings by our Supreme Court, *Leandro I* and *Leandro II*. In *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (*Leandro I*), the Supreme Court held that “Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.” Article I is the “Declaration of Rights.” Section 15 of that article states: “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. art. I § 15. The Supreme Court then went on to set forth four minimum criteria for “a sound basic education.” These criteria were not static or set in stone for all time, but rather were qualified by phrases such as “to enable the student to function in a complex and rapidly changing society[;]” “successfully engage in post-secondary education or vocational training[;]” to be able to obtain “gainful employment in contemporary society.” *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255.

Later, in *Hoke Cty. Bd. of Educ. v. State (Leandro II)*, the Supreme Court established that “the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education.” 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). The Supreme Court recognized that “a sound basic education” required the State to address the problem of “at-risk” prospective enrollees in the public schools, but reversed the portion of the of the trial court’s order mandating a “pre-kindergarten” program. *Hoke Cty. Bd. of Educ.*, 358 N.C. at 645, 599 S.E.2d at 395. The Supreme Court left it to the legislative and executive branches of government to fashion an appropriate remedy. *Hoke Cty. Bd. of Educ.*, 358 N.C. at 644-45, 599 S.E.2d at 395. Thereafter, MAF was enacted in 2001.

The bill called for MAF to be consolidated into the Division of Child Development, and for that division to be renamed “the Division of Child Development and Early Education (DCDEE).” The bill then directed DCDEE to “maintain the More At Four program’s high programmatic standards.” See 2011 N.C. Sess. Laws 145 § 10.7(a). Specifically, the bill mandated DCDEE to “continue to serve at-risk children identified through . . . methods in which at-risk children are currently served” and to “serve at-risk children regardless of income.” See 2011 N.C. Sess. Laws 145 § 10.7(f). However, the bill also mandated that “the total number of at-risk children served shall constitute no more than twenty percent (20%) of the four-year-olds served within the prekindergarten program.” *Id.*

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On 10 May 2011, before the bill became law, plaintiffs filed a motion in Wake County Superior Court requesting a hearing, in relevant part, to address how “the reduction in pre-kindergarten services for at-risk children in the House Budget” would affect the children’s rights under the State constitution to “a sound basic education.” On 20 May 2011, the trial court sent notice that it would hold a hearing on 22 June 2011 to assess whether certain provisions of the bill complied with *Leandro II*. Specifically, the trial court stated that the subject matter of the hearing would be, in relevant part, the pre-kindergarten services to “at-risk” children and “the obligation of the State of North Carolina, as set forth in *Leandro II*, Section V, to afford ‘at-risk’ prospective enrollees their guaranteed opportunity to obtain a sound basic education.”

On 15 June 2011, the bill became law; however, the trial court proceeded with the hearing. Following the conclusion of evidence, the trial court issued an order on 18 July 2011 titled “Memorandum of Decision and Order Re: Pre-Kindergarten Services of At-Risk Four Year Olds.” In that order, the trial court mandated that

- 1) The State of North Carolina shall not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program (NCPK) and shall provide the quality services of the NCPK to any eligible at risk four year old that applies.
- 2) The State of North Carolina shall not implement or enforce that portion of the 2011 Budget Bill, section 10.7.(f) that limits, restricts, bars, or otherwise interferes, in any manner, with the admission of all eligible at-risk four year olds that apply to the pre-kindergarten program, including but not limited to the 20% cap restriction, or for that matter any percentage cap, of the four year olds served within the prekindergarten program, NCPK.
- 3) Further, the State of North Carolina shall not implement, apply, or enforce any other artificial rule, barrier, or regulation to deny any eligible at-risk four year old admission to the pre-kindergarten, NCPK.
- 4) The Court is confident that the State of North Carolina will honor and discharge its constitutional duties in connection with this manner.

The State appeals from this order.

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II. Analysis

The State presents three arguments on appeal: 1) that the trial court exceeded its authority when it ordered the State to provide pre-kindergarten services to all at-risk four year olds in North Carolina; 2) that the trial court erroneously enjoined the implementation or enforcement of properly enacted legislative provisions regarding North Carolina's Pre-Kindergarten Program; 3) that the trial court's order cannot be upheld because it contains no appropriate findings of fact or conclusions of law. The State Board of Education, co-defendants, do not join the State in its appeal.

A. Authority of order

The State first argues that the trial court exceeded its authority when it ordered the State to "not deny any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program." Specifically, the State contends that 1) there is no constitutional requirement for the State to provide pre-kindergarten services, 2) pre-kindergarten services are not a necessary remedy required to provide a sound basic education, and 3) the trial court lacked jurisdiction to mandate pre-kindergarten services on a state-wide basis. We will address the State's constitutional arguments together, as they relate to the Supreme Court's ruling in *Leandro II*. We will then address the State's jurisdictional argument.

i. Leandro II

[1] In *Leandro II* the Supreme Court addressed, in part, the issue of " 'at-risk' children approaching and/or attaining school-age eligibility" and "whether the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education." 358 N.C. at 639-40, 599 S.E.2d at 391-92. There, the trial court had concluded that "[i]t was ultimately the State's responsibility to meet the needs of 'at-risk' students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education[]" and "that State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 640, 642, 599 S.E.2d at 392, 393.

On appeal, the Supreme Court concluded "[t]o that point in the proceedings, we agree with the trial court[.]" *Id.* at 642, 599 S.E.2d at 393. However, the Supreme Court reversed the portion of the trial court's order "requiring the State to provide pre-kindergarten classes for either all of the State's 'at-risk' prospective enrollees or all of

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Hoke County's 'at-risk' prospective enrollees." *Id.* The Supreme Court reasoned that "such specific court-imposed remedies are rare, and strike this Court as inappropriate at this juncture" because "the suggestion that pre-kindergarten is the sole vehicle or, for that matter, a proven effective vehicle by which the State can address the myriad problems associated with such 'at-risk' prospective enrollees is, at best, premature." *Id.* at 643, 644, 599 S.E.2d at 393, 394. However, the Supreme Court noted that it

recognizes the gravity of the situation for "at-risk" prospective enrollees in Hoke County and elsewhere, and acknowledges the imperative need for a solution that will prevent existing circumstances from remaining static or spiraling further, we are equally convinced that the evidence indicates that the State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures.

358 N.C. at 643, 599 S.E.2d at 394.

Now, it has been approximately eight years since the Supreme Court's ruling in *Leandro II*. During this time, the State has had ample opportunity to develop a program that would meet the needs of "at-risk" students approaching and/or attaining school-age eligibility. The only program, evidenced in the record, that was developed by the State since *Leandro II* to address the needs of those students was MAF, a pre-kindergarten program. Thus, unlike the Supreme Court in *Leandro II*, we are not faced with the decision of selecting for the State which method would best satisfy their duty to help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education. Rather, the State made that determination for itself when in 2001 it developed the pre-kindergarten program, MAF.

Thus, we do not deem it inappropriate or premature at this time to uphold an order mandating the State to not deny any eligible "at-risk" four year old admission to the North Carolina Pre-Kindergarten Program. Under *Leandro II*, the State has a duty to prepare all "at-risk" students to avail themselves of an opportunity to obtain a sound basic education. Pre-kindergarten is the method in which the State has decided to effectuate its duty, and the State has not produced or developed any alternative plan or method. Accordingly, we affirm the trial court's order.

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ii. Jurisdiction

[2] Although the State next contends “[t]here is no jurisdictional basis in this case to mandate the provision of pre kindergarten services on a state-wide basis,” the State mischaracterizes the mandate of Paragraph 1 of the July 2011 Order. The trial court did not order the State to provide pre kindergarten programs for all “at risk” four-year-old prospective enrollees in North Carolina; rather, the trial court’s decree rejected those parts of the proposed 2011 legislation that sought to erect “artificial barrier[s] or any other barrier[s]” that would deny any “at risk” four year old prospective enrollee throughout the State his or her constitutional right to an opportunity to obtain a sound basic education by denying that child admission to an existing pre kindergarten program in his or her county. With this clarification in mind, we now examine whether the trial court acted within its authority to mandate the unrestricted acceptance of all “at risk” four-year-old prospective enrollees who seek to enroll in existing pre kindergarten programs in his or her respective county.

[3] In *Leandro II*, 358 N.C. 605, 599 S.E.2d 365 (2004), the Supreme Court agreed with the trial court’s conclusion that the State’s efforts to provide remedial aid to Hoke County’s “at risk” prospective enrollees were inadequate to assist such students in availing themselves of their respective rights to an opportunity to obtain a sound basic education. *See Leandro II*, 358 N.C. at 642, 599 S.E.2d at 393. However, the Supreme Court could not ascertain foundational support for the trial court’s order “compelling the legislative and executive branches to address that need in a singular fashion” by “requiring the State to provide pre kindergarten classes for either all of the State’s ‘at risk’ prospective enrollees or all of Hoke County’s ‘at risk’ prospective enrollees.” *Id.* Although the Supreme Court recognized that, “when the State fails to live up to its constitutional duties,” and “if the offending branch of government or its agents either fail to [remedy the deficiency] or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it,” the Supreme Court also recognized that “such specific court-imposed remedies are rare.” *Id.* at 642–43, 599 S.E.2d at 393. Consequently, the Supreme Court determined that the trial court’s remedy was “inappropriate at this juncture” for two related reasons: 1) “[t]he subject matter of the instant case—public school education—is clearly designated in our state Constitution as the shared province of the legislative and executive branches”; and 2) “[t]he evidence and findings

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of the trial court, while supporting a conclusion that ‘at risk’¹ children require additional assistance and that the State is obligated to provide such assistance, do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government’s other branches.” *Id.* at 643, 599 S.E.2d at 393.

Nonetheless, in sharp contrast to the record that was before the Supreme Court in *Leandro II*, the record that was developed in the trial court and is now before this Court is replete with evidence, much of which was presented by the State, of the State’s preferred—and, incidentally, only proposed—remedial aid to “at risk” prospective enrollees, as reflected in the following unchallenged finding by the trial court:

The bottom line, seven years after *Leandro, II*, is that the State, using the combination of Smart Start and the More at Four Pre-Kindergarten Programs, have [sic] indeed selected pre kindergarten combined with the early childhood benefits of Smart Start and its infrastructure with respect to pre kindergarten programs, as the means to “achieve constitutional compliance” for at risk prospective enrollees.

Moreover, the trial court found, and the State does not deny, that the State has touted the measurable statewide success and national recognition of its pre kindergarten program, and has demonstrated the commitment of both the executive and legislative branches to increasing the availability of *Leandro*-compliant pre kindergarten programs. For instance, the chairman of the State Board of Education and the state superintendent of the Department of Public Instruction submitted extensive action plans to the trial court chronicling the pre kindergarten program’s to date and proposed future growth and expansion in order to fulfill the State’s obligation to comply with the mandates first articulated in *Leandro I*. Additionally, the General Assembly enacted session laws that sought to standardize pre kindergarten program requirements statewide and allocated State funds to facilitate the continued success of pre kindergarten programs available to “at risk” prospective enrollees across the State. In other

1. “[M]ost educators seem in agreement that an ‘at risk’ student is generally described as one who holds or demonstrates one or more of the following characteristics: 1) member of low-income family; 2) participate in free or reduced-cost lunch programs; 3) have parents with a low-level education; 4) show limited proficiency in English; 5) are a member of a racial or ethnic minority group; 6) live in a home headed by a single parent or guardian.” *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 637 n.16, 599 S.E.2d 365, 389–90 n.16 (2004).

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words, based on the present record, it cannot be said that the trial court's order requiring the State to allow the unrestricted enrollment of "at risk" prospective enrollees to pre kindergarten programs "effectively undermine[d] the authority and autonomy of the government's other branches," see *Leandro II*, 358 N.C. at 643, 599 S.E.2d at 393, since both the executive and legislative branches have evidenced their selection and endorsement of this—and only this—remedy to address the State's constitutional failings identified in *Leandro II*.

Finally, the State urges that, if the trial court is authorized to order the unrestricted admission of "at risk" prospective enrollees to existing pre kindergarten programs, such authority should only extend to those "at risk" four-year-old prospective enrollees who seek to enroll in programs in Hoke County. In light of the Supreme Court's footnotes 5 and 14 in *Leandro II*, we recognize that the State's assertion is not entirely without basis. See *id.* at 613 n.5, 633 n.14, 599 S.E.2d at 375–76 n.5, 388 n.14. Nevertheless, as the State concedes, it offered evidence to the trial court through its own witnesses attesting to the implementation and efficacy of the pre kindergarten programs made available to "at risk" prospective enrollees *statewide*. Although the State opines that it chose to provide a broader remedy than that which was required to meet the needs of the parties at issue and urges this Court to limit the trial court's mandate to the "at risk" prospective enrollees of Hoke County, we are not persuaded that the record necessitates such restraint of the trial court's order. Accordingly, based on the record before us, we hold that the trial court acted within its authority to mandate the unrestricted acceptance of all "at risk" four year old prospective enrollees who seek to enroll in existing pre kindergarten programs across the State.

B. Enjoinment of legislation

[4] The State next argues that the trial court's order improperly enjoins the enforcement of section 10.7.(f) of the bill. We dismiss this argument.

On 17 May 2012, the House of Representatives introduced a bill titled "AN ACT TO REPEAL THE PROHIBITION ON TEACHER PRE-PAYMENT, CLARIFY ELIGIBILITY FOR THE NC PRE-K PROGRAM, AND ENACT 2012-2013 SALARY SCHEDULES FOR TEACHERS AND SCHOOL ADMINISTRATORS." That bill, in part, entirely rewrote the language of section 10.7.(f) at issue here. On 11 June 2012, that bill was signed into law. As such, section 10.7.(f) is no longer in effect, and we need not address the State's issue regarding its enforcement.

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See *Southwood Assn., LTD. v. Wallace*, 89 N.C. App. 327, 328, 365 S.E.2d 700, 701 (1988) (If the issues before the court or administrative body become moot at anytime during the course of the proceedings, the usual response should be to dismiss the action.) (citations omitted). Accordingly, we dismiss this issue.

C. Sufficiency of findings of fact/conclusions of law

[5] Finally, the State argues that trial court's order must be vacated and remanded because it lacks findings of fact and conclusions of law as required by our Rules of Civil Procedure. We disagree.

According to our Rules of Civil Procedure, “[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” N.C. Gen. Stat. § 1A-1, Rule 52 (2012). “The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual[.]” *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). The rule exists because “[e]ffective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated.” *Id.* at 714, 268 S.E.2d at 190. “Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself.” *Id.*

Here, the trial court issued a detailed, twenty-four page order which very clearly articulates its chain of reasoning. The order begins by addressing the scope of the issues addressed at the hearing. It states that, “the major issue before the Court is whether or not the General Assembly's 2011 Budget Bill, Section 10.7 (a) through (j) . . . is in conformity with the Supreme Court's decision in *Leandro II*.” The order then summarizes the decision of the Supreme Court in *Leandro II*. Then, after discussing procedural history and precedent, the order describes the history of the MAF program and summarizes the research of the effects of the program. Next, the order focuses on the issues raised by plaintiffs, specifically the allegations regarding Sections 10.7 (a)-(j) of the bill.

Further, in a separate section labeled “Discussion and Decision,” the order contains the trial court's conclusions. Specifically, the trial court concluded that

[based] on the record now before the Court, it appears that the State . . . has taken the prekindergarten program (formerly MAF)

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established for at-risk 4 year olds and reduced the number of slots available to at-risk 4 year old upwards of 80% without providing any alternative high quality prekindergarten option for at-risk 4 year olds at all.

[T]his artificial barrier, or any other barrier, to access to prekindergarten for at-risk 4 year olds may not be enforced.

Simply put, it is the duty of the State of North Carolina to protect each and every one of these at-risk and defenseless children, and to provide them their lawful opportunity, through a quality pre-kindergarten program, to take advantage of their equal opportunity to obtain a sound basic education as guaranteed by the North Carolina constitution.

Thus, we conclude that the trial court's rationale in reaching its decision is specifically articulated in the order. The order provides a detailed summary or findings section, followed by a separate section of conclusions. As such, we are unable to agree with the State's argument with regards to this issue.

[6] Additionally, we would like to emphasize that while MAF was the remedy chosen by the legislative and executive branches in 2001 to deal with the problems presented by "at risk" four year olds, it is not necessarily a permanent or everlasting solution to the problem. What is required of the State to provide as "a sound basic education" in the 21st century was not the same as it was in the 19th century, nor will it be the same as it will be in the 22nd century. It would be unwise for the courts to attempt to lock the legislative and executive branches into a solution to a problem that no longer works, or addresses a problem that no longer exists. Therefore, should the problem at hand cease to exist or should its solution be superseded by another approach, the State should be allowed to modify or eliminate MAF. This should be done by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification.

III. Conclusion

In sum, we affirm the trial court's order mandating the State to not deny any eligible "at-risk" four year old admission to the North Carolina Pre-Kindergarten Program. Further, we dismiss the State's argument with regards to the enjoinder of legislation that has been

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repealed. Lastly, we conclude that the trial court's order contains sufficient findings of fact and conclusions of law.

Affirmed in part, dismissed in part.

Chief Judge MARTIN and Judge STEELMAN concur.

IN THE MATTER OF APPEAL OF: IBM CREDIT CORPORATION FROM THE DECISION OF THE DURHAM COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING THE VALUATION OF BUSINESS PERSONAL PROPERTY FOR TAX YEAR 2001

No. COA11-1144

(Filed 21 August 2012)

1. Appeal and Error—law of the case—issues not decided

In a case involving the tax valuation of leased computer equipment, the Tax Commission's determination that findings or conclusions from prior appeals were the law of the case was incorrect. The law of the case applies only to what is actually decided; the prior appeals resulted from the Tax Commission's failure to address evidence concerning the valuation and the Court of Appeals never addressed the underlying issues.

2. Appeal and Error—mootness—prior remands—misreading

In a tax valuation action that had been remanded twice previously, valuation issues were not moot where they had to be addressed after the last remand whether or not Schedule U5 was used. Portraying the valuation issues as applicable only as they

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related to the use of Schedule U5 was a misreading of the prior remand. The County's argument that IBM created the problem ignored the fact that the burden of proof had shifted to the County.

3. Taxation—valuation of property—taxpayer values accepted—further remand futile

A Tax Commission decision was reversed and remanded for a decision reducing an assessment to the value listed by the taxpayer where there had been two prior remands and a further remand would be futile. There was no expert testimony as to any valuation approach other than the taxpayer's, which the county rejected; the county did not use an accepted method of valuation and misunderstood its burden of proof; and the Tax Commission twice failed to comply with the Court of Appeals' mandate.

Judge BEASLEY concurs in result only

Appeal by IBM Credit Corporation from a final decision entered 24 June 2011 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 9 February 2012.

Manning Fulton Skinner, P.A., by Michael T. Medford, for taxpayer-appellant IBM Credit Corporation.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for respondent-appellee Durham County.

STROUD, Judge.

IBM Credit Corporation ("IBM") appeals from a final decision of the Property Tax Commission (the "Tax Commission") regarding the tax valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001. Based on this Court's mandates in the prior decisions in *In re Appeal of IBM Credit Corp.*, 186 N.C. App. 223, 650 S.E.2d 828 (2007), *aff'd per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008) ("IBM I") and *In re Appeal of IBM Credit Corp.*, 201 N.C. App. 343, 689 S.E.2d 487 (2009), *disc. review denied and appeal dismissed*, 363 N.C. 854, 694 S.E.2d 204 (2010) ("IBM II"), which held that the Tax Commission failed to comply with its previous decision, and the unchallenged findings and conclusions of the third final decision by the Tax Commission, we reverse the third final decision and remand to the Tax Commission for entry of a decision

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finding that the property is valued at the value as listed by taxpayer IBM, due to the failure of the County to meet its burden of proof to demonstrate that its valuation is the “true value” of the property.

I. Procedural Background

This is the third appeal arising from the 2001 tax valuation of IBM’s 40,779 pieces of computer and computer-related equipment leased to 364 customers in Durham County. We will not repeat in detail the long procedural history of this case, as we have previously stated this in *IBM I* and *IBM II*. See *IBM I*, 186 N.C. App. at 224-25, 650 S.E.2d at 829-30; *IBM II*, 201 N.C. App. at 343-45, 689 S.E.2d at 488-89. Briefly stated, in the first appeal, this Court vacated the Tax Commission’s affirmance of the County’s valuation of the property in the amount of \$144,277,140, “on the grounds that the Commission’s prior order had failed to properly employ the burden of proof required in tax appraisal cases.” See *IBM II*, 201 N.C. App. at 345, 689 S.E.2d at 489; *IBM I*, 186 N.C. App. at 228-29, 650 S.E.2d at 831-32. On remand, the Commission, after receiving new briefing from the parties, but no additional evidence, issued a second decision, “which again upheld Durham County’s tax appraisal of \$144,277,140.00.” *IBM II*, 201 N.C. App. at 345, 689 S.E.2d at 489. Once again, IBM appealed, and on the second appeal, we again reversed and remanded to the Tax Commission. *Id.* at 354, 689 S.E.2d at 494. In that opinion, we directed the Tax Commission as to the specific issues to consider and address on remand. *Id.*

In *IBM II*, this Court made two specific holdings:

[(1)] Although the Commission does not explicitly state what effect, if any, all this evidence¹ has on the legal presumption of correctness, for purposes of this decision we hold that it is “‘competent, material and substantial’ evidence” *tending to show* that “the county tax supervisor used an arbitrary method of valuation” which led to “the assessment substantially exceed[ing] the true value in money of the property.” [*In re*

1. “This evidence,” in context, refers to (1) the NACOMEX report; (2) testimony of IBM’s valuation expert, Mr. Zises; (3) testimony of Durham County’s expert, Mr. Baker, who developed Schedule U5’s depreciation tables, as modified after the Tax Commission’s decision *In re Appeals of Northern Telecom*, N.C. St. Tax Rep. (CCH) P 201-813 (May 20, 1994) (holding that values obtained using a former version of Schedule U5 were deficient because the assessor “fail[ed] to consider market information about the prices of new and used equipment in the taxpayer’s industry.”), who testified that the tables “were not based on actual market purchases and sales.” *IBM II*, 201 N.C. App. at 347-48, 689 S.E.2d at 490-91.

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Appeal of AMP, Inc., 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975)] (emphasis omitted) (internal quotation marks omitted). Therefore, the burden of persuasion and going forward with evidence that the methods used do in fact produce “true value” shifts to Durham County. [*In re Southern Railway*, 313 N.C. 177, 182, 328 S.E.2d 235, 239 (1985)]; N.C.G.S. § 105–283.

. . . .

[(2)] In appraising IBM Credit’s property, Durham County did not meet the statutory standards required of N.C.G.S. § 105–283. In reviewing the methods applied by Durham County, we hold that the county did not make adequate deductions for depreciation by applying Schedule U5 and its transmittal instructions. The failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions results in an appraisal which does not reflect “true value.” The decision of the Commission upholding the appraisal is unsupported by substantial evidence based upon a review of all the evidence in the record.

Id. at 348, 353-54, 689 S.E.2d at 491, 494 (emphasis in original). Based upon these holdings, we reversed the Tax Commission’s second final order, as follows:

Because we are not a fact-finding body, we do not make a finding as to the proper amount of additional depreciation deduction to be applied upon remand. We therefore reverse the Final Decision of the Commission, and again remand to the Commission for a reasoned decision with regard to what amount of depreciation deduction should have been deducted from the valuation to account for functional and economic obsolescence due to market conditions.

Id. at 354, 689 S.E.2d at 494. In addition to these specific holdings, we noted six specific omissions in the Tax Commission’s second final order, which led to “conclusions which lack evidentiary support and are therefore arbitrary and capricious.” *Id.* at 349-51, 689 S.E.2d at 491-93. We will discuss some of these specific omissions in detail below, but for now we will address the Tax Commission’s misunderstanding of the law of the case as it has developed in *IBM I* and *IBM II*.

II. Law of the Case

[1] First, the third final decision by the Tax Commission, entered on 24 June 2011, and the subject of this appeal, notes that certain points

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have been decided by the prior two decisions of this Court and are thus the “law of the case.” Our Supreme Court has described the “law of the case” doctrine as follows:

[A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

However, the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the Court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case.

In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*.

Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (citations and quotation marks omitted).

The Tax Commission’s third final decision noted, correctly, that this Court has previously ruled that “Durham County produced sufficient evidence ‘to establish a presumption of correctness’ ” of its *ad valorem* assessment in *IBM II*; and that “IBM Credit presented evidence ‘tending to show’ that Durham County used an ‘arbitrary method of valuation’ ” so that “the burden is now shifted to Durham County, the taxing authority, to show ‘that the methods used do in fact produce ‘true value.’ ” See *IBM II*, 201 N.C. App. at 347-48, 689 S.E.2d at 489-91. The Tax Commission also correctly noted that this Court reversed the second final order and remanded with the direction to the Tax Commission to make “a reasoned decision with regard to what amount of depreciation deduction should have been deducted from the valuation to account for functional and economic obsolescence due to market conditions.” See *id.* at 354, 689 S.E.2d at 494.

The Tax Commission also specifically noted that it was bound by the “law of the case” as to the following findings or conclusions: (1) Its prior findings of fact as to Mr. Zises’ NACOMEX Report, as these

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findings “have not been set aside on appeal[;]” (2) that Mr. “Zises’ report is ‘not the appropriate methodology’ to assess the subject equipment[;]” (3) that “the NACOMEX Report’s lack of credibility and persuasiveness remain the law of the case” and “the NACOMEX Report is based on the market sales method alone and does not use the income method[;]” and (4) that “[t]he North Carolina Court of Appeals has held that Durham County did not meet the statutory standards required by G.S[] § 105-283 in applying Schedule U5 and there is not sufficient evidence in the current record to answer the issues the Court raised about Schedule U5. . . . For these reasons, Schedule U5 and Durham County’s application of that Schedule to IBM Credit’s equipment will not be relied on or discussed further in this Final Decision.” The Tax Commission’s determination that the first three findings or conclusions listed above are the “law of the case” is incorrect.

The County argues that the Tax Commission properly found that its prior findings and conclusions as to the NACOMEX report and Mr. Zises’ testimony had not been “overturned” by this Court:

This Court, in *IBM Credit II*, expressly did not set aside the Property Tax Commission’s prior finding as to the NACOMEX Report. *See IBM Credit II* at 493 (“The Commission found that the evidence produced by Mr. Zises was flawed with regard to several factors. For purposes of our review, we do not have to determine whether these findings are supported by the evidence or whether the values produced by Mr. Zises’ depreciation tables are accurate.”) Hence, the Property Tax Commission’s findings as to the flaws in the NACOMEX Report were appropriate.

Both the County and the Tax Commission appear to have misconstrued this Court’s consideration as to the NACOMEX report and Mr. Zises’ testimony. We did not hold in either prior case that this report was lacking in credibility, persuasiveness, or relevance, all of which are noted by the Tax Commission in its findings. Instead, we stated that

[t]he Commission found that the evidence produced by Mr. Zises was flawed with regard to several factors. These factors include the failure of Mr. Zises to consider use of the computers in the market; design factors inherent in IBM Credit’s equipment that impair the equipment’s desirability or usefulness in the current market; and criticisms of the use of the subset of data upon which the depreciation tables used by Mr. Zises were obtained. For purposes of our review, *we do not have to determine* whether these findings are supported by the evidence or whether the values produced by Mr. Zises’ depreciation tables are accurate.

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IBM II, 201 N.C. App. at 353, 689 S.E.2d at 494 (emphasis added). We also noted that “[b]ecause we are not a fact-finding body, we do not make a finding as to the proper amount of additional depreciation deduction to be applied upon remand.” *Id.* at 354, 689 S.E.2d at 494.

The law of the case applies only to “what is actually decided[.]” See *Hayes*, 243 N.C. at 536, 91 S.E.2d at 682. In *IBM II*, we specifically did *not* decide whether the Tax Commission’s findings as to the NACOMEX report and Mr. Zises’ testimony “are supported by the evidence or whether the values produced by Mr. Zises’ depreciation tables are accurate” as it was not necessary for the issues upon which we reversed the second final decision. See *IBM II*, 201 N.C. App. at 353, 689 S.E.2d at 494. In fact, also in *IBM II*, our first specific holding was that IBM’s evidence was “competent, material, and substantial evidence” sufficient to shift the burden of proof and persuasion to the County:

Although the Commission does not explicitly state what effect, if any, all this evidence² has on the legal presumption of correctness, for purposes of this decision we hold that it is “‘competent, material and substantial’ evidence” *tending to show* that “the county tax supervisor used an arbitrary method of valuation” which led to “the assessment substantially exceed[ing] the true value in money of the property.” *AMP, Inc.*, 287 N.C. at 563, 215 S.E.2d at 762 (emphasis omitted) (internal quotation marks omitted). Therefore, the burden of persuasion and going forward with evidence that the methods used do in fact produce “true value” shifts to Durham County. *Southern Railway*, 313 N.C. at 182, 328 S.E.2d at 239; N.C.G.S. § 105–283.

IBM II, 201 N.C. App. at 348, 689 S.E.2d at 491 (emphasis in original). We do not understand how this holding could be construed as a determination that *this Court* upheld the Tax Commission’s finding that the NACOMEX report and Mr. Zises’ testimony were irrelevant or not credible, as these were the very portions of IBM’s evidence which we found shifted the burden of proof to the County, although we could not make findings of fact based upon the evidence, as this is not the role of this Court. If the evidence was “irrelevant,” it logically could not have been “competent, material, and substantial” evidence which would shift the burden of proof.

2. As noted above, “this evidence” referred back to the NACOMEX report, Mr. Zises’ testimony, and other evidence.

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Some of this confusion appears to have arisen based upon the wording of *IBM I* as compared to *IBM II*. In *IBM I*, we held as follows:

We believe it is necessary to remand this case so that the Commission may apply the proper burden of proof framework. As this Court stated in a similar context:

Because the [State Personnel] Commission acted under a misapprehension of the law, this case must be remanded. *The rule fixing the burden of proof constitutes a substantial right of the party upon whose adversary the burden rests and must be rigidly enforced.* The law relating to the burden of proof is equally applicable to proceedings which are not conducted before a jury. We cannot say, as a matter of law, that the Commission's finding was not affected by its misapprehension of the law. Therefore, we *vacate the findings and conclusions and remand this case to the Commission for reconsideration of the evidence in additional proceedings in which petitioner has the burden of proof.*

[*N.C. Dep't of Justice v. Eaker*, 90 N.C. App. 30, 36-37, 367 S.E.2d 392, 397 (emphasis added) (internal citations omitted), *disc. review denied*, 322 N.C. 836, 371 S.E.2d 279 (1988), *overruled on other grounds by Batten v. N.C. Dep't of Corr.*, 326 N.C. 338, 389 S.E.2d 35 (1990).] Here, too, we cannot determine with certainty whether the Commission's misunderstanding of the relevant burdens set forth in *AMP* and *Southern Railway* affected its findings and conclusions.

Therefore, we remand this case to the Property Tax Commission for reconsideration of the evidence in accord with this opinion. Given our resolution of this appeal, we do not address IBM Credit's remaining arguments.

Remanded.

186 N.C. App. at 228-29, 650 S.E.2d at 832 (emphasis added). Thus, in *IBM I*, the Tax Commission's first final order was not "reversed," but "vacated" so that on remand the Tax Commission could reconsider the evidence in light of the proper burden of proof. This Court has described the effect of an opinion "vacating" an order as follows:

The term "vacate" means: "To annul; *to set aside*; to cancel or rescind. To render an act void; as, to vacate . . . a judgment." *Black's Law Dictionary* 1548 (6th ed. 1990). Thus, the vacated portions of the 17 October 1997 order were void and of no effect.

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Friend-Novorska v. Novorska, 143 N.C. App. 387, 393, 545 S.E.2d 788, 793 (emphasis added), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). Despite the fact that *IBM I* specifically vacated “the findings and conclusions [in the first final decision] and remand[ed] this case to the Commission for reconsideration of the evidence in additional proceedings in which petitioner has the burden of proof[,]” 186 N.C. App. at 228, 650 S.E.2d at 832, the Tax Commission found as follows:

17. The Commission also found in the Final Decision entered March 30, 2006, that Zises’ report is “not the appropriate methodology” to assess the subject equipment. *See* Finding 8 of March 30, 2006 Final Decision. *This finding was not set aside on appeal either.*

(Emphasis added.) This finding is entirely unsupported by the record and clearly erroneous; the “findings and conclusions” of the 30 March 2006 order were *vacated*. To vacate means to “set aside[.]” *See Friend-Novorska*, 143 N.C. App. at 393, 545 S.E.2d at 793.

In *IBM II*, as discussed above, we again remanded the case to the Tax Commission for reconsideration. The final mandate is stated simply as “Reversed and remanded.” *See IBM II*, 201 N.C. App. at 354, 689 S.E.2d at 494. The Tax Commission may have construed the fact that *IBM I* used the term “vacate” and that *IBM II* used the word “reverse” as creating some sort of meaningful difference in the portions of its final decision approved or disapproved by this Court. But a full reading of *IBM II* reveals that the entire second final decision by the Tax Commission was reversed. *IBM II* did not approve some portions of the second final decision and disapprove other portions.³ As a practical matter, the terms “vacate” and “reverse” are synonymous as used in most cases. The term “reverse” is defined as “[t]o overthrow, vacate, *set aside*, make void, annul, repeal, or revoke; as, to reverse a judgment, sentence, or decree, of a lower court by an appellate court, or to change to the contrary or to a former condition.” *Black’s Law Dictionary* 1319 (6th ed. 1990) (emphasis added); *See D & W, Inc. v.*

3. It has long been recognized that the court may set aside portions of a decision while other portions stand on remand. “When a judgment appealed from consists of distinct and independent matters so that the erroneous portions thereof can be segregated from the parts that are correct, the court will not set aside the entire judgment, but only so much as is erroneous, leaving the residue undisturbed. Thus, where a judgment, entered on several causes of action, is correct as to some of them but erroneous as to others, it may, if the judgment is divisible, be reversed as to the latter, and affirmed as to the former.” *Newbury v. Sea Board Air Line Ry.*, 160 N.C. 156, 161, 76 S.E. 238, 240 (1912) (quotation marks omitted).

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City of Charlotte, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966) (“To reverse an injunction is to vacate it.”)

Despite the fact that the second final decision was reversed in *IBM II*, the Tax Commission made the following finding of fact:

16. The above findings (Nos. 1-15) as to Zises’ NACOMEX Report, other than minor editing, were made in the Final Decision entered by the Commission on August 29, 2008. *See* Findings 1-4, 8, 10, and 14-22 of August 29, 2008 Final Decision. Such findings *have not been set aside* on appeal.

(Emphasis added.)

Again, this finding is also entirely unsupported by the record and clearly erroneous. The entire 29 August 2008 Final Decision was reversed by this Court in *IBM II*; it was “set aside.” *IBM II* specifically stated that it did not “determine whether these findings [regarding the NACOMEX Report and Mr. Zises’ testimony] are supported by the evidence or whether the values produced by Mr. Zises’ depreciation tables are accurate.” 201 N.C. App. at 353, 689 S.E.2d at 494.

The third final decision also states that “the Commission has twice ruled that the NACOMEX Report is not credible or reliable, and such rulings *have not been overturned on appeal*.” (emphasis added). Again, this is simply incorrect, as the entire first final decision was vacated, and the entire second final decision was reversed. Both of the prior final decisions were “overturned” or rendered “void” by *IBM I* and *IBM II*, respectively. It is also true, however, that this Court has not previously approved or disapproved the Tax Commission’s findings of fact regarding the NACOMEX report and Mr. Zises’ testimony, which it has now made three times, *because we have never addressed this issue*.⁴ We have not ever reached the point of addressing it

4. In *IBM I*, we addressed only the issue of the proper burden of proof, and noted that “[g]iven our resolution of this appeal, we *do not address IBM Credit’s remaining arguments*.” 186 N.C. App. at 229, 650 S.E.2d at 832 (emphasis added). Four of these issues which were not addressed were: “9. DID THE PROPERTY TAX COMMISSION ERR BY FINDING AND CONCLUDING THAT THE NACOMEX REPORT IS NOT CREDIBLE BECAUSE MR. ZISES DID NOT AUDIT OR EXAMINE EACH OF THE MORE THAN 40,000 PIECES OF COMPUTER EQUIPMENT THAT COMPRISE THE SUBJECT PROPERTY?”

10. DID THE PROPERTY TAX COMMISSION ERR BY FINDING AND CONCLUDING THAT THE NACOMEX REPORT IS NOT CREDIBLE BECAUSE IT IS NOT AN APPRAISAL OF THE SUBJECT PROPERTY BECAUSE IT DOES NOT CONTAIN AN OPINION OF VALUE?

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because the Tax Commission has never addressed it in accordance with our two prior decisions which directed it to do so.

III. Issues to be considered as directed by *IBM II*

[2] In addition, in *IBM II*, this Court set out six specific issues regarding valuation which the Tax Commission was to address on remand. *See* 201 N.C. App. at 349-51, 689 S.E.2d at 491-93. We discussed each in detail, and the Tax Commission's third final decision does address these issues. We will not address all six issues in detail here, as far more words have already been written about this case than should have been. However, as to issues 4 and 5, the Tax Commission found that "[t]he current record does not contain sufficient information to respond to this issue." The County argues that "since the Commission did not use Schedule U5 to value IBM Credit's computer equipment in the Final Decision, these issues have now become moot." We disagree. Although the County attempts to portray these issues as applicable only as they relate to the use of Schedule U5, which is no longer relevant since Schedule U5 was not used in this decision, this is not an accurate reading of *IBM II*. Whether the Tax Commission determined that Schedule U5 could be used or not, these valuation issues still had to be addressed. For example, we stated:

Fifth, the Commission does not address why the fact and circumstances of the valuation do not require the appraiser to make adjustments for additional functional or economic obsolescence or for other factors. . . . Where the taxpayer calls to the attention of the appraiser and the Commission facts and circumstances which require special consideration of additional factors, the decision of the county tax appraisers must be evaluated and explained. The rejection of the additional depreciation argument may be justified in some way, but the final decision does not explain why or upon what facts this conclusion would be reached.

11. DID THE PROPERTY TAX COMMISSION ERR BY FINDING AND CONCLUDING THAT THE NACOMEX REPORT IS NOT CREDIBLE BECAUSE IT CONTAINED UNVERIFIED DATA AND IGNORED THE CURRENT USE OF THE PROPERTY IN DURHAM COUNTY, NORTH CAROLINA AND/OR THE VALUE OF THE PROPERTY IN PLACE PERFORMING THE FUNCTION OR FUNCTIONS FOR WHICH IT IS REQUIRED TO DO?

12. DID THE PROPERTY TAX COMMISSION ERR BY FINDING AND CONCLUDING THAT THE NACOMEX REPORT IS NOT CREDIBLE BECAUSE MR. ZISES ONLY CONSIDERED THE MODEL NUMBERS WHICH DO NOT TAKE INTO CONSIDERATION THE CONFIGURATION OF THE SUBJECT PROPERTY?"

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Id. at 350-51, 689 S.E.2d at 492. Granted, the Tax Commission *did* explain its “rejection of the additional depreciation argument” in its third final decision; unfortunately, its explanation was that “the current record does not contain sufficient information to respond to this issue.” Where the County has the burden of proof, this is not an appropriate explanation. The County argues that IBM created this problem, contending that

[t]he reason, however, that the Property Tax Commission did not address these issues is that the existing record does not contain evidence sufficient to respond to them. IBM Credit successfully opposed any additional evidence being taken to respond to such issues. Having chosen to oppose allowing the Commission to respond to these issues, IBM Credit is now estopped from complaining that they were not answered.

This argument entirely ignores the fact that the burden of proof has shifted to the County, as this Court determined in *IBM II*. If there is not sufficient evidence, the fact that the County has the burden of proof means that the County loses. The burden of proof and persuasion is not on IBM.

IV. Valuation methodology

[3] Since it could not value the property in accordance with the directions as to the six issues as directed by *IBM II*, the Tax Commission adopted a “hybrid” approach to come to its valuation. The Tax Commission noted that it did not have “sufficient information” to respond to this Court’s directives in *IBM II* and cobbled together a valuation approach it describes as “[a] combination of the market and income methods[.]” The County argues that the Tax Commission is not required to accept the approach to valuation argued by one side or the other, but

[t]he Commission may analyze the evidence itself and come to its own conclusions. See *In re Appeal of Westinghouse Elec. Corp.*[.] 93 N.C. App. 710, 716, 379 S.E.2d 37, 40 (1989) (“we believe that the Commission was free to choose a method of calculating depreciation based on its assessment of expert testimony”) and holding the Commission could choose a depreciation method proposed by some experts but increase the value of improvements to the property based on testimony of other experts; See also *In re the Appeal of the Blue Ridge Mall*, ____ N.C. App. ____, 713 S.E.2d. 779, 789 (2011).

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The County is correct, in part, but the cases upon which it relies demonstrate the error in its argument. In both cases, the Tax Commission considered *evidence presented by expert witnesses as to valuation* and ultimately adopted valuation approaches based on the evidence, while not adopting any particular expert's exact methodology. *See Appeal of Westinghouse Elec. Corp.*, 93 N.C. App. 710, 713, 716 379 S.E.2d 37, 38-39, 40 (1989) (noting that "[a]t the hearing of this matter, the Commission heard testimony from six experts in the field of property assessment, three testifying on behalf of the Taxpayer and three for the County. They represented different viewpoints as to which methodology should be employed in appraising Taxpayer's property. . . . We believe that the Commission was free to choose a method of calculating depreciation based on its assessment of expert testimony. It is true that the Commission increased depreciation for economic and functional obsolescence based on testimony of two of Taxpayer's experts who did not use the residual method for calculation. In our view, this fact did not bind the Commission to employ these experts' method of calculation, as it was free to accept as much of their testimony as it found convincing."); *In re Blue Ridge Mall LLC*, ___ N.C. App. ___, ___, 713 S.E.2d 779, 787 (2011)(in affirming the Tax Commission's use of the income approach to valuation using a different capitalization rate rather than the rate proposed by the taxpayer's expert witness, this Court noted that "the Commission's decision demonstrates that, although it adopted Mr. Carter's appraisal method, it made a downward adjustment to the capitalization rate employed by Mr. Carter after recognizing that, in estimating that rate, Mr. Carter had relied most heavily on the sale of a mall which was 50% older than the Blue Ridge Mall and had been sold after the appraisal date of the property here. Because '[t]he capitalized value of a given income stream varies directly with the amount of income and inversely with the capitalization rate,' see *In re Owens*, 132 N.C. App. 281, 287, 511 S.E.2d 319, 323 (1999), the Commission's downward adjustment to the capitalization rate was reasonable. We further note that the capitalization rates from sales of malls 'most comparable' in Mr. Carter's report ranged from 8.94% to 17.34%; thus, the Commission's capitalization rate of 10.5% was within the range of those rates. Although the taxpayer and the County disagree as to the proper capitalization rate to employ, we do not believe that a mere disagreement demonstrates the Commission's rate was unsupported by the evidence or was arbitrary or capricious.") The difference here is that there was no expert testimony as to any valuation approach, other than that presented by IBM, which the Tax Commission

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rejected. The “hybrid” approach ultimately used was actually not developed by any witness, expert or otherwise.

IBM argues that

[a]s a substitute for evidence, the County asserted—and the PTC accepted—a new and novel theory that the County failed to raise when the record was being created or at any time prior to the second remand. . . . The County’s newly-minted theory, however, seeks to fill the County-created gap in Mr. Lally’s testimony by using for the first time a new valuation table and graph created by the County’s lawyers on remand, without evidentiary support. . . . Exhibits 1,2,3, and 5 to the Third Final Decision were not admitted into evidence at the evidentiary hearing.

(Emphasis in original.) The County does not respond to this argument, and the record supports it. While we could reject this new valuation approach only on the basis that it was not raised at the hearing before the Tax Commission, as it is well-settled that the “law does not permit parties to swap horses between courts in order to get a better mount[.]” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (noting that “[a]n examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.”) But the County’s argument fails for more substantial reasons as well. In reality, all this new “hybrid” approach did was reduce the length of time over which the property was depreciated, from five years to three, based upon testimony of IBM’s fact witnesses that the equipment’s useful life for leasing purposes is three years. The Tax Commission reasoned that since the property was producing income for three years, “the value of the equipment declines steadily as lease payment are made during the three-year term of the leases. Therefore, the *income approach* mandates a steady rate of decline in value between the sales dates.” (emphasis added).

This so-called “income approach” bears no resemblance to the actual income approach to valuation which has previously been recognized by North Carolina’s courts. In *In re Owens*, 132 N.C. App. 281, 511 S.E.2d 319 (1999), this Court described the income approach to valuation in the context of an *ad valorem* tax valuation:

The County contends it complied with the foregoing provisions in employing an income approach to the valuation of the property. We have previously commented “the income approach is the most

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reliable method in reaching the market value of investment property.” *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d 921, 924, *aff’d*, 342 N.C. 890, 467 S.E.2d 242 (1996). “The income approach to value is based on the principle that something is worth what it will earn.” *In re Southern Railway*, 313 N.C. 177, 185, 328 S.E.2d 235, 241 (1985).

The capitalized value of a given income stream varies directly with the amount of income and inversely with the capitalization rate . . . and [s]light variations in the capitalization rate can result in large variations in value.

Id.

The parties agree that there are two principal income capitalization appraisal methods—direct capitalization and yield capitalization. Indeed, both parties cite and rely upon a textbook produced by the Institute of Appraisers, *The Appraisal of Real Estate*. Although not binding upon this Court, this source summarizes the two methods of capitalization as follows:

Direct capitalization is . . . used to convert an estimate of a single year’s income expectancy, or an annual average of several years’ income expectancies, into an indication of value in one direct step—either by dividing the income estimate by an appropriate income rate or by multiplying the income estimate by an appropriate factor. . . . The rate or factor selected represents the relationship between income and value observed in the market and is derived through comparable sales analysis.

. . . .

Yield capitalization is . . . used to convert future benefits to present value by discounting each future benefit at an appropriate yield rate or by developing an overall rate that explicitly reflects the investment’s income pattern, value change, and yield rate. . . . The method is profit-or yield-oriented, simulating typical investor assumptions with formulas that calculate the present value of expected benefits assuming specified profit or yield requirements.

. . . .

Direct capitalization is simple and easily understood. The capitalization rate or factor is derived directly from the market. . . . Yield capitalization, on the other hand, tends to be complex, requiring the use of special tables, calculators, or computer pro-

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grams [and the] formulas and factors [used] can be obtained from financial tables. . . .

According to the testimony of Long, the County utilized a mortgage-equity capitalization approach, a variety of yield capitalization, to value the property. In the absence of evidence of direct comparable sales within Rutherford County, the County determined the capitalization rate by looking to “the marketplace as to what the equity yield [was]. And [the County derived] that information just from lending practices.” The only comparable sales information was from areas outside Rutherford County and was “secondary information,” and not “highly comparable.” Ultimately, the County established the appropriate capitalization rate as being between ten and one-half percent (10.5%) and twelve and three-quarters percent (12.75%), depending upon the age of the warehouse.

Id. at 287-88, 511 S.E.2d at 323-24. There is absolutely no evidence, and no findings, as to the actual income, or market income, generated by the property to be valued nor as to any capitalization rate which might be applicable to this situation. The only relevance of the word “income” in the “income approach” as used in the third final decision is that IBM receives income, in some undefined amount, from the leased property for three years. The County has not cited, and we cannot find, any prior cases which have recognized this valuation methodology. This is not an accepted method of valuation and is simply an attempt by the Tax Commission to get around the clear direction of *IBM II*, which specifically stated the factors that it should consider, and that MORE depreciation should be deducted, not less, and “valuation depreciation,” not “accounting depreciation”, *IBM II*, 201 N.C. App. at 352-53, 689 S.E.2d at 493-94, should be considered in its valuation.⁵

Thus, we are here in 2012, in the ridiculous position of considering a third appeal in the same case, for a tax valuation of property for 2001, where the Tax Commission has twice failed to comply with this Court’s mandate. In addition, it has also become clear that based upon the voluminous record and prior opinions of this Court that the following is true:

5. Specifically, we held “that the county *did not make adequate deductions* for depreciation in applying Schedule U5 The failure to make *additional depreciation deductions* . . . does not reflect ‘true value.’” *IBM II*, 201 N.C. App. at 353-54, 689 S.E.2d at 494 (emphasis added). We also see no indication that the Tax Commission heeded *IBM II*’s directions to distinguish between valuation depreciation and accounting depreciation.

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1. “[T]he burden of persuasion and going forward with evidence that the methods used do in fact produce ‘true value’ [has shifted] to Durham County.” See *IBM II*, 201 N.C. App. at 348, 689 S.E.2d at 491 (citation omitted).
2. “[T]he county did not make adequate deductions for depreciation by applying Schedule U5 and its transmittal instructions. The failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions results in an appraisal which does not reflect ‘true value.’” See *IBM II*, 201 N.C. App. at 353-54, 689 S.E.2d at 494.
3. “The North Carolina Court of Appeals has held that Durham County did not meet statutory standards required by G.S. 105-283 in applying Schedule U5 and there is not sufficient evidence in the current record to answer the issues the Court raises about Schedule U5.”⁶
4. There is no expert valuation testimony in the record to support the valuation methodology used by the Tax Commission.

Thus, even if we were to remand, yet again, to the Tax Commission with the direction to consider anew, as it should have on the prior two remands, IBM’s evidence, including the NACOMEX report and Mr. Zises’ testimony, the Tax Commission would be well within its authority to find, yet again, that this evidence is not “reliable” or “credible.” These determinations are the province of the Tax Commission. See *IBM II*, 201 N.C. App. at 349, 689 S.E.2d at 491 (stating that “it became the Commission’s duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.” (quoting *Southern Railway*, 313 N.C. at 182, 328 S.E.2d at 239)). If it were to so find, this case would be right back where it is, without “sufficient evidence” in the record to comply with the directives of this Court in *IBM II*. The Tax Commission would then be required to hold that the County has failed to meet its burden of proof and thus IBM would prevail. So even if the Tax Commission *agrees* with the County’s arguments and rejects IBM’s evidence, IBM still wins. It is an exercise in futility to remand this case again. The County did not meet its burden of proof, which is not surprising, as it misunderstood its burden of proof when this case

6. This finding is not challenged on appeal.

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was first tried in 2006. Accordingly, we reverse the third final decision of the Tax Commission and remand to the Tax Commission for the Tax Commission to enter a decision reducing the assessment of the property to \$96,458,707.00, the value as listed by taxpayer IBM.

REVERSED AND REMANDED.

Judge STEPHENS concurs.

Judge BEASLEY concurs in result only.

JOHN JONES, PLAINTIFF-APPELLEE v. SOUTHERN GENERAL INSURANCE COMPANY,
DEFENDANT-APPELLANT

No. COA12-44

(Filed 21 August 2012)

Civil Procedure—Rule 59—new trial—ten-day limit

The trial court erred by ordering a new trial 24 days after judgment was entered. N.C.G.S. § 1A-1, Rule 59(d) is clear and unambiguous, and has a time limit of ten days.

Appeal by Defendant from order entered 17 June 2011 by Judge Abraham Penn Jones in Superior Court, Wake County. Heard in the Court of Appeals 8 May 2012.

Messick Law Firm, by Melissa A. Bowers and William C. Messick, for Plaintiff-Appellee.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for Defendant-Appellant.

McGEE, Judge.

John Jones (Plaintiff) filed a complaint against Southern General Insurance Company (Defendant) for an alleged breach of contract following Defendant's denial of Plaintiff's insurance claim for the alleged theft of Plaintiff's vehicle. Defendant filed a motion for summary judgment on 14 January 2010 and the trial court denied Defendant's motion by order entered 22 March 2010. The case was tried before a jury on 9 May 2011 and the jury returned a verdict in

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favor of Defendant. Thereafter, on 17 June 2011, the trial court entered an order granting Plaintiff a new trial *sua sponte*. Defendant appeals.

I. Factual Background

Defendant issued Plaintiff an automobile liability insurance policy (the policy) for Plaintiff's 1999 Ford Expedition. Plaintiff thereafter reported a claim for the alleged theft of his insured vehicle on 14 July 2005. Following an investigation into Plaintiff's claim, Defendant sent Plaintiff a letter on 22 May 2006 denying Plaintiff's claim. In its letter, Defendant contended that Plaintiff had violated provisions of the policy by making "fraudulent statements" and "[engaging] in fraudulent conduct in connection with [the] accident or loss for which coverage is sought under [the] policy[.]"

Following denial of his claim, Plaintiff filed this action against Defendant for breach of contract. At trial, the jury found in favor of Defendant and the trial court entered judgment on 24 May 2011. The trial court entered an order granting a new trial on 17 June 2011, twenty-four days after judgment had been entered.

II. Issues on Appeal

Defendant raises on appeal the issues of whether: (1) the trial court timely filed its order granting a new trial under N.C. Gen. Stat. § 1A-1, Rule 59(d); (2) the trial court erred in "setting aside the verdict and ordering a new trial[;]" (3) the trial court erred by denying Defendant's "motion for summary judgment and . . . motion for directed verdict[;]" and (4) the court "erred in refusing to deem all requests for admissions admitted by operation of law[.]"

III. Order Granting a New Trial

Defendant contends that the trial court failed to order a new trial within the ten day time limit allowed by N.C. Gen. Stat. § 1A-1, Rule 59(d). Rule 59(d) states:

Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

N.C. Gen. Stat. § 1A-1, Rule 59(d) (2011). In the present case, judgment was entered on 24 May 2011. The trial court did not enter an order granting a new trial until 17 June 2011, twenty-four days after judgment was entered. The trial court's order for a new trial occurred

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outside the permissible time limit described in Rule 59(d) and, therefore, was not properly entered.

Plaintiff contends in his brief that “[a] trial judge does not violate the North Carolina Rules of Civil Procedure in ordering a new trial more than ten days after entry of judgment when it acts upon its own initiative by issuing a Notice and Order within ten days as required by Rule 59(d)[,]” and cites *Chiltoski v. Drum*, 121 N.C. App. 161, 464 S.E.2d 701 (1995), in support thereof. In *Chiltoski*, however, this Court considered whether an order for a new trial must contain “findings [or] explication reflecting the grounds for the court’s action.” *Chiltoski*, 121 N.C. App. at 163, 464 S.E.2d at 702. This Court did not consider whether the trial court may order a new trial outside the ten day time limit stated in Rule 59(d). *Id.*

This Court has held that “[w]hen a statute’s language is clear and unambiguous, it must be given effect, and its clear meaning may not be evaded by the courts under the guise of construction.” *State v. Felts*, 79 N.C. App. 205, 208-09, 339 S.E.2d 99, 101 (1986). We find no ambiguity in the language of Rule 59(d). Under N.C.G.S. § 1A-1, Rule 59(d), the trial court may order a new trial on its own initiative “[n]ot later than 10 days after entry of judgment[.]” N.C.G.S. § 1A-1, Rule 59(d).

While this Court normally reviews a trial court’s order for a new trial only for abuse of discretion, “when the trial court grants or denies a new trial ‘due to some error of law,’ then its decision is fully reviewable.” *Chiltoski*, 121 N.C. App. at 164, 464 S.E.2d at 703 (quoting *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987)). Because the trial court entered an order for a new trial outside the permitted time limit set forth in N.C. Gen. Stat. § 1A-1, Rule 59 (d), this Court reviews that order *de novo*. The trial court’s order for a new trial was not permissible under N.C.G.S. § 1A-1, Rule 59(d) and is, therefore, reversed.

It should be noted that Rule 59(d) in the Federal Rules of Civil Procedure allows a trial court to order a new trial on its own motion up to twenty-eight days after judgment. *See* Fed. R. Civ. Pro. 59(d). This rule was amended in 2009 to allow a twenty-eight day period after federal courts had held that the rule required a trial court to order a new trial, not merely act toward ordering a new trial, within ten days following judgment. *See* Fed. R. Civ. Pro. Adv. Comm. N., 59(d) (2009); *Tarlton v. Exxon*, 688 F.2d 973, 978 (5th Cir. 1982) (“The language of Rule 59(d) is explicit: the trial court may order a new trial for any reason it might have found sufficient on motion of a party, not

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later than 10 days after entry of judgment. In the case at bar, the district court's order of June 3 was obviously filed more than 10 days after the March 27 judgment." (internal quotations omitted)). The North Carolina Rules of Civil Procedure have not been so amended. We recognize the inherent difficulty in completing the procedural requirements for filing an order for a new trial in a matter of only ten days following entry of judgment. However, the opportunity for changing Rule 59(d) to allow a more reasonable time for a trial court to order a new trial *sua sponte* lies with the North Carolina General Assembly. We must give effect to the present "clear and unambiguous" language of Rule 59(d). *See Felts*, 79 N.C. App. at 208-09, 339 S.E.2d at 101.

Having determined that the trial court's order of a new trial was untimely, this Court need not address Defendant's arguments concerning the trial court's reasons for ordering a new trial. Furthermore, as Defendant is no longer an aggrieved party upon reversal of the trial court's order for a new trial, we need not consider whether the trial court erred by denying Defendant's motions for summary judgment and directed verdict, or by "refusing to deem all requests for admissions admitted by operation of law." We therefore reverse the trial court's order for a new trial and remand the case for entry of judgment upon the verdict rendered by the jury. *See Chiltoski*, 121 N.C. App. at 165, 464 S.E.2d at 704.

Reversed and remanded.

Judges STEPHENS and HUNTER, Jr. concur.

SHARON A. KEYES, PLAINTIFF V. W. GLENN JOHNSON, GUARDIAN OF THE ESTATE OF
NELSON T. CURRIN, DEFENDANT

No. COA12-81

(Filed 21 August 2012)

Appeal and Error—preservation of issues—appeal from applicable order

The trial court correctly granted summary judgment for defendant on a claim by plaintiff for attorney fees after the Clerk of Court removed plaintiff as attorney of record in a guardianship proceeding.

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Plaintiff did not appeal the guardianship order and therefore did not challenge its findings, even though it was not interlocutory (a substantial right was affected).

Appeal by Plaintiff from order entered 30 August 2011 by Judge Lucy N. Inman in Harnett County Superior Court. Heard in the Court of Appeals 23 May 2012.

Sharon A. Keyes, for Plaintiff-Appellant.

Narron, O'Hale & Whittington, PA, by James W. Narron and Matthew S. McGonagle, for Defendant-Appellee.

BEASLEY, Judge.

Sharon A. Keyes (Plaintiff) appeals from an order granting summary judgment in favor of W. Glenn Johnson, Guardian of the Estate of Nelson T. Currin (Defendant). For the following reasons, we affirm.

Plaintiff commenced this action by filing a complaint on 20 January 2011 alleging breach of contract and asking to recover legal fees incurred while she represented Defendant's Ward, Nelson Currin (Nelson). The legal fees Plaintiff seeks to recover stem from Plaintiff's representation of Nelson Currin in his guardianship proceeding in 2009. Plaintiff appeared before the trial court on the matter purporting to represent both Nelson and his wife Coma Lee Currin (Coma Lee). A motion to remove Plaintiff as attorney of record, alleging there was a direct conflict of interest in representing both Nelson and Coma Lee, was filed on 22 September 2009. A hearing on that motion was held on 12 November 2009, and Plaintiff was present at and participated in that hearing. By order filed 17 November 2009, the trial court allowed the motion to remove Plaintiff as attorney of record for Nelson.

Defendant moved for summary judgment on Plaintiff's complaint filed 20 January 2011 and on 15 June 2011. A hearing on Defendant's motion was held on 22 August 2011. On 30 August 2011, the trial court entered an order granting Defendant's motion for summary judgment. On 20 September 2011, Plaintiff filed a notice of appeal to this Court from the 30 August 2011 order.

Plaintiff argues that the trial court erred in granting Defendant's motion for summary judgment. We disagree.

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

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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). “A trial court’s grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.” *Sturgill v. Ashe Mem’l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007) (citing *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004)).

Under the doctrine of collateral estoppel, sometimes referred to as “issue preclusion,” “the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

In the guardianship proceeding, and in response to a motion filed by Denise Currin Matthews and Durane Currin to disqualify Plaintiff as Nelson’s attorney, the Clerk of Court entered an order on 17 November 2009 which found in part that the waiver of conflict of interest signed by Nelson to allow Plaintiff to represent both Nelson and Coma Lee “does not contain any specifics as to what conflicts either party waives and is ineffective.” The Clerk of Court further found and concluded that Plaintiff in this action had an irreconcilable conflict of interest in representing both Nelson and Coma Lee. The order additionally found and concluded that even if the conflict could be waived, Nelson was not capable of making a knowing waiver of the conflict. Plaintiff was present at the hearing on the aforementioned motion and in fact questioned the petitioners’ witnesses regarding the motion. Thus, Plaintiff enjoyed a full and fair opportunity to litigate the issue.

Plaintiff failed to appeal the 19 November 2009 order and therefore failed to challenge the findings of fact contained therein. Although Plaintiff contends that she could not appeal the earlier order because it was interlocutory, that argument is without merit. *See Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 293, 420 S.E.2d 426, 429 (1992)(recognizing that an interlocutory order granting a motion to disqualify counsel is immediately appealable because it “has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney”). Plaintiff cannot now ask this Court to find that she is owed payment for services under a contract that the trial court found contained a direct conflict of interest for which the waiver Plaintiff prepared was

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ineffective. Accordingly, we affirm the trial court's grant of summary judgment in favor of Defendant.

Affirmed.

Judge HUNTER, Robert C. dissents with separate opinion.

Judge GEER concurs.

HUNTER, Robert C., Judge, dissenting.

While I agree with the majority's conclusion that the doctrine of collateral estoppel would prevent Plaintiff Sharon A. Keyes ("Plaintiff") from asserting she was entitled to relief based on a breach of contract claim, I believe that there is a genuine issue of material fact as to whether Plaintiff could recover the value of her services she provided up until the time the Clerk's order removing her as attorney was finalized under the theory of *quantum meruit*. Therefore, I respectfully dissent.

On 21 August 2009, Plaintiff entered into a contract with Nelson Currin ("Mr. Currin") to represent him during incompetency proceedings. Plaintiff also purportedly represented Mr. Currin's wife, Coma Lee Currin ("Ms. Currin"), which is evidenced by a nondated "Waiver of Conflict" stating that both Mr. and Ms. Currin have "asked [Plaintiff] to represent [the Currins] jointly in connection with the Petition for Adjudication of Incompetence and Appointment of Guardian filed against [Mr. Currin] . . ." The "Waiver," which was signed by both Mr. and Ms. Currin, asserted that they had each agreed to waive any conflict of interest that may arise out of Plaintiff's representation of them during the incompetency proceedings. Plaintiff made several appearances of record and appealed various actions of the court on behalf of the Currins.

Prior to the incompetency hearing, a hearing was held on 12 November 2009 before the Harnett County Assistant Clerk of Superior Court ("the Clerk") regarding a jurisdictional issue and on a motion to remove Plaintiff and Matthew Vaughn ("Vaughn"), another attorney also purporting to represent the Currins, as the attorneys of record. The motion to remove was filed by several of Mr. Currin's children who were also the petitioners in the incompetency proceedings. Based on the evidence presented at the hearing, the Clerk made the following conclusions of law:

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1. That [Plaintiff and Vaughn] have an irreconcilable conflict of interest in representing both [Mr. and Ms. Currin].
2. That even if said conflict could be waived, [Mr. Currin] is not capable of executing a knowing waiver of said conflict.

The Clerk granted the motion to remove Plaintiff.

On 20 January 2011, Plaintiff filed a complaint against Defendant W. Glenn Johnson (“Defendant”), the guardian of Mr. Currin’s estate who was appointed by the court at the incompetency hearing, alleging that she was entitled to attorney fees based on the contract she had with Mr. Currin and asserting a breach of contract claim. Defendant filed a motion for summary judgment on 15 June 2011 and argued that: (1) Plaintiff should have known that Mr. Currin was incapable of waiving any conflict of interest, and (2) Plaintiff was precluded from asserting a claim for breach of contract based on the doctrines of collateral estoppel and judicial estoppel. The matter came on for hearing before Special Superior Court Judge Lucy N. Inman on 22 August 2011. On 26 August 2011, the trial court granted Defendant’s motion for summary judgment and dismissed Plaintiff’s claim against Defendant with prejudice. Plaintiff filed a Notice of Appeal from the trial court’s order granting Defendant’s motion for summary judgment on 20 September 2011 to this Court.

“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)). “[O]n a motion for summary judgment the burden of proving that there is no genuine issue as to any material fact is on the movant, and if he fails to carry that burden, summary judgment is not proper, whether or not the nonmoving party responds.” *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 27, 423 S.E.2d 444, 457 (1992). “The party opposing the motion for summary judgment does not have to establish that he would prevail on the issue, but merely that the issue exists.” *Gregorino v. Charlotte-Mecklenburg Hosp. Auth.*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996).

“[C]ollateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim.” *Whiteacre P’ship v. Biosignia, Inc.*,

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358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). As the majority notes, and I agree, based on the doctrine of collateral estoppel, Plaintiff is precluded from now arguing that she is entitled to attorney fees based on a breach of contract claim because the Clerk has already determined that the contract between herself and Mr. Currin is unenforceable due to their irreconcilable conflict, the ineffective waiver, and his incapacity to contract. In other words, the Clerk has already determined that the contract is unenforceable, and Plaintiff may not now allege a breach of this contract. Thus, if this was Plaintiff's only avenue to recover attorney fees, summary judgment would be proper since the contract between Plaintiff and Mr. Currin is unenforceable due to the irreconcilable conflict, the ineffective waiver, and Mr. Currin's inability to enter into a contract.

However, since the contract is no longer valid, I believe Plaintiff may be entitled to attorney fees under a theory of *quantum meruit*. "*Quantum meruit* is an equitable principle that allows recovery for services based upon an implied contract." *Paxton v. O.C.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983). "To recover in *quantum meruit*, [a] plaintiff must show: (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Envtl. Landscape Design Specialists v. Shields*, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985).

Here, Plaintiff may be entitled to equitable relief under *quantum meruit* because, based on the allegations in her complaint and her testimony at the summary judgment hearing, she knowingly and voluntarily provided services to Mr. Currin based on what she believed was an enforceable contract. Therefore, the record is sufficient to establish a claim for *quantum meruit* and establish that a genuine issue of material fact exists. While "recovery in *quantum meruit* is not, in any event, available when . . . there is an express contract" or "actual agreement[,]" the contract and the agreement in the present case has already been found unenforceable by the Clerk. *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 328, 595 S.E.2d 759, 765 (2004); *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998). Thus, there is no express contract between Plaintiff and Mr. Currin. Furthermore, even though Plaintiff based her complaint on a breach of contract claim and did not specifically plead she was entitled to attorney fees under the theory of *quantum meruit*, the trial court has the authority to award a party the reasonable value of her services under the theory of *quantum meruit*. See *Paxton*, 64 N.C.

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App. at 133-34, 306 S.E.2d at 529-30 (affirming the trial court's holding that the plaintiff was entitled to recover in *quantum meruit* even though plaintiff did not specifically plead it in her complaint but instead alleged the existence of an express contract).

Because Plaintiff's complaint may entitle her to relief under *quantum meruit*, a genuine issue of material fact existed, and I believe the trial court erred in holding Defendant was entitled to judgment as a matter of law. The burden is on the moving party to show that no genuine issue of material fact existed, and I believe Defendant failed to meet this burden since Plaintiff's complaint established a potential claim for *quantum meruit*. Thus, I am persuaded the trial court should have denied Defendant's motion.

A person who is alleged to be incompetent should be able to hire an attorney of his choice to represent him in incompetency proceedings. I believe that the potential for an attorney to be precluded from attempting to collect attorney fees based on that representation once a person is found incompetent and, thus, unable to contract, would have a chilling effect on that process. However, I am persuaded that the equitable relief that may be available to an attorney under the theory of *quantum meruit* would circumvent that effect and prevent other attorneys from finding themselves in the position Plaintiff is now in. My dissent is primarily premised on my belief that those who need representation in incompetency hearings will be unable to find it if our courts hold that the person's ultimate adjudication as incompetent would prevent an attorney from collecting attorney fees.

Despite the fact that collateral estoppel prevents Plaintiff from asserting a breach of contract claim, I believe that Plaintiff's complaint establishes a genuine issue of material fact as to whether she is entitled to equitable relief up until the time the Clerk's order was finalized under the theory of *quantum meruit*. Therefore, I would reverse the trial court's grant of summary judgment.

LEGACY VULCAN CORP. v. GARREN

[222 N.C. App. 445 (2012)]

LEGACY VULCAN CORP., F/K/A VULCAN MATERIALS COMPANY, PLAINTIFF APPELLANT
v. MARY LYNN GARREN, EXECUTRIX OF THE ESTATE OF HARRY C. GARREN;
LARRY S. HARTLEY, TRUSTEE OF THE HARRY C. GARREN ADMINISTRATIVE
TRUST; JAMES L. CARTER; TAVA ORR CARTER; BOYD L. HYDER; AND ANGELA
S. BEEKER, TRUSTEE, DEFENDANTS-APPELLEES

No. COA11-1478

(Filed 21 August 2011)

1. Appeal and Error—interlocutory order—summary judgment—remaining defendant—treated as petition for certiorari

A summary judgment for all but one of the defendants remaining in an action was an interlocutory order but the appeal was treated as a petition for *certiorari* under Rule 2 of the Rules of Appellate Procedure. Nothing in the record indicated that the remaining defendant received a final judgment or that she had been dismissed from this action, but dismissing the appeal as interlocutory would likely waste judicial resources.

2. Real Property—notice of preemptive rights—not sufficient

The trial court correctly granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment in an action against an estate and trustees for specific performance arising from an interwoven real estate transaction involving an option to purchase, an exchange of the option property for a second tract, and a right of first-refusal for a third tract that was not dependent on the exercise of the option. The issue was whether defendants had notice of plaintiff's preemptive rights: the only reasonable interpretation of a memorandum of agreement that was recorded and re-recorded was that all of plaintiff's rights expired on 31 December 1996, more than a decade before the transaction at issue here. Defendants were not required to draw inferences from the timing of the recordings, nor was language in the memorandum referring to the sequence of recording sufficient to arouse suspicion in a reasonable person performing a title search.

Appeal by Plaintiff from order entered 17 August 2011 by Judge Gary M. Gavenus in Superior Court, Henderson County. Heard in the Court of Appeals 24 April 2012.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr. and James A. Dean, for Plaintiff-Appellant.

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Prince, Youngblood & Massagee, PLLC, by Sharon B. Alexander, for Defendants-Appellees.

McGEE, Judge.

Legacy Vulcan Corporation (Plaintiff) filed a complaint on 23 November 2009 against Mary Lynn Garren, Executrix of the Estate of Harry C. Garren; Larry S. Hartley, Trustee of the Harry C. Garren Administrative Trust; James L. Carter; Tava Orr Carter; Boyd L. Hyder; and Angela S. Beeker, Trustee of a Deed of Trust (collectively, Defendants), seeking specific performance, or in the alternative, invalidation of a deed and purchase money deed of trust, and damages for breach of contract. Defendant James L. Carter also filed a cross-claim against Defendant Mary Lynn Garren and Defendant Larry S. Hartley.

Plaintiff voluntarily dismissed without prejudice all claims against Defendants Garren and Hartley on 26 July 2010. However, Defendants Garren and Hartley remain parties to the lawsuit as cross-defendants based on the cross-claim filed against them by Defendant James L. Carter. The success of this cross-claim is contingent upon Plaintiff's receiving a favorable outcome in this appeal.

Defendants James L. Carter, Tava Orr Carter, and Boyd L. Hyder filed a motion for summary judgment against Plaintiff on 20 July 2011. Plaintiff filed a motion for summary judgment with respect to Plaintiff's claim for specific performance against Defendants James L. Carter, Tava Orr Carter, and Boyd L. Hyder on 21 July 2011. Defendant Angela S. Beeker did not file a motion for summary judgment, but did file an affidavit in opposition to summary judgment. The trial court entered an order granting summary judgment in favor of Defendants James L. Carter, Tava Orr Carter, and Boyd L. Hyder against Plaintiff. Defendant Beeker was not named in the trial court's order granting summary judgment.

I. Grounds for Appellate Review

[1] “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). In the present case, it is not clear from the record what, if any, relief Plaintiff has sought, or seeks, against Defendant Beeker. Nothing in the record indicates that Defendant Beeker received a final judgment or that she has been dismissed from this action. *See*

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Pentecostal Pilgrims & Strangers Corp. v. Connor, 202 N.C. App. 128, 131, 688 S.E.2d 81, 83 (2010) (noting that “[T]he [superior] court’s grant of [a defendant’s] motion to dismiss was not a final judgment as to all parties to the litigation and, as such, the order was interlocutory.”).

However, pursuant to Rule 2 of the N.C. Rules of Appellate Procedure, this Court may, on its own initiative, “suspend or vary the requirements or provisions” of the rules of appellate procedure in order “to expedite decision in the public interest[.]” N.C.R. App. P. 2. Further, N.C.R. App. P. 21 provides:

The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists[.]

N.C.R. App. P. 21(a)(1) (2011). We believe that dismissing this appeal as interlocutory would likely waste judicial resources. *See Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (2005) (granting *certiorari* where there was the potential for “additional litigation [which] would be a waste of judicial resources”). Further, we believe our decision will, in effect, resolve all legal issues in dispute. We exercise our authority under Rule 2 to consider Plaintiff’s appeal as a petition for *certiorari*, and we grant *certiorari* to review the trial court’s interlocutory order. *See Brown*, 171 N.C. App. at 269, 614 S.E.2d at 601.

II. Factual Background

Plaintiff operates a quarry in Henderson County, North Carolina. The record reveals that Plaintiff entered into an agreement (the Agreement) with Defendant Harry C. Garren (Mr. Garren) on 2 July 1996. The Agreement was titled “Option Agreement and Right of First Refusal” and specified the rights related to the following three tracts of real property: (1) an 8.83-acre tract of land located to the southeast of Plaintiff’s property (the Option property); (2) an approximately 4-acre tract of land located to the west of Plaintiff’s property (the Trade property); and (3) an approximately 16-acre tract of land located to the northwest of Plaintiff’s property (the Refusal property).

Under the Agreement, Plaintiff was also given an option to purchase the Option property on or before 31 December 1996. This option to purchase allowed Plaintiff to obtain the Option property in exchange for the Trade property, while reserving a right of first

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refusal on the Trade property. The right of first refusal on the Trade property only became operative if and when Plaintiff exercised its option. The Agreement also gave Plaintiff a right of first refusal over the Refusal property regardless of whether Plaintiff exercised its right to obtain the Option property.

A document titled “Memorandum of Option Agreement and Right of First Refusal” (the Memorandum) was recorded on 31 July 1996. Plaintiff exercised its option, and took possession of the Option property in exchange for the Trade property on 22 October 1996. The Memorandum was re-recorded on 18 November 1996.

Mr. Garren died on 26 September 2008. Defendants Mary Lynn Garren and Larry S. Hartley sold a portion of the Refusal property and the entire Trade property (collectively, the Contract property) to Defendants James L. Carter, Tava Orr Carter, and Boyd L. Hyder on 14 May 2009. In its original complaint, Plaintiff alleged that it was not notified of the pending sale or afforded an opportunity to exercise its right of first refusal.

Plaintiff appeals from the order granting summary judgment in favor of Defendants James L. Carter, Tava Orr Carter, and Boyd L. Hyder, and denying Plaintiff's motion for summary judgment.

III. Issue on Appeal and Standard of Review

Plaintiff raises the issue on appeal of whether the trial court erred by granting summary judgment in favor of Defendants and by failing to grant summary judgment in favor of Plaintiff. “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 omitted).

IV. Entry of Summary Judgment

[2] Plaintiff contends there are two “similar but independent . . . grounds to reverse the order below.” First, Plaintiff argues that we should “reaffirm the established principle that a party searching the title to real property has constructive notice, as a matter of law, of recorded instruments and of unrecorded documents referenced therein.” Second, Plaintiff contends that “even if Defendants were not on notice of the right of first refusal as a matter of law, there is a genuine issue of material fact regarding whether the memorandum

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and other recorded documents disclosed sufficient facts to put Defendants on inquiry notice of the Right of First Refusal.”

We first note that a right of first refusal is a “preemptive right” that “requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person.” *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) (citations omitted). The holder of a preemptive right may “enforce that preemptive right against subsequent purchasers for value who are charged with notice of the right in the recorded chain of title . . . provided there is no equitable matter precluding this ability.” *Id.* at 68, 269 S.E.2d at 614 (citation omitted).

However, to bind future purchasers of the real property, a purchaser must have actual or constructive knowledge of the preemptive right. Plaintiff relies on *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964) to argue that Defendants should be charged with notice in this case. In *Morehead*, our Supreme Court stated that:

“A person is as a general rule charged with notice of what appears in the deeds or muniments in his grantor’s chain of title, including . . . instruments to which a conveyance refers. . . Under this rule, the purchaser is charged with notice not only of the existence and legal effects of the instruments, but also of every description, recital, reference, and reservation therein. . . . If the facts disclosed in a deed in the chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed.”

Id. at 340, 137 S.E.2d at 183 (citation omitted). The Supreme Court further stated that:

Where the defense of ‘innocent purchaser’ is interposed and there has been a bona fide purchase for a valuable consideration, the matter which debases the apparent fee must have been expressly or by reference set out in the muniments of record title or brought to the notice of the purchaser *in such a manner as to put him upon inquiry*. An innocent purchaser takes title free of equities of which he had no actual or constructive notice.

Id. at 342, 137 S.E.2d at 185 (emphasis added). *See also Perkins v. Langdon*, 237 N.C. 159, 167-68, 74 S.E.2d 634, 641 (1953) (“[O]rdinarily where a party has information which is reasonably calculated to excite attention and stimulate inquiry, he is charged with constructive notice of all that reasonable inquiry would have disclosed[.]”).

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We must determine if there is a genuine issue of material fact as to whether Defendants were on notice of Plaintiff's preemptive rights. We must further decide whether Defendants can be charged with actual or constructive notice of Plaintiff's preemptive rights.

In the present case, Plaintiff's right of first refusal was not "brought to the notice of the purchaser in such a manner as to put [Defendants] upon inquiry" of Plaintiff's rights. The Memorandum refers to both Plaintiff's right of first refusal and Plaintiff's option rights as "the Option." The first paragraph specified that Plaintiff had "an option to purchase" the Option property. Paragraph 2 of the Memorandum specified that: "The term of the Option is for a period of six (6) months to and including the 31st day of Dec, 1996." Paragraph 3 of the Memorandum states that: "The *Option* grants Buyer a right of first refusal to purchase or lease the real estate described in Exhibit 'B' and Exhibit 'C' attached hereto and incorporated herein by reference." (emphasis added). No other dates, aside from the dates of recording, are referenced in the memorandum agreement.

Plaintiff argues that "[t]he logical way to read the memorandum . . . is to interpret the term 'Option' as 'option to purchase' in Paragraphs 1 and 2 and as 'Option Agreement & Right of First Refusal' in Paragraph 3." Such an interpretation would assign different meanings to the same term within a legal document. We do not believe this is a reasonable interpretation. The parenthetical indication, along with the consistent capitalization, indicates that the meaning of the phrase "the Option" was intended to have the same meaning throughout the Memorandum. *Cf. Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 639, 217 S.E.2d 682, 693 (1975) ("[C]ontract provisions should not be construed as conflicting unless no other reasonable interpretation is possible."). Here, the only reasonable construction apparent from the face of the document is that all of Plaintiff's rights referenced by the Memorandum expired on 31 December 1996, more than a decade before the 2009 transaction at issue.

"Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms."

Hodgin v. Brighton, 196 N.C. App. 126, 128, 674 S.E.2d 444, 446 (2009) (citation omitted).

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Therefore, a title search of the property, if completed in 2009 when the transaction at issue occurred, would indicate only that Plaintiff's rights under the "Option" had expired more than ten years prior to the transaction at issue. Rather than exciting the attention of a reasonable person, the Agreement *negates* the need for further inquiry on the part of the title searcher.

We find support for this position in *Smith v. Fuller*, 152 N.C. 7, 67 S.E. 48 (1910). *Smith* addressed the question of whether the presence on the record of a canceled mortgage was sufficient to place a subsequent purchaser on notice of a mortgagor/mortgagee relationship. *Id.* at 13, 67 S.E. at 51. The Supreme Court did not consider the appearance of a canceled mortgage on the record to be sufficient to charge the purchaser with notice, writing:

Upon what principle can a subsequent purchaser of property, once covered by a mortgage, but which long before he deals with it, has been properly canceled and the entry of satisfaction properly entered on the record, be held to a notice of it, in his examination of the records to ascertain the then condition of the title of the property he is negotiating to purchase? If at that time it is not an existing charge upon the property (and the entry of satisfaction by the proper person is to him conclusive that it is not), he has absolutely no concern with it; and no statute and no adjudication of any court that we have discovered requires him to observe it, or affects him with constructive notice of its presence on the books, and assuredly none of any equities *dehors* the deed growing out of a relation once existing, but by the entry of satisfaction properly made conclusively determined as to him.

Smith, 152 N.C. at 13-14, 67 S.E. at 51. In the present case, as in *Smith*, the record did not indicate that there was an existing charge upon the real property.

Plaintiff cites the following language that, at the time of the re-recording of the Memorandum, was printed on the Memorandum: "To record in proper sequence so that future title search would not miss this encumbrance[.]" Plaintiff contends that this language "alone[]" should have aroused sufficient suspicion to cause Defendants to review the Agreement." Plaintiff does not cite any authority for this proposition, and we find none. We do not believe that the presence of this language would have aroused suspicion in a reasonable person performing a title search.

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[222 N.C. App. 452 (2012)]

Plaintiff also argues that the “[s]equencing of the [M]emorandum’s filing put Defendants on inquiry notice that there was an outstanding Right of First Refusal.” Plaintiff argues that, because the Memorandum was re-recorded on 18 November 1996, Defendants should have been able to intuit that Plaintiff retained an interest in the real property other than the option. Defendants were not required to draw inferences from the timing of the recordings. This does not give notice of Plaintiff’s preemptive rights by expressly noting those rights or by referencing them in the Memorandum. *See Morehead*, 262 N.C. at 340, 137 S.E.2d at 183. Nor was the sequencing “reasonably calculated to excite attention and stimulate inquiry” by Defendants. *See Perkins*, 237 N.C. at 167, 74 S.E.2d at 641. Therefore, the sequencing is not sufficient information to charge Defendants with notice.

The trial court correctly granted Defendants’ motion for summary judgment and denied Plaintiff’s motion for summary judgment.

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

CLYDE VERNON LOVETTE, PETITIONER v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER IN HIS CAPACITY AS SECRETARY OF CORRECTION, AND RUDY FOSTER IN HIS CAPACITY AS ADMINISTRATOR OF DAN RIVER PRISON WORK FARM, RESPONDENTS

CHARLES LYNCH, PETITIONER v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER IN HIS CAPACITY AS SECRETARY OF CORRECTION, AND TIM KERLEY IN HIS CAPACITY AS ADMINISTRATOR OF CATAWBA CORRECTIONAL CENTER, RESPONDENTS

No. COA11-1081

(Filed 21 August 2012)

1. Sentencing—life imprisonment—prior statute

In an action involving the release date for inmates sentenced to life imprisonment under a prior statute, the trial court did not err by concluding that it was bound by *Jones v. Keller*, 364 N.C. 249, but then differentiating petitioners from the limited scope of the *Jones* decision. The Supreme Court went to great lengths to distinguish the *Jones* defendants (serving life sentences for first-degree murder) from other defendants serving life terms under N.C.G.S. § 14-2.

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2. Judges—change by subsequent judge—sentencing determination

The trial court did not change determinations by other superior courts when it held that petitioners, sentenced to life imprisonment under N.C.G.S. § 14-2, were serving sentences statutorily set at 80 years and had unconditional release dates to which credits should be applied.

3. Constitutional Law—separation of powers—sentencing determination

The trial court did not violate the separation of powers doctrine by ordering the unconditional release of inmates imprisoned for life under a statute that defined “life” as 80 years where those prisoners had credits toward their release date.

Judge ERVIN dissenting.

Appeal by respondents from order entered 16 June 2011 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 25 January 2012.

Sarah Jessica Farber, Vernetta Alston, and Mary S. Pollard for petitioners-appellees.

Roy A. Cooper, Attorney General, by Special Deputy Attorney General Thomas J. Pitman and Assistant Attorney General Elizabeth F. Parson, for respondents-appellants.

BRYANT, Judge.

Where the trial court held that petitioners had fully served their life sentences after credits had been applied to their unconditional release dates, we affirm the trial court’s order.

Facts and Procedural History

Clyde Vernon Lovette and Charles Lynch (petitioners) were both inmates of the North Carolina Department of Correction (hereinafter “DOC”) system, serving sentences of life imprisonment. On 15 October 2010, petitioners filed applications for writs of habeas corpus commanding respondents, the DOC, Alvin Keller in his capacity as Secretary of the DOC, Rudy Foster in his capacity as Administrator of Dan River Prison Work Farm, and Tim Kerley in his capacity as Administrator of Catawba Correctional Center, to grant them uncon-

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ditional release from prison. Petitions for writ of habeas corpus were simultaneously filed for thirteen other inmates.

Petitioners were each sentenced to life imprisonment pursuant to former N.C. Gen. Stat. § 14-2 (1974) which provided that a life sentence should be considered as imprisonment for eighty years.¹ Petitioners alleged that while incarcerated in the DOC, they had earned sentence reduction credits for “gain time,” “good time,” and “meritorious service.” Based on these credits as well as days actually served, petitioners alleged that they had served their entire sentences and were entitled to be discharged from incarceration pursuant to N.C. Gen. Stat. § 17-33(2) (2010) (allowing for summary proceedings pursuant to a writ of habeas corpus).

On 6 December 2010, respondents filed motions to deny petitioners’ applications for writ of habeas corpus. Petitioners filed a Joint Motion for Summary Judgment on their applications for writ of habeas corpus as well as a Joint Response in Opposition to [respondents’] Motion to Dismiss petitioners’ applications for writ of habeas corpus.²

Following a hearing on the parties’ motions held on 14 February 2011, the trial court denied summary judgment to both parties and denied respondents’ Motion to Deny Application for Writ of Habeas Corpus.

Subsequent to a second hearing, on 15 April 2011, the trial court joined petitioners’ applications for hearing and concluded the following: “Given the stipulation that Petitioners’ total credits, if applied to the unconditional release date, are sufficient to fully satisfy each Petitioners’ sentence, the Petitioners have fully served their sentences” and therefore the “continued detention of Petitioners is unlawful.” The trial court allowed the writs of habeas corpus and ordered petitioners to be discharged by 17 June 2011.

Respondents filed with this Court a petition for writ of certiorari, a motion for supersedeas, and a motion for temporary stay. On 24 June 2011, our Court issued a writ of certiorari to review the 16 June

1. Petitioner Lovette was charged with a first-degree murder that was committed in 1978 but plead guilty to second-degree murder. Petitioner Lynch was charged with two counts of second-degree burglary and one count of assault with intent to commit rape, offenses that were committed in 1978. Lynch’s charges were consolidated and a single life sentence was imposed for second-degree burglary.

2. While titled “Joint Response in Opposition to Motion to Dismiss,” petitioners’ motion was in direct response to respondents’ 6 December 2010 “Motion to Deny Application for Writ of Habeas Corpus.”

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2011 order, allowed the petition for writ of supersedeas, and stayed the 16 June 2011 order pending disposition of respondents' appeal.

Respondents' sole issue on appeal is whether the trial court erred by ordering petitioners' unconditional release from prison.

[1] Respondents argue the trial court erred by concluding that it was bound by the decision in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), but ignoring the reasoning of *Jones*. While the trial court's findings of fact are binding on appeal if supported by competent evidence, the trial court's conclusions of law are reviewable *de novo*. *State v. Barber*, 335 N.C. 120, 130, 436 S.E.2d 106, 111 (1993).

In the 16 June 2011 order, the trial court made the following pertinent conclusions of law:

1. This Court is bound by the holding in *Jones v. Keller*, 364 N.C. 249; 698 S.E.2d 49 (2010), (hereinafter, "*Jones*"), which was decided by the North Carolina Supreme Court subsequent to the decision by the North Carolina Court of Appeals in *Bowden*.
2. The *Jones* decision clearly and on its face limited its decision to inmates serving life sentences for first-degree murder between 8 April 1974 and 30 June 1978 (*See Jones at 252*: "it is this limited group that we consider in this opinion").
3. This Court now considers Petitioners, two inmates that are part of a distinguishable subset of the *Bowden* class, different than those considered in *Jones*: those who were sentenced to life imprisonment between 8 April 1974 and 30 June 1978 based on lesser convictions, for crimes other than first-degree murder.

In *State v. Bowden*, 193 N.C. App. 597, 668 S.E.2d 107 (2008), the defendant was convicted of two counts of first-degree murder and sentenced to two life sentences in 1975, at a time where N.C. Gen. Stat. § 14-2 (1974) provided that a life sentence should be considered as imprisonment for 80 years. *Id.* at 597-98, 668 S.E.2d at 108. The *Bowden* defendant filed a petition for a writ of *habeas corpus* and argued that after applying all of his sentence reduction credits, he had completed his 80-year sentence and was entitled to immediate release from prison. *Id.* The trial court denied his petition and the *Bowden* defendant appealed to this Court. We treated the matter as a motion for appropriate relief, vacated the trial court's order, and remanded the matter, ordering the trial court to conduct an evidentiary hearing to resolve issues of fact raised in the defendant's petition. Later, the

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trial court denied defendant's claim for relief and concluded that N.C.G.S. § 14-2 (1974) only required the DOC to treat the defendant's life sentence as a term of 80 years for purposes of parole eligibility. *Id.* at 598, 668 S.E.2d at 108.

The State asserted that N.C.G.S. § 14-2 did not govern the length of the defendant's sentence in prison but only applied when determining his eligibility for parole and that a life sentence deemed a person to be imprisoned for the term of his natural life. *Id.* at 599, 668 S.E.2d at 109. Our Court concluded the following:

The plain language of the statute states that life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison without any limitation or restriction. . . . Had our Legislature intended that N.C. Gen. Stat. § 14-2 (1974) only apply when determining a prisoner's parole eligibility, it would have been a simple matter to have included that explicit phrase.

Id. at 601, 668 S.E.2d at 110 (citations omitted). Accordingly, our Court reversed the trial court's order and remanded for a hearing to determine defendant's sentence reduction credit eligibility and to whom those credits would apply. *Id.*

Subsequent to *Bowden*, in *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010), the North Carolina Supreme Court was asked to determine whether the defendant was entitled to habeas corpus relief on the grounds that once his good time, gain time, and merit time were credited toward his life sentence, statutorily defined as eighty years, he was entitled to unconditional release. *Id.* at 251, 698 S.E.2d at 52. Earlier, the trial court had concluded that because the *Jones* defendant was entitled to credits awarded by the DOC, had served the entirety of his sentence, and was entitled to relief, his petition for habeas corpus should be allowed and ordered that the *Jones* defendant be released. The DOC appealed to the North Carolina Supreme Court which allowed DOC's motion for temporary stay and granted its petition for writ of certiorari. *Id.*

The DOC "assert[ed] that it never considered that [its] regulations applied to [the defendant] Jones or other inmates similarly situated for the purpose of calculating an unconditional release date." *Id.* at 258, 698 S.E.2d at 57. The Supreme Court noted that although DOC's regulations defined good time, gain time, and merit time as "[t]ime credits applied to an inmate's sentence that reduce[] the amount of time to be served[,] these credits were not to be used to calculate an

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unconditional release date. *Id.* at 258, 698 S.E.2d at 56. Accordingly, the trial court's judgment was reversed with the North Carolina Supreme Court specifically stating that

[i]n light of the compelling State interest in maintaining public safety, we conclude that these regulations do not require that DOC apply time credits for purposes of unconditional release to those *who committed first-degree murder during the 8 April 1974 through 30 June 1978 time frame and were sentenced to life imprisonment.*

Id. at 258, 698 S.E.2d at 57 (emphasis added). The *Jones* court emphasized the fact that the State's "interest in ensuring public safety [was] particularly pronounced when dealing with those convicted of first-degree murder." *Id.* at 257, 698 S.E.2d at 56 (citations omitted).

Based upon the language of the *Jones* court, the trial court in the instant case concluded that it was bound by the *Jones* decision regarding the application of time credits for purposes of unconditional release to those convicted of first-degree murder. Further, the trial court concluded that petitioners were distinguishable from the *Jones* defendant and distinguishable from the limited group the *Jones* decision addressed. The *Jones* decision only applied to inmates who committed first-degree murder during the time period from 8 April 1974 through 30 June 1978 and were subsequently sentenced to life imprisonment for first-degree murder. In the case before us, petitioners were sentenced to life imprisonment during the relevant time period but were convicted of lesser crimes than first-degree murder: Lovette for second-degree murder; and Lynch for second-degree burglary.

Considering both *Bowden* and *Jones*, we cannot say the trial court erred by concluding that petitioners were "part of a distinguishable subset of the *Bowden* class, different than those considered in *Jones*[" Like the trial court, we think the Supreme Court went to great lengths to distinguish the *Jones* defendants—those who committed first-degree murder and were sentenced to life imprisonment for first-degree murder—from other defendants serving life terms under N.C.G.S. § 14-2 (1974). Petitioners were serving life sentences statutorily set at eighty years with unconditional release dates to which credits could be applied. Therefore, the trial court did not err by concluding it was bound by the *Jones* decision but then differentiating the petitioners from the limited scope of the *Jones* decision.

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[2] Next, respondents contend the trial court could not alter the effect of sentences imposed on petitioners as it changed the determinations made by other superior courts. Specifically, respondents argue that “[t]he trial court’s order erroneously overlooks that terms of years sentences were provided by statute for the crimes committed by [petitioners], but the sentencing courts imposed life sentences.” Respondents’ argument is misplaced.

The trial court held that “[p]etitioners, though sentenced to terms of life imprisonment, were actually serving sentences statutorily set at eighty years. . . [and] like others serving sentences of a determinate length, had unconditional release dates to which credits should be applied.” As stated above, petitioners were sentenced to life imprisonment under former N.C.G.S. § 14-2 (1974), which provided that a life sentence should be considered as imprisonment for eighty years. The trial court did not change the sentences imposed on petitioners, but rather, the trial court held that credits should be applied to their unconditional release dates, like similar prisoners who were serving sentences of a determinate length.

[3] Last, respondents argue the 16 June 2011 order violated the separation of powers doctrine “by invading the provinces of the legislative and executive branches.” By ordering petitioners’ unconditional release, respondents’ argue that the trial court “usurped the authority of the legislature in (i) providing for parole for their life sentences and (ii) delegating to the Parole Commission sole authority in this matter.” Respondents also argue that the trial court usurped the authority of the executive branch by preventing the Governor from pardoning or commuting petitioners’ sentences by preventing the Parole Commission from exercising its discretionary authority regarding parole. The trial court’s order applied credits to petitioners’ unconditional release dates, holding that petitioners had fully served their sentences. This ruling of the trial court, which is upheld, that petitioners are entitled to unconditional release by operation of law, does not violate the separation of powers doctrine.

Based on the foregoing, the trial court’s order is affirmed.

Judge ELMORE concurs.

Judge ERVIN dissents in separate opinion.

ERVIN, Judge, dissenting.

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After a careful review of the record in light of the applicable law, I am compelled to conclude, contrary to the result reached by my colleagues, that the trial court's order should be reversed. Simply put, I believe that we are required to utilize the analysis employed by the Supreme Court in *Jones v. Keller*, 364 N.C. 249, 255-60, 698 S.E.2d 49, 54-58 (2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2150, 179 L. Ed. 2d 935 (2011), based upon the facts of this case in determining whether Petitioners are entitled to have their earned time credits utilized in calculating their unconditional release date, a step which the Court fails to take. After conducting an analysis of the type employed in *Jones*, I conclude that Petitioners are not entitled to have their earned time credits applied against their sentences for purposes of calculating their unconditional release date and respectfully dissent from the Court's decision to affirm the trial court's order.

I. Factual Background and Trial Court's Order

As I understand the record, Petitioner Lovette was convicted of second degree murder and Petitioner Lynch was convicted of second degree burglary. Petitioners were both sentenced to life imprisonment pursuant to former N.C. Gen. Stat. § 14-2 (1974), which provided that a life sentence should be considered as imprisonment for a term of eighty years. In their petitions, Petitioners have alleged that, while incarcerated, they earned sufficient credits for "gain time," "good time," and "meritorious service" to entitle them to unconditional release from their confinements. According to Petitioners, the DOC's refusal to utilize these earned time credits in calculating their unconditional release dates violated their rights to due process and equal protection, constituted an *ex post facto* clause violation, and contravened fundamental notions of separation of powers. After holding a hearing, the trial court entered an order in which it found facts in accordance with the undisputed record evidence and concluded as a matter of law that:

1. This Court is bound by the holding in [*Jones*], which was decided by the North Carolina Supreme Court subsequent to the decision by the North Carolina Court of Appeals in [*State v. Bowden*], 193 N.C. App. 597, 668 S.E.2d 107 (2008), *disc. review improvidently granted*, 363 N.C. 621, 683 S.E.2d 208 (2009).]
2. The *Jones* decision clearly and on its face limited its decision to inmates serving life sentences for first-degree murder

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between 8 April 1974 and 30 June 1978 (*See Jones* at 252: “it is this limited group that we consider in this opinion”).

3. This Court now considers Petitioners, two inmates that are part of a distinguishable subset of the *Bowden* class, different than those considered in *Jones*: those who were sentenced to life imprisonment between 8 April 1974 and 30 June 1978 based on lesser convictions, for crimes other than first-degree murder.
4. The controlling statute then in effect is the same as that in the *Jones* case, and it provides that a “sentence of life imprisonment shall be considered as a sentence of 80 years in the State’s prison.” [N.C. Gen. Stat. §] 14-2 (Cum. Supp. 1974).
5. Therefore, the term of imprisonment for all *Bowden*-class inmates is clear: it is a term of eighty years. The question before this Court, as it was in *Jones*, is the application or administration of that sentence by DOC.
6. The only material difference in the cases at bar and the *Jones* case is that *Jones*’s life sentence was based upon a conviction for first-degree murder, whereas the Petitioners were convicted of lesser charges.
7. The *Jones* analysis of DOC regulations, under the doctrine of separation of powers, defers to the administrative agency’s interpretation of its own rules. DOC has the power to create rules and regulations governing inmates, including the awarding of various types of credit. “DOC’s application of its own regulations to accomplish these ends is ‘strictly administrative’ and outside the purview of the courts.” (citations omitted, *Jones* at 255).
8. *Jones*, however, goes on to say that “DOC does not have carte blanche.” (*Jones* at 254.)
9. The due process rights of the inmates in the case at bar are limited; but indeed, a liberty interest has been created by DOC in its promulgation of rules and regulations regarding various credits available to inmates, as well as the application of credits for specific purposes.
10. Petitioners['] liberty interests in having good time, gain time, and merit time used for purposes of calculating a date of unconditional release is no longer de minimis when compared to the State’s compelling interest in keeping inmates

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incarcerated until they can be safely released. While the Court in *Jones* determined that a specific class of *Bowden* inmates (those sentenced to life on a conviction of first-degree murder) had only a de minimis liberty interest, there can be no other reason for limiting its decision to that class other than a recognition that other inmates serving life sentences for lesser crimes have an elevated liberty interest, one that soars above the minimal interest set forth in *Jones*.

11. Additionally, the *Jones* court clearly saw a weighty State interest in protecting the public from those convicted of first-degree murder, quoting with approval several North Carolina and United States Supreme Court cases. Compare, e.g., “this most serious crime,” and “defendants who do not kill . . . are categorically less deserving of the most serious forms of punishment.” (citations omitted, *Jones* at 257-8).
12. On balance, Petitioners’ liberty interest is anything but de minimis, and that significant liberty interest outweighs an important, but far less compelling, State interest in protecting the public from inmates who long ago committed crimes that, though horrific, fall far short of first-degree murder under any rational measure.
13. With regards to Petitioners’ equal protection claims, the analysis applied by the *Jones* court again leads to a different result.
14. In *Jones*, the Supreme Court, applying the appropriate rational basis standard, determined that a person serving a sentence for first-degree murder presents a greater threat to society than inmates convicted of other offenses, and thus DOC has a rational basis to decline to award credit for purposes of conditional release, “even though these same credits have been awarded for that purpose to other prisoners with determinate sentences.” (*Jones* at 260).
15. The *Jones* Court on multiple occasions went to great length to differentiate the public safety concerns of the State as they relate to first-degree murderers, as opposed to those who commit any other crimes. Petitioners’ convictions are, of course, for second-degree murder and second-degree burglary. Nowhere in its opinion does the *Jones* court allow for the possibility that other classes of crimes may rise to the same level of concern for public safety as first-degree mur-

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der. It is clear that the equal protection analysis undertaken in *Jones* leads to a different result for Petitioners.

16. Petitioners were convicted of crimes that, since at least 1995, carry determinate sentences. Many, if not most, defendants convicted of these same crimes, even at the time Petitioners were convicted, received sentences of determinate length. These other defendants, therefore, had good time, gain time, and merit time credits applied to their cases for purposes of unconditional release. Petitioners, though sentenced to terms of life imprisonment, were actually serving sentences statutorily set at eighty years. Petitioners, like others serving sentences of a determinate length, had unconditional release dates to which credits should be applied. Therefore, there is no rational basis for DOC to refuse to apply these credits to Petitioners.
17. In light of the liberty interest of Petitioners, and of the denial of equal protection of Petitioners, or either standing alone, this Court finds that DOC regulations do require DOC to apply all time credits (good time, gain time, and merit time) for purposes of unconditional release of Petitioners.
18. Given the stipulation that Petitioners' total credits, if applied to the unconditional release date, are sufficient to fully satisfy each Petitioner[s] sentence, the Petitioners have fully served their sentences.
19. The court finds that no law or regulation has retroactively altered the sentence reduction credits of Petitioners, and therefore, no ex post facto violations have occurred.
20. The continued detention of Petitioners is unlawful.

Based upon these findings and conclusions, the trial court ordered that Petitioners be unconditionally discharged from imprisonment on 17 June 2011. Respondents noted an appeal to this Court from the trial court's order, contending that the trial court (1) ignored the reasoning utilized in *Jones* in determining that Petitioners' due process and equal protection rights had been violated; (2) impermissibly changed the determinations that had been made by the original sentencing courts; and (3) violated the separation of powers doctrine.

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II. Jones

Although the Court correctly recognizes that we are bound by *Jones, State v. Davis*, 198 N.C. App. 443, 447, 680 S.E.2d 239, 243 (2009) (acknowledging that the Court of Appeals must follow Supreme Court precedent), it states that “the Supreme Court went to great lengths to distinguish the *Jones* defendants—those who committed first-degree murder and were sentenced to life imprisonment for first-degree murder—from other defendants serving life terms under [N.C. Gen. Stat.] § 14-2 (1974)” and holds, based on that determination, that the trial court correctly concluded that Petitioners were “part of a distinguishable subset of the *Bowden* class, different than those considered in *Jones*[.]” After reaching this conclusion, however, my colleagues have failed to take what strikes me as the next step logically required by *Jones*, which is to utilize the analytical approach adopted in *Jones* for the purpose of determining whether the same constitutional arguments that were deemed insufficient with respect to individuals convicted of first degree murder in *Jones* are sufficient to require the unconditional release of individuals convicted of offenses other than first degree murder. After independently examining the record before the Court in this case using the analytical framework set out in *Jones*, I feel compelled to conclude that the trial erred by ordering that the Petitioners be unconditionally released.

In *Jones*, the Supreme Court examined whether the DOC’s refusal to utilize earned time credits for the purpose of calculating the petitioner’s unconditional release date violated his constitutional rights to due process and equal protection. 364 N.C. at 255-60, 698 S.E.2d at 54-58. As both the trial court and my colleagues have recognized, the only significant difference between the present case and *Jones* is that *Jones* dealt with an inmate who had been sentenced to life imprisonment for first degree murder pursuant to former N.C. Gen. Stat. § 14-2, while Petitioners were sentenced to life imprisonment under that statute for other offenses. Given that *Jones* addressed the same constitutional claims that have been raised in this case, with the only difference being the identity of the crimes for which the individual inmates were convicted, I believe that we are required to follow the analysis delineated in *Jones* in order to determine whether Petitioners are entitled to unconditional release from incarceration. In other words, I do not believe that the fact that this case and *Jones* involve individuals convicted of different offenses, without more, provides an adequate basis for affirming the trial court’s order.

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A. Statutory Authority Concerning “Earned Time Credits”

Before addressing the petitioner’s constitutional claims in *Jones*, the Supreme Court considered whether “DOC’s administration of good time, gain time, and merit time credits [was] within the statutory authority delegated [to] it by the General Assembly.” 364 N.C. at 255, 698 S.E.2d at 54. In undertaking that analysis, the Supreme Court recognized that, “implicit in DOC’s power to allow time for good behavior . . . is [the] authority to determine the purposes for which time is allowed” and the “[d]iscretion to determine [whether] the purposes for which time is awarded is consistent with such DOC goals as assuring that only those who can safely return to society are paroled or released and that they have been suitably prepared for outside life.” *Id.* at 255, 698 S.E.2d at 55. Based on that logic, the Supreme Court concluded that the manner in which DOC applied its own regulations was “‘strictly administrative’” and consistent with the agency’s statutory authority. *Id.*

B. Due Process

In order to analyze the petitioner’s substantive constitutional claims, the Supreme Court first considered whether the DOC’s “interpretation and implementation of its regulations” violated the petitioner’s due process rights, with the Court’s analysis focusing upon the petitioner’s liberty interest in the earned time credits created by the DOC’s regulations. *Jones*, 364 N.C. at 256, 698 S.E.2d at 55. At the beginning of its analysis, the Supreme Court discussed the parameters of the petitioner’s liberty interest and stated that:

[w]hen a liberty interest is created by a State, it follows that the State can, within reasonable and constitutional limits, control the contours of the liberty interest it creates. In other words, the liberty interest created by the State through its regulations may be limited to those particular aspects of an inmate’s incarceration that fall within the purview of those regulations. DOC has interpreted its regulations as permitting the award of different types of time credits for certain purposes and has, in fact, awarded those credits to [the petitioner] for those purposes. On the record before this Court, DOC has taken no action against [the petitioner] for punitive reasons. Because [the petitioner] has received the awards to which he is entitled for the purposes for which he is entitled, he has not been denied credits in which he has a constitutionally protected liberty interest.

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Id. at 256-57, 698 S.E.2d at 55-56. The Supreme Court then addressed the petitioner's contention that his earned time credits should have been applied in calculating his unconditional release date by weighing his liberty interest, if any, in having his earned time credits utilized to calculate his unconditional release date against the State's interest in "keeping inmates incarcerated until they [could] be released with safety to themselves and to the public[.]" concluding that, while the petitioner's liberty interest was *de minimis*, the State's interest was compelling. *Id.* at 257, 698 S.E.2d at 56. As part of this process, the Supreme Court noted that the petitioner was eligible for parole and had received annual parole reviews without having been released by the North Carolina Parole Commission. *Id.* Thus, the Supreme Court concluded that the petitioner had "received the process that [was] due him as an inmate eligible for parole, when the State's corresponding interest, [was] assuring that inmates [were] safely released under supervision." *Id.* Finally, the Supreme Court stated that:

[a]ssuming without deciding that DOC's procedures for determining parole adequately protect an inmate's due process rights to consideration for parole, those procedures [were] also adequate to preserve [the petitioner's] constitutional rights while still permitting the State to withhold application of [the petitioner's] good time, gain time, and merit time to the calculation of a date for his unconditional release. He ha[d] no State[.]created right to have his time credits used to calculate his eligibility for unconditional release. [The petitioner's] due process rights [were] not . . . violated.

Id.

Although my colleagues correctly noted that Petitioners in this case, unlike the petitioner in *Jones*, have been convicted of offenses other than first degree murder, I am unable to read *Jones* as establishing that first degree murder convictions represent the only occasions in which the State's interest in public safety is so compelling as to outweigh any liberty interest that an individual sentenced to life imprisonment pursuant to former N.C. Gen. Stat. § 14-2 based upon a conviction for an offense other than first degree murder might have in being awarded earned time credits for the purpose of calculating an unconditional release date. Although the Supreme Court did recognize that the issue before the Court in *Jones* involved the treatment of individuals who had been sentenced to life imprisonment for first degree murder pursuant to former N.C. Gen. Stat. § 14-2, nothing in

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Jones suggests to me that the Supreme Court intended that the outcome would necessarily be different in a case involving individuals who had been sentenced to life imprisonment pursuant to former N.C. Gen. Stat. § 14-2 based upon convictions for offenses other than first degree murder. On the contrary, it seems to me that we are required to conduct the same analysis utilized in *Jones* in light of any differences between the facts at issue in that case and those at issue here in order to determine whether a different outcome than that reached with respect to individuals convicted of first degree murder in *Jones* should be reached here.

After conducting an analysis like that employed in *Jones*, I am unable to avoid reaching the conclusion that Petitioners “h[ave] not been denied credits in which [they] have a constitutionally protected liberty interest.” 364 N.C. at 257, 698 S.E.2d at 56. As I have previously noted, the Supreme Court has indicated that the State may create a liberty interest available to incarcerated individuals by adopting regulations such as those providing for earned time credits of the type at issue here. *Jones*, 364 N.C. at 256, 698 S.E.2d at 55. However, the Supreme Court expressly stated in *Jones* that this liberty interest has a limited scope given the State’s ability, “within reasonable and constitutional limits, [to] control the contours of the liberty interest it creates.” *Id.* at 256, 698 S.E.2d at 56. Put another way, earned time credits created by DOC regulation “may be limited to those particular aspects of [Petitioners’] incarceration that fall within the purview of those regulations.” *Id.* at 257, 698 S.E.2d at 56. In the present case, as in *Jones*, while acknowledging that Petitioners had accumulated earned time credits, the DOC contends that the credits were not intended to be applied to reduce the time to be served on Petitioners’ sentences. As the stipulations between the parties reflect (1), “[b]ecause Petitioners were sentenced under pre-Fair Sentencing law, their sentences were shown in their combined inmate records as “LIFE,” and no credits were applied by DOC to calculate unconditional release dates for them[,]” and (2):

DOC has never applied either good time or gain and merit time to calculate an unconditional release date for inmates sentenced to or serving life sentences, regardless of whether the inmates were sentenced under pre-Fair Sentencing law or the Fair Sentencing Act or regardless of the crime of which the inmate was convicted. For such inmates, DOC applied good time credits only for the purpose of shortening the time required to be served to become eligible for parole consideration and the time required to be

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served to become eligible for promotion to minimum custody, the least restrictive DOC custody status. By contrast, DOC applied good time and gain or merit time in the event the Governor commuted a life sentence to a term of years' sentence.

As a result, given that the "DOC has interpreted its regulations as permitting the award of different types of time for certain purposes and has, in fact, awarded those credits to [Petitioners] for those purposes . . . [Petitioners have] received the awards to which [they] are entitled for the purposes for which [they] are entitled," *Id.*, and have not, under the logic set out in *Jones*, been deprived of a constitutionally protected liberty interest.¹

In addition, even if we were to address Petitioners' due process claims by weighing, as the Supreme Court did in a separate portion of its *Jones* opinion, their liberty interest, "if any, . . . [against] the State's compelling interest in keeping inmates incarcerated until they can be released with safety to themselves and to the public[.]" I would still feel compelled to conclude that no due process violation has occurred in this case. *Id.* at 257, 698 S.E.2d at 56.

A careful reading of *Jones* indicates that the weighing analysis discussed by the Supreme Court rested upon determinations that (1) the liberty interest, if any, that had been created by the DOC's provisions providing for "earned time credits" was relatively minimal; (2) the State's interest in keeping inmates incarcerated until their release posed no danger to the public was compelling; and (3) the fact that the petitioners were eligible for parole, sufficed "to preserve [his] constitutional rights while still permitting the State to withhold application of [his] good time, gain time, and merit time [from] the calculation of a date for [his] unconditional release." *Id.* Although the Supreme Court certainly emphasized the particularly heinous nature of the conduct needed to establish an individual's guilt of first degree murder in conducting the balancing test described in *Jones*, I do not see anything in the Supreme Court's opinion that suggests that the outcome would necessarily be different in the event that this same analysis were conducted in a case involving individuals convicted of something other than first degree murder. For that reason, even

1. In their brief, Petitioners contend that "the Supreme Court found that DOC could limit the purpose of [the petitioner's] sentence reduction credits due to the fact that [his] liberty interest in those credits was different than that of other inmates because he committed first-degree murder." I am unable, however, to read *Jones* as suggesting that the discussed determination in the text was limited to situations in which the petitioner had been sentenced to life imprisonment for first degree murder.

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though the State's public safety interest may be less pronounced in this case than in a case involving an individual convicted of first degree murder, that fact does not necessarily mean that the incarcerated individual's limited interest in having earned time credits applied to his or her unconditional release date outweighs the State's public safety interest. As a result, we must replicate the *Jones* analysis based on the differing facts at issue here in order to determine whether to evaluate the validity of the trial court's due process decision.

The Supreme Court's determination that a prisoner's interest, if any, in the use of earned time credits to calculate a prisoner's unconditional release date is relatively minimal does not appear to me to hinge on the nature of the offense which led to his or her incarceration. For that reason, the liberty interest upon which Petitioners rely must, under *Jones*, be deemed minimal. In addition, although the offenses for which Petitioners are currently incarcerated are not as heinous as first degree murder, second degree burglary and second degree murder are very serious offenses that involve significant public safety implications. Finally, as was the case with respect to the convicted first degree murderers at issue in *Jones*, Petitioners were "eligible for parole . . . [,] had received annual [or three year] parole reviews, [and] the Parole Commission [had] consistently . . . declined to parole [them]." 364 N.C. at 257, 698 S.E.2d at 56. For that reason, as in *Jones*, the protections afforded to Petitioners were "adequate to preserve [Petitioners'] constitutional rights while still permitting the State to withhold application of [Petitioners'] good time, gain time, and merit time to the calculation of a date for [their] unconditional release." *Id.* at 257, 698 S.E.2d at 56. As a result, given that the significant public safety concerns associated with the offenses for which Petitioners were convicted coupled with the adequacy of Petitioners' parole-related rights outweigh the minimal liberty interest that Petitioners possess in having their earned time credits utilized to calculate their unconditional release dates, I would hold that the trial court erred by concluding that Petitioners' liberty interests "[were] anything but de minimis;" that "th[ose] significant liberty interests outweigh[ed] an important, but far less compelling, State interest in protecting the public from inmates who long ago committed crimes that, though horrific, f[e]ll far short of first-degree murder under any rational measure;" and that Petitioners' due process rights were violated.

C. Equal Protection

The trial court also concluded that the DOC's refusal to credit Petitioners' "earned time credits" for the purpose of calculating their

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unconditional release date constituted an equal protection violation. The trial court reached this conclusion on the grounds that (1) *Jones* made a sharp distinction between the public safety concerns that would be triggered by the release of individuals sentenced to life imprisonment pursuant to former N.C. Gen. Stat. § 14-2 for first degree murder and the release of individuals sentenced to life imprisonment under that statute for other offenses and (2) the fact that Petitioners would not be subject to a life sentence for second degree murder and second degree burglary under current law. In affirming the trial court's decision with respect to this equal protection issue, my colleagues rely, once again, upon their determination that the difference between a life sentence under former N.C. Gen. Stat. § 14-2 for first degree murder and a life sentence under that statute for some other offense is outcome-determinative. I do not find this reasoning persuasive.

In *Jones*, the Supreme Court rejected the petitioner's argument that those sentenced to life imprisonment for first degree murder under former N.C. Gen. Stat. § 14-2 were "serving determinate sentences differently [than] other inmates serving determinate sentences" and that the "DOC's denial of good time, gain time, and merit time for the purposes of calculating an unconditional release date violate[d] [the petitioner's] right to equal protection of the law." 364 N.C. at 259, 698 S.E.2d at 57. In analyzing the petitioner's equal protection claim, the Supreme Court began by noting that "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of crime unless it prescribes different punishment for the same acts committed under the same circumstances by persons in like situation[s]." *Id.* at 260, 698 S.E.2d at 57-58 (quoting *State v. Benton*, 276 N.C. 641, 660, 174 S.E.2d 793, 805 (1970)). After determining that the petitioner's claim should be subject to rational basis scrutiny, the Supreme Court stated that:

[the petitioner] was convicted of a different crime than others serving determinate sentences under statutes other than [N.C. Gen. Stat.] § 14-2, even if the sentences of some of those others are for eighty years or even longer (perhaps due to the imposition of consecutive sentences). The fact that [the petitioner] is serving a sentence for first[.]degree murder reasonably suggests that he presents a greater threat to society than prisoners convicted of other offenses.

Id. at 260, 698 S.E.2d at 58. As a result, the Supreme Court concluded that the "DOC ha[d] a rational basis for denying [the] petitioner good

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time, gain time, and merit time for the purposes of unconditional release, even though these same credits ha[d] been awarded for that purpose to other prisoners with determinate sentences.” *Id.*

At the time that their life sentences were imposed, individuals convicted of second degree murder and second degree burglary were subject to either an explicitly determinate sentence or a sentence of life imprisonment imposed pursuant to former N.C. Gen. Stat. § 14-2. As a result of the Supreme Court’s determination that claims such as the one at issue here are subject to rational basis review, *Jones*, 364 N.C. at 259-60, 698 S.E.2d at 57, we are required to uphold the DOC’s refusal to utilize Petitioners’ earned time credits for the purpose of calculating an unconditional release date as long as that decision “bear[s] some rational relationship to a conceivable legitimate governmental interest.” *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). Although, the Supreme Court’s decision in *Jones* appears to rest upon the fact that an individual “serving a sentence for first-degree murder . . . presents a greater threat to society than prisoners convicted of other offenses[.]” 364 N.C. at 260, 698 S.E.2d at 58, the fact that Petitioners were convicted of offenses less heinous than first degree murder does not necessitate the conclusion that an equal protection violation has occurred in this instance. On the contrary, given that these individuals, who could have received an explicitly determinate sentence at trial, were sentenced to life imprisonment pursuant to former N.C. Gen. Stat. § 14-2, I believe that, under the same basic logic adopted by the Supreme Court in *Jones*, we are compelled to conclude that there was a rational basis for believing that these individuals represented a greater threat to society than those sentenced to explicitly determinate sentences for the same offenses.

In addition, I do not believe that the fact that Petitioners would not be subject to sentences of life imprisonment under current law has any bearing on the equal protection analysis that should be employed in order to decide this case. As the General Assembly stated in repealing former N.C. Gen. Stat. § 14-2:

[t]his act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences.

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Ch. 24, Sec. 14, 1993 N.C. Sess. Laws (Extra Sess. 1994) at 96. As the Supreme Court has recognized, the General Assembly has the authority to change the sentences applicable to particular criminal offenses on a prospective basis, with the judicial branch having the obligation to apply the revised sentencing legislation consistently with the effective date provisions enacted by the General Assembly. *State v. Whitehead*, ___ N.C. ___, ___, 722 S.E.2d 492, 495 (2012). As a result of the fact that the legislation repealing former N.C. Gen. Stat. § 14-2 expressly left existing sentences undisturbed and the fact that such a change in the applicable sentencing statutes does not result in the imposition of differing sentences for the same conduct under the same circumstances, I am unable to see how the enactment of the existing sentencing statutes has any bearing on the constitutional analysis that we are required to undertake in this case. As a result, I would hold that the trial court erred by concluding that Petitioners have been deprived of their right to the equal protection of the laws by virtue of the DOC's refusal to utilize their earned credits in calculating their unconditional release dates.²

III. Conclusion

Thus, although I agree with my colleagues that *Jones* controls the outcome in the present case, I believe that a proper understanding of *Jones* requires us to conduct an independent analysis of the specific facts underlying Petitioners' claims in order to determine the validity of the trial court's order. After conducting such an analysis, I am compelled to conclude that Petitioners' constitutional rights to due process and equal protection have not been violated by the DOC's refusal to utilize their earned time credits in calculating their unconditional release dates. As a result, I believe that we should reverse the trial court's order and respectfully dissent from the Court's decision to the contrary.

2. Because the trial court's decision to order Petitioners' unconditional release rested exclusively upon due process and equal protection considerations, I see no need to address the DOC's remaining challenges to the trial court's order.

MANECKE v. KURTZ

[222 N.C. App. 472 (2012)]

CHRISTOPHER B. MANECKE, PLAINTIFF V. JERROLD M. KURTZ AND
DEBORAH A. KURTZ, DEFENDANTS

No. COA11-1447

(Filed 21 August 2012)

1. Real Estate—broker—real or apparent authority

The trial court did not err in an action over a failed real estate sale by granting summary judgment for defendants on the issue of whether defendants' broker acted with real or apparent authority. The evidence of record was that defendants' broker acknowledged that he did not possess actual authority to bind defendants by contract to purchase plaintiff's property and there was no evidence that defendants held the broker out as possessing that authority or permitted him to represent himself as having that authority. The broker himself acknowledged that his responsibility was to assist in negotiating the terms of the contract and not to enter into the contract.

2. Contracts—sale of real estate—communications with broker—not a binding contract

There was no material issue of fact as to whether a valid contract existed for the sale of real estate where communications between defendants' broker and plaintiff about a counteroffer did not bind defendants in contract, so that plaintiff could not maintain that defendants ratified the contract. The communications from defendants' broker did not constitute an acceptance in a manner recognized under the terms of the contract, which stated that it would become binding when it was signed or initialed by both parties.

3. Evidence—statute of frauds—underlying issue—no binding contract

In an action involving a failed real estate purchase, the question of whether the writings were sufficient to satisfy the statute of frauds was not considered where plaintiff did not establish that defendants entered into a binding contract.

Appeal by plaintiff from order entered 11 August 2011 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2012.

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John F. Hanzel, P.A., by John F. Hanzel, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by Mark P. Henriques and Brandie N. Smith, for defendant-appellees.

BRYANT, Judge.

Where the record fails to disclose the existence of genuine issues of material fact as to whether defendants entered into a contract to purchase plaintiff's real property, the trial court did not err by granting defendants' motion for summary judgment.

In 2010, Christopher B. Manecke ("plaintiff"), a resident of Mecklenburg County, North Carolina sought to sell his residence located at 21104 Blakely Shores Drive, Cornelius, North Carolina. Plaintiff engaged the services of real estate broker Linda Schafer ("Schafer") to list the property for sale. Jerrold M. Kurtz and Deborah A. Kurtz ("defendants"), residents of the state of New Jersey, sought to purchase real property in North Carolina. Defendants engaged the services of Real Estate Broker Thomas Wells ("Wells") and entered into a standard buyer agency agreement as issued by the North Carolina Realtors Association to negotiate a contract for the purchase of real property.

On 22 August 2010, Wells sent an email to Schafer that he had an offer to purchase plaintiff's property. Attached to the email was a standard "Offer to Purchase and Contract" form signed by defendants offering to purchase plaintiff's property for \$785,000. In response, Schafer emailed Wells a counteroffer to sell plaintiff's residence for \$845,000 with an \$8,000 repair contingency. In reply, Wells emailed Schafer the following message: "[defendants] are really excited about their new home and agree to> [sic] the counter offer [sic] [.]"¹ On 23 August 2010, Wells emailed Schafer a copy of an earnest money deposit check in the amount of \$20,000. In the email, Wells informed Schafer that defendant Jerrold Kurtz would be overnighting the earnest money deposit check and that "[Wells] should also have the initialed changes to the contract tomorrow."

On 25 August 2010, in response to an email from Schafer inquiring as to the deposit, Wells emailed Schafer informing her that he had received defendants' deposit and that he would deliver it to Schafer's office on the morning of 26 August 2010. Wells also stated that he

1. Plaintiff received another offer to purchase his real property for the amount of \$850,000.00 but rejected it in lieu of defendants' offer.

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would have the initialed changes to the contract at that time, that he would ask defendants to select an attorney for the closing and arrange for the home inspection. At the request of defendants, Wells asked that the closing date be postponed from 30 September 2010 to 15 October 2010. On 26 August 2010, defendants informed Wells that they were not going to sign the counteroffer, and instructed Wells to tear up their earnest money deposit check. Wells informed Schafer via telephone that defendants were no longer interested in purchasing plaintiff's property.

On 17 November 2010, plaintiff filed suit against defendants in Mecklenburg County Superior Court seeking specific performance and, in the alternative, recovery for breach of contract. On 15 June 2011, defendants filed a motion for summary judgment. The trial court heard defendants' motion for summary judgment on 11 August 2011 and that same day, entered an order granting defendants' motion for summary judgment. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary judgment finding that there were no genuine issues of material fact. After setting out (A) the standard of review, plaintiff argues that there are genuine issues of material fact as to whether (B) Wells acted with actual or apparent authority, (C) there is a valid contract, and (D) the writings are sufficient to satisfy the statute of frauds.

A.

"Summary judgment is proper when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007)). When considering a motion for summary judgment, "[t]he trial court must consider the evidence in the light most favorable to the non-moving party." *Id.* (citations omitted). "[A]n issue is genuine if it is supported by substantial evidence, and [a]n issue is material if the facts alleged . . . would affect the result of the action[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal citations and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]" *Id.* (internal citations and quotation marks omitted).

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Where a summary judgment motion has been granted the two critical questions of law on appeal are whether, on the basis of the materials presented to the trial court, (1) there is a genuine issue of material fact and, (2) whether the movant is entitled to judgment as a matter of law.

North River Ins. Co. v. Young, 117 N.C. App. 663, 667, 453 S.E.2d 205, 208 (1995). “Review of summary judgment on appeal is necessarily limited to whether the trial court’s conclusions as to these questions of law were correct ones.” *Id.* (citing *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987)). “On appeal, this Court reviews an order granting summary judgment *de novo*.” *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 745, 641 S.E.2d 695, 697 (2007) (citing *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006)).

B.

[1] Plaintiff argues that there exists a genuine issue of material fact as to whether defendants’ real estate broker Wells acted with actual or apparent authority to bind defendants by contract to purchase plaintiff’s property. We disagree.

A principal is liable upon a contract made by its agent with a third party in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority.

Bell Atl. Tricon Leasing Corp. v. DRR, Inc., 114 N.C. App. 771, 774, 443 S.E.2d 374, 376 (1994).

“ ‘Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal.’ ‘Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question.’ ” *Leiber v. Arboretum Joint Venture, LLC*, ___ N.C. App. ___, ___, 702 S.E.2d 805, 812 (2010) (quoting *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000)).

Plaintiff argues there was a valid binding contract created by the actions of the parties as well as their “agents,” including Wells. However, plaintiff fails to offer facts to establish that defendants granted Wells the authority necessary to bind them to a real estate contract. A real estate agent in North Carolina, absent special author-

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ity, does not have the power to bind his principal in a contract to convey real property. *Forbis v. Honeycutt*, 301 N.C. 699, 703, 273 S.E.2d 240, 242 (1981).

In an affidavit filed with the trial court, defendant Jerrold Kurtz states that he and his wife entered into a Buyer Agent Agreement with Wells “for the purpose of acquiring property in North Carolina.” Defendant further avers that Wells was authorized to negotiate a contract for the purchase of real property but defendant denies vesting Wells with “any special authority . . . to enter into a binding contract”

In his deposition, Wells testified as follows:

Q. And, at that point in time, do I understand correctly that [defendants] wanted to put in an offer. And then you explained to them, as part of that putting in an offer process, they needed to sign an agreement with you?

A. Correct.

Q. Did they sign the agreement with you before signing the offer?

A. Correct.

Q. Was the agreement that they signed with you the standard —

A. Buyer agency—I’m sorry.

Q. — buyer agency agreement —

A. Correct.

Q. — that’s issued by the North Carolina Realtors Association?

A. Correct.

Q. Any changes to it?

A. No.

...

Q. [Defendants] never provided you with a power of attorney form to let—that would let you execute documents on their behalf?

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A. Correct.

Q. You understand that, as a licensed real estate broker, your responsibility is to negotiate—assist your clients in negotiating the terms of a contract but that you don't have authority to enter into any binding contract on their behalf; is that right?

[Plaintiff's attorney]: Objection

A. Correct.

...

Q. So was it you understanding that there would only be a binding contract once the counteroffer submitted by . . . [plaintiff] was, in fact, initialed by [defendants]?

A. Correct.

Q. And without initials, there was not any enforceable contract pursuant to the offer that was submitted; correct?

[Plaintiff's attorney]: Objection

A. Correct.

The evidence of record here is that Wells acknowledged that he did not possess actual authority to bind defendants by contract to purchase plaintiff's property. Therefore, plaintiff has failed to establish a genuine issue of material fact as to whether Wells acted with actual authority.

Apparent authority "is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (citations and quotations marks omitted). "Pursuant to the doctrine of apparent authority, the principal's liability is to be determined by what authority a person in the exercise of reasonable care was justified in believing the principal conferred upon his agent." *Branch*, 151 N.C. App. at 250, 565 S.E.2d at 253 (citations omitted).

Plaintiff contends that Wells' email to Schafer, plaintiff's real estate broker, stating that defendants "agree to > [sic] [plaintiff's] counteroffer" to purchase plaintiff's property, as well as, Wells' faxed copy of the earnest money deposit check sent to Schafer and Wells' email that he expected to receive the initialed copy of the contract

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indicated that Wells acted with apparent authority if not actual authority to bind defendants to the contract to purchase plaintiff's property.

But plaintiff's contentions do not support the theory that Wells acted with apparent authority. Plaintiff's contentions cite no more than notifications from Wells that defendants agreed to the terms of plaintiff's counteroffer, that Wells had received a facsimile of a \$20,000.00 check intended to serve as an earnest money deposit, and that Wells expected to receive the initialed copy of plaintiff's counteroffer. The record provides no evidence that defendants held Wells out as possessing authority to bind them in contract or permitted Wells to represent himself as having such authority. *See High Rock Realty, Inc.*, 151 N.C. App. at 250, 565 S.E.2d at 252. In fact, Wells acknowledged that his responsibility as defendants' real estate broker was to assist defendants in negotiating the terms of a contract, not to enter into a contract that would bind them. Therefore, plaintiff has failed to establish a genuine issue of material fact as to whether Wells acted with apparent authority. Accordingly, we overrule plaintiff's arguments.

C.

[2] Plaintiff next argues that there exists a genuine issue of material fact as to whether a valid contract exists between plaintiff and defendants. Plaintiff provides two arguments to support the existence of a contract between the parties. First, plaintiff contends that defendants ratified Wells' actions by sending the faxed copy of the \$20,000.00 check. Second, plaintiff argues that the terms of the "Offer to Purchase and Contract," setting out the modes of communication by which the offer would become binding, in conjunction with the written email notifications provided to plaintiff, support the existence of a valid contract. We disagree.

"[W]hen one, with no authority whatever, or in excess of the limited authority given him, makes a contract as agent for another, or purporting to do so as such agent, the supposed principal, upon discovery of the facts, *may ratify* the contract . . ." *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 492, 146 S.E.2d 390, 393 (1966) (emphasis added) (citations omitted).

The act of a principal will establish ratification of an unauthorized transaction of an agent where "(1) . . . at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) . . . the principal

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had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify.” *Carolina Equip. & Parts Co. v. Anders*, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965).

Barbee v. Johnson, 190 N.C. App. 349, 356, 665 S.E.2d 92, 98 (2008).

Plaintiff contends that by agreeing to the terms of plaintiff’s counteroffer, Wells acted to bind defendants to the contract to purchase plaintiff’s property, and defendants ratified that contract by sending the facsimile of the \$20,000.00 check intended to notify plaintiff that defendants were sending an earnest money deposit. As discussed in part B, *supra*, and as we further discuss herein, Wells’ communications to plaintiff did not bind defendants in contract. Thus, plaintiff cannot maintain the argument that defendants ratified the contract to which Wells allegedly bound them.

Second, plaintiff also argues the terms of the Offer to Purchase and Contract support the contention that the contract was entered into and, thus, binding. The contract states:

This offer shall become a binding contract on the date that: (i) the last one of the Buyer and Seller has signed or initialed this offer or the final counteroffer, if any, and (ii) such signing or initialing is communicated to the party making the offer or counteroffer, as the case may be.

Following in paragraph 27, the contract reads:

Any notice or communication to a party herein may be given to the party or to each party’s agent. Any written notice or communication in connection with the transaction contemplated by this contract may be given to a party or a party’s agent by sending or transmitting it to any mailing address, e-mail address or fax number set forth in the “Notice Address” section below.

Plaintiff contends defendants accepted the offer made by plaintiff in Wells’ email sent to Schafer stating that “[defendants] are really excited about their new home and agree to > [sic] the counter offer [sic][.]” Plaintiff also references Wells’ email to plaintiffs’ agent, Schafer, stating “[Defendant Jerrold Kurtz] is overnighting the [earnest money deposit] check tomorrow. We will get it on Wednesday. . . . I should also have the initialed changes to the contract tomorrow.” Plaintiff asserts that these communications constitute defendants’ acceptance in a manner recognized under the terms of the contract and bind defendants accordingly. We disagree.

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All contracts to sell or convey any lands . . . or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2011).

Here, the contract states that it shall become binding when it has been signed or initialed by both parties. Wells' email that defendants "agree to > [sic] the counter offer [sic]" does not indicate that the contract reflecting the counteroffer had been signed. Moreover, Wells' email that he "should also have the initialed changes to the contract tomorrow" is not an indication that the contract had been initialed or signed. To the contrary, it indicates only when Wells expected to receive the signed or initialed contract.

Plaintiff has failed to establish a genuine issue of material fact as to whether defendants ratified a contract entered into by Wells or were bound by the terms of the counteroffer based on the email communications updating plaintiff about the status of the documents expected to be delivered. Accordingly, plaintiff's argument is overruled.

D.

[3] Lastly, plaintiff argues that there is a genuine issue of material fact as to whether the writings exchanged between the parties are sufficient to satisfy the statute of frauds. Plaintiff contends that there are numerous writings when read together establish a contract sufficient to satisfy the statute of frauds. We need not reach this issue.

As plaintiff has failed to establish that defendants have entered into a contract binding them to the purchase of plaintiff's real property, we need not consider whether the writings provided were sufficient to satisfy the statute of frauds, a defense to the formation of a contract.

For the foregoing reasons, the trial court's decision is affirmed.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

MORGAN v. NASH CNTY.

[222 N.C. App. 481 (2012)]

ADA MORGAN, RAY MORGAN, JUDITH SCULL A/K/A JUDITH THOMPSON SCULL, DAVID SCULL, ROGER PARKER A/K/A BILLY ROGER PARKER, JR., AND THE CITY OF WILSON, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFFS V. NASH COUNTY, DEFENDANT

No. COA11-1544

(Filed 21 August 2012)

1. Zoning—standing—direct effect of amendment—hypothetical injury—distance between properties

The trial court did not err by concluding that the City of Wilson did not have standing to challenge a rezoning by Nash County that would allow a poultry processing plant on a tract of land in the County. Although the City maintained that it had standing because the separate tract on which the treated wastewater from the processing plant would be dispersed was within the watershed from which the City drew about half of its water supply, the City was not directly affected by the amendment because disposal of agricultural wastewater was a permitted use on the separate tract before the rezoning of the tract on which the plant would be built, the alleged injury was hypothetical because the sprayfields would have to meet State and federal regulations, and the distance from City property to the rezoned property was too remote to support standing.

2. Appeal and Error—new evidence while appeal pending—advisory opinion

The trial court did not abuse its discretion in an advisory opinion filed while plaintiff's appeal was pending by finding that proffered new evidence was merely cumulative and corroborative and concluding that plaintiff's Rule 60(b) motion would have been denied had it been before the court.

3. Attorney Fees—pending appeal—Rule 60(b)—standing

The trial court erred by awarding attorney fees and expenses to defendants when issuing an advisory opinion on plaintiff's Rule 60(b) motion while plaintiff's appeal was pending. The subject matter of the Rule 60(b) motion was the same issue underlying the appeal and the trial court did not have jurisdiction to make the award.

MORGAN v. NASH CNTY.

[222 N.C. App. 481 (2012)]

Appeal by plaintiff from order entered 30 June 2011 by Judge W. Russell Duke, Jr., in Nash County Superior Court. Heard in the Court of Appeals 9 May 2012.

Brough Law Firm, by Robert E. Hornik, Jr., for plaintiff-appellant City of Wilson.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Elizabeth Brooks Scherer, and Battle, Winslow, Scott & Wiley, P.A., by G. Vincent Durham, Jr., for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff City of Wilson (“the City”) appeals from the trial court’s order granting Nash County’s (“Nash County” or “the County”) motion to dismiss the City and its claims after concluding the City lacked standing to maintain its claims against Nash County.¹ After careful review, we affirm the trial court’s 30 June 2011 order.

Additionally, pursuant to a petition for writ of certiorari, the City asks this Court to review the advisory opinion entered by the trial court in response to the City’s Rule 60(b) motion filed during the pendency of this appeal and of the trial court’s order awarding Nash County attorneys’ fees and expenses resulting from the City’s Rule 60(b) motion. Upon granting certiorari, we find no abuse of discretion in the trial court’s advisory opinion, but we vacate the order awarding attorneys’ fees and expenses to Nash County.

Background

In May 2010, the North Carolina Department of Commerce contacted Nash County officials to inform them that a Mississippi corporation, Sanderson Farms, Inc. (“Sanderson Farms”), was interested in constructing a large, poultry processing facility in North Carolina. The County began to actively recruit Sanderson Farms to locate the processing facility in Nash County and identified a 147-acre tract of land (“the subject property”) that the County believed was suitable for its use. The subject property was then owned by Cecil and Bertine Williams, who are not a party to the underlying action.

Nash County is a member of a North Carolina not-for-profit corporation, Carolinas Gateway Partnership (“CGP”), whose mission is

1. Plaintiffs Ada Morgan, Ray Morgan, Judith Scull a/k/a Judith Thompson Scull, David Scull, Roger Parker a/k/a Billy Roger Parker, Jr., did not appeal from the trial court’s order.

MORGAN v. NASH CNTY.

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to promote economic development in Nash and Edgecombe Counties. In August 2010, CGP created a limited liability corporation, Coastal Plain Land Company, LLC (“Coastal”), for the purpose of facilitating the recruitment of Sanderson Farms to Nash County. To that end, in September 2010, Coastal acquired an option to purchase the subject property from the Williams family. The subject property was zoned for “Rural Commercial” and “Residential” uses, which would not allow for the type of economic development Sanderson Farms or similar businesses could bring to Nash County. Consequently, Coastal submitted a rezoning application for the subject property to the Nash County Board of County Commissioners requesting that the property be rezoned to a “General Industrial” district, which would permit a variety of industrial uses, not only the use proposed by Sanderson Farms.

In order for the subject property to be a viable site for the processing facility, not only would the land have to be rezoned, but Sanderson Farms would require additional land on which to locate a hatchery and land to use for sprayfields—fields on which Sanderson Farms could disperse the processing facility’s treated wastewater. Nash County officials and CGP located separate tracts of land in Nash County suitable for these additional needs: a tract of land located approximately two miles to the east of the subject property as a potential site for the hatchery; and a 650-plus acre tract of land located several miles to the west of the subject property that could be used as sprayfields. In order to utilize the sprayfields, a six-mile long, sanitary sewer pipe would have to be constructed to transport the processing facility’s treated wastewater to the fields.

A. First Rezoning

On 1 November 2010, the Nash County Board of County Commissioners (“the Board”) voted to rezone the subject property to a General Industrial zoning district.² On 19 November 2010, the City of Wilson joined thirty-three individual plaintiffs and filed a lawsuit in Nash County Superior Court challenging the rezoning. In that suit the plaintiffs alleged: (1) that the Board failed to comply with statutory and administrative procedural requirements when rezoning the subject property; and (2) that the rezoning constituted an illegal “contract zoning.” On 1 July 2011, Judge W. Russell Duke, Jr., entered an

2. The tracts of land identified for the hatchery and sprayfields were not rezoned with the subject property; Sanderson Farms’s proposed uses of those tracts were permitted uses under the sites’ existing zoning designations. The zoning of the proposed hatchery and sprayfield sites was not challenged in the underlying action.

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order granting the County's Rule 12(b)(1) motion to dismiss the City and all its claims, with prejudice, concluding that the City failed to establish that it had standing to maintain its challenge to the rezoning of the subject property. The City appealed and that appeal is the subject of a companion case, *Albright v. Nash County*, ___ N.C. App. ___, ___ S.E.2d ___, (No. COA11-1530) (Aug. 21, 2012) (unpublished), filed simultaneously with this decision. As the resolution of *Albright* is controlled by our holding in this case, we have dismissed the appeal in *Albright* as moot. *Id.*

B. Second Rezoning

Coastal's option to purchase the subject property from the Williams family was set to expire in December 2010 by which time Sanderson Farms had not committed to locating its proposed facilities in Nash County. Realizing that the subject property was an ideal location for economic development by Sanderson Farms or other businesses, Nash County purchased 142 acres of the subject property on 23 December 2010; the Williams family retained ownership of the remaining five acres. In January 2011, Sanderson Farms announced that it was postponing its decision, for at least one year, as to whether it would build a poultry processing facility in North Carolina.

On 23 February 2011, the Williams family and Nash County filed a joint application to rezone the subject property a second time. On 4 April 2011, the Board voted to approve the application, rezoning the subject property to a "General Industrial" district. On 26 April 2011, the City joined five property owners in filing the underlying action challenging the validity of the second rezoning of the subject property. In their complaint, plaintiffs alleged that the Board failed to comply with N.C. Gen. Stat. § 153A-341 by failing to adopt a consistency statement prior to approving the second rezoning application and that the rezoning of the subject property constituted an illegal "contract zoning."

In response, Nash County filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 seeking summary judgment with respect to plaintiffs' claims. The County also filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) seeking dismissal of all plaintiffs and their claims for lack of standing, except for plaintiff Billy Roger Parker, Jr. Following a hearing on the County's motions, the trial court entered an order on 30 June 2011 in which the court: dismissed the City and all its claims, with prejudice, for lack of standing; denied the County's motion to dismiss the remaining plaintiffs concluding they had stand-

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ing to challenge the rezoning of the subject property; and granted, *inter alia*, the County's motion for summary judgment on all claims by all plaintiffs. The City timely entered notice of appeal.

Discussion**A. Standing**

[1] First, the City contends the trial court erred as a matter of law in concluding that it did not have standing to challenge the County's rezoning of the subject property. We disagree.

We review *de novo* the trial court's order granting a motion to dismiss for lack of standing. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Id.* at 113, 574 S.E.2d at 51 (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). The party invoking the trial court's jurisdiction bears the burden of establishing that it has standing to maintain its action. *Id.* The three elements of standing are:

(1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 114, 574 S.E.2d at 52 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)).

The City maintains that as a result of the rezoning Sanderson Farms will build a poultry processing plant on the subject property and will disperse treated wastewater from the processing plant onto the proposed sprayfields which are located in the Toisnot Watershed. The City alleges that because it draws approximately half of its water supply from the Toisnot Watershed, the dispersal of treated agricultural wastewater by Sanderson Farms on the proposed sprayfields would threaten the City's water treatment facilities and the quality of its water supply. Therefore, the City contends that it has legal standing to maintain the underlying action.

We acknowledge that the City has provided uncontested evidence that Sanderson Farms is interested in building its poultry processing facility on the subject property. Despite the evidence of Sanderson

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Farms's interest in the rezoned property, however, we conclude the City cannot establish standing to challenge Nash County's rezoning of the subject property when the land use the City seeks to prevent was not made possible by the zoning amendment it seeks to reverse; the subject property and the sprayfields are separate and distinct tracts of land located several miles apart. The sprayfields were not rezoned by Nash County, and plaintiffs do not challenge the zoning of that land.

In fact, the City does not dispute that before the second rezoning of the subject property was approved the disposal of agricultural wastewater was a permitted use on that land. Thus, while the City contends that Sanderson Farms's processing facility could not exist on the subject property without the sprayfields, that fact, if true, is not determinative. Rather, the critical fact is that the sprayfields—whether they belong to Sanderson Farms or any other business—could exist without the processing facility. In short, the City cannot establish that it is likely the alleged “injury will be ‘redressed by a favorable decision[.]’” *Lujan*, 504 U.S. at 561, 119 L. Ed. 2d at 364 (citation omitted), since the disposal of treated wastewater would still be permitted on the proposed sprayfields despite a reversal of the second rezoning of the subject property.

Additionally, under *Lujan*, for the City to establish that it has standing it must demonstrate the alleged injury is “actual or imminent, not conjectural or hypothetical[.]” *Id.* at 560, 119 L. Ed. 2d at 364 (citation and quotation marks omitted). The City contends the damage to its water supply will result from “millions of gallons of nutrient-bearing wastewater” being sprayed on land within the Toisnot Watershed and that the County has offered no evidence to the contrary. However, the County has provided evidence that the wastewater would be treated at a disinfection station before being dispersed and that the treatment system must meet the requirements of the North Carolina Administrative Code. 15A N.C.A.C. 2T.0504 (2012). Additionally, the wastewater irrigation system would have to comply with the permitting requirements imposed by the North Carolina Administrative Code. *Id.* In fact, the Wilson city manager, Grant Goings, conceded that any wastewater entering into the watershed would have to meet state and federal effluent standards. Therefore, for the City to establish actual or imminent injury we must assume that the wastewater would not be properly treated and that the fields would not be properly monitored, in contravention of state and federal regulations. Should such events occur, a separate action

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for violations of environmental regulations may provide the City with the proper remedy. Accordingly, we conclude the alleged injury is “conjectural or hypothetical” and insufficient to establish standing under the Supreme Court’s holding in *Lujan*, 504 U.S. at 560-61, 119 L. Ed. 2d at 364 (citation and quotation marks omitted).

The City counters that the standard set forth in *Lujan* is not the proper standard by which to analyze standing for the purpose of the review of a legislative rezoning decision. Rather, the City contends the proper standard is set forth in *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976). However, applying the rationale of *Taylor*, we conclude the City again fails to establish standing.

In *Taylor*, the plaintiff-landowners challenged the rezoning of a tract of land by the City of Raleigh that allowed for the construction of multiple apartment houses on the property. *Id.* at 616, 227 S.E.2d at 581. In order to complete the construction, the City of Raleigh brought condemnation proceedings against the plaintiffs for easements across the plaintiffs’ property through which water and sewer lines would connect to the apartment development. *Id.*

Despite the fact that the City of Raleigh sought to condemn portions of the plaintiffs’ property, our Supreme Court held the plaintiffs failed to establish standing where: (1) the nearest plaintiff lived one-half mile from the rezoned property and (2) multi-family dwellings were already permitted on the rezoned land before the City of Raleigh amended the zoning ordinance—the amended ordinance merely increased the type and number of units permitted. *Id.* at 620-21, 227 S.E.2d at 583-84 (“Plaintiffs’ standing to attack the rezoning ordinance must be considered and determined with reference to whether *the rezoning ordinance itself directly* and adversely affects them.” (emphasis added)). Similarly, here, the zoning ordinance that the City seeks to challenge did not enable the land use that the City alleges will result in harm to its water system; instead, the treated wastewater, if dispersed, would be dispersed on a tract of land separate and distinct from the rezoned property and could be dispersed in the Toisnot Watershed irrespective of the zoning designation of the subject property. Thus, the contested zoning amendment does not “directly” affect the City as required by *Taylor*, and the City’s argument is overruled.

The City further contends that our caselaw has not required ownership of either the rezoned property or of property adjoining the rezoned property to establish standing to challenge a zoning amend-

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ment. However, it is apparent that the plaintiff's proximity to the rezoned property is a factor our courts have considered. The *Taylor* Court considered the fact that the plaintiff's property nearest to the rezoned property was one-half mile away and separated by a buffer of 45 acres. *Id.* Here, the City's property is *three and a half miles* away from the rezoned property and is thus too remote to support the City's claim of standing to challenge the zoning amendment. *See also Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) (standing found where the plaintiffs were "owners of property *in the adjoining area* affected by the ordinance" (emphasis added)); *Zoppi v. City of Wilmington*, 273 N.C. 430, 431, 160 S.E.2d 325, 328 (1968) (standing found where plaintiffs owned property in a subdivision "adjoining or in close proximity" to the rezoned property). The City's argument is overruled.

B. Plaintiffs' Petition for Writ of Certiorari

During the pendency of this appeal plaintiffs filed a Rule 60(b) motion with the trial court seeking relief from the trial court's order granting the County's motion to dismiss the City and its claims. The trial court entered an advisory opinion stating that it would deny plaintiffs' motion had the City not appealed the order, and it entered an order awarding Nash County attorneys' fees and expenses incurred in its response to plaintiffs' motion. Plaintiffs ask this Court to review the trial court's advisory opinion and order by a petition for writ of certiorari. We grant the writ of certiorari, and after careful review, we discern no abuse of discretion in the advisory opinion, but we vacate the trial court's order awarding attorneys' fees and expenses to Nash County.

1. Advisory Opinion

[2] The basis for plaintiffs' Rule 60(b) motion was plaintiffs' discovery of new evidence they allege supports their claims against Nash County. The new evidence was discovered after the filing of this appeal and consists of a survey plat ("the plat") for a tract of land on which plaintiffs allege Sanderson Farms intends to build a hatchery. The plat identified the land as the "Sanderson Farms Rocky Mount Hatchery Site." The plat was based on a survey performed in November 2010 and was recorded in the Nash County Registry in December 2011. Plaintiffs allege the proposed hatchery would service the processing facility that Sanderson Farms intends to build on the subject property. The land for this proposed hatchery and the subject property are separate and distinct tracts of land located approximately two miles apart.

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In support of their Rule 60(b) motion, plaintiffs argued: (1) that the plat is relevant to whether the City of Wilson has standing to challenge the rezoning of the subject property; and (2) that the plat is relevant to their allegation that the rezoning of the subject property was an illegal “contract zoning” because the plat demonstrates “the commitment of financial resources by Sanderson Farms to a key component” of the plans to build a poultry processing plant on the subject property.

In an advisory opinion entered 30 April 2012, the trial court concluded that it would have denied plaintiffs’ motion had the court retained jurisdiction over the matter. *See Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979) (describing the procedure whereby a trial court may “consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending”), *rev’d on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). The trial court noted that the plat did not describe the subject property, which was rezoned by Nash County; rather, it described a separate tract of land located approximately one mile from the subject property. Additionally, the trial court noted that plaintiffs had already established that Sanderson Farms was working with CGP in considering locating a hatchery on the property described in the plat and had produced numerous maps depicting the site. Consequently, the trial court concluded the plat was not new evidence but was merely cumulative and corroborative of evidence already before the court, citing *Waldrop v. Young*, 104 N.C. App. 294, 296, 408 S.E.2d 883, 884 (1991) (“Proffered evidence which is merely cumulative or corroborative is not ‘newly discovered evidence’ within the meaning of Rule 60(b)(2).”).

We discern no new information in plaintiffs’ proffered evidence, and, thus, no abuse of discretion by the trial court in reaching its conclusion that it would deny plaintiff’s Rule 60(b) motion had it been before the court. *See Kingston v. Lyon Const., Inc.*, ___ N.C. App. ___, ___, 701 S.E.2d 348, 353 (2010) (“Denial of a Rule 60(b) motion is reviewed under an abuse of discretion standard.”). Plaintiffs’ argument is overruled. We remand for the trial court to enter an order on the Rule 60(b) motion consistent with our decision. *See In re: Baby Boy Scarce*, 81 N.C. App. 662, 665, 345 S.E.2d 411, 413-14 (concluding that where the trial court entered an advisory opinion on a Rule 60 motion during the pendency of the underlying appeal, and where this Court agreed, in part, with the advisory opinion, we remanded the matter to the trial court for entry of an order on the Rule 60

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motion consistent with the trial court's advisory opinion on that issue), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986).

2. Award of Attorneys' Fees and Expenses

[3] In an order entered simultaneously with the advisory opinion on plaintiffs' Rule 60(b) motion, the trial court awarded Nash County reasonable attorneys' fees and expenses incurred in response to plaintiffs' motion in the amount of \$25,607.35. The trial court concluded that because plaintiffs presented no new evidence to support their Rule 60(b) motion, there was a complete lack of a justiciable issue supporting the motion.

The trial court also concluded that Nash County was the "prevailing party" in regard to plaintiffs' motion and, upon motion by Nash County, awarded attorneys' fees and expenses to the County pursuant to N.C. Gen. Stat. § 6-21.5 ("In any civil action . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading."). In their petition for writ of certiorari, plaintiffs contend the trial court erred in awarding attorneys' fees and expenses to the County as it did not have jurisdiction to do so.³ We agree.

Section 1-294 of our General Statutes, provides that

[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2011). Thus, pending appeal, "the trial judge is *functus officio*, subject to two exceptions and one qualification." *Kirby Bldg. Sys., Inc. v. McNeil*, 327 N.C. 234, 240, 393 S.E.2d 827, 831 (1990).

The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal.

3. Plaintiffs entered notice of appeal from the trial court's award of attorneys' fees and expenses and filed the petition for writ of certiorari "out of an abundance of caution." Nash County did not file a response to the petition.

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The qualification to the general rule is that “the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned” and thereby regain jurisdiction of the cause.

Id. (quoting *Bowen v. Motor Co.*, 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977)). These two exceptions and one qualification do not apply in this case.

Once plaintiffs gave notice of appeal from the 30 June 2011 order the trial court was divested of jurisdiction over all matters included in the action that were “not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294. The subject matter of plaintiffs’ Rule 60(b) motion is the same issue underlying the appeal from the trial court’s 30 June 2011 order: whether the City of Wilson has standing to challenge Nash County’s rezoning of the subject property. Thus, we conclude the Rule 60(b) motion is necessarily one that is affected by the outcome of this appeal, and the trial court did not have jurisdiction to make a final order on the Rule 60(b) motion or make an award of attorneys’ fees and expenses related to the motion. *See McClure v. County of Jackson*, 185 N.C. App. 462, 466, 471, 648 S.E.2d 546, 548, 551-52 (2007) (concluding the trial court did not have jurisdiction to award attorneys’ fees after notice of appeal was entered where the award was based on the outcome of the proceeding from which the appeal was taken). Further, we note the inherent contradiction in the trial court’s entry of an order awarding attorneys’ fees to the “prevailing party” in an advisory opinion, the purpose of which is merely to indicate “how [the trial court] *would be inclined to rule* on the motion were the appeal not pending.” *Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409 (emphasis added). Thus, the trial court’s order awarding attorneys’ fees and expenses must be vacated.

Conclusion

We conclude the trial court did not err in dismissing the City of Wilson and its claims against Nash County for a lack of standing. The City cannot establish standing under the standard set forth in *Lujan*, 504 U.S. at 560-61, 119 L. Ed. 2d at 364, or in *Taylor*, 290 N.C. at 621, 227 S.E.2d at 584, as Nash County’s rezoning of the subject property did not enable the land use from which the City alleges it will suffer harm. Because the trial court did not err in concluding the City failed to establish standing to maintain its legal challenge to the rezoning of the subject property, we do not reach the City’s additional argument that the trial court erred in granting the County’s motion for summary

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judgment concerning all claims. Accordingly, the trial court's 30 June 2011 order is affirmed.

Additionally, we find no abuse of discretion in the trial court's advisory opinion, indicating that it would be inclined to deny plaintiffs' Rule 60(b) motion, and we remand for the trial court to enter an order denying the motion. We conclude the trial court was without jurisdiction to enter its order granting Nash County's motion for attorneys' fees and expenses, and the 30 April 2012 order is vacated.

AFFIRMED as to the 30 June 2011 order.

REMANDED as to the 30 April 2012 advisory opinion for entry of an order consistent with this decision.

VACATED as to the 30 April 2012 order awarding attorneys' fees and expenses.

Judges STROUD and ERVIN concur.

NRC GOLF COURSE, LLC, PLAINTIFF v. JMR GOLF, LLC; ROBERT B. HOBBS, JR.,
TRUSTEE AND THE BANK OF CURRITUCK, DEFENDANTS

No. COA11-738

(Filed 21 August 2012)

1. Appeal and Error—partial summary judgment—disputed sale of golf course—certiorari

The Court of Appeals treated an appeal from summary judgment as a petition for *certiorari* in the interest of judicial economy in a case involving the disputed sale of a golf course to plaintiff and the lease of the course to a subsidiary of the seller. Issues concerning the future possession and control of the property and the present and future compensation for use of the operating material were not resolved, so that the summary judgment was partial.

2. Real Property—lease and option to purchase—one agreement

The trial court erred by determining that a lease and an option to purchase a golf course were separate agreements where

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the lease and original option agreement were executed contemporaneously and were entered into in furtherance of a common purpose, the lease agreement referenced and incorporated the original option to purchase, and the only change to the option to purchase was a modification of the price term.

3. Contracts—lease payments—modified option—no consideration

Lease payments were not sufficient consideration to support the modification of an option to purchase where plaintiff was legally obligated to make the payments. *First-Citizen's Bank & Trust Co. v. Frazelle*, 226 N.C. 724, did not apply.

4. Estoppel—quasi—modification of option—invalid—acceptance of payments under original contract

Quasi-estoppel did not apply and the trial court properly granted summary judgment for defendant JMR Golf, LLC where there was a lease of a golf course with an option to purchase, there was a modification of the option that was invalid for lack of consideration, and payments were accepted under the lease agreement but not under the revised option. The lease and original option were part of one transaction, but the modification was not and the payments accepted under the lease were not required under the terms of the revised option.

5. Real Property—purchase option modification—validity not reached

The issue of whether an option to purchase a golf course was facially valid was not reached where a modification to the option was invalid for lack of consideration and summary judgment for defendant was appropriate.

6. Appeal and Error—mootness—injunctive relief—object of relief obtained

The question of whether the trial court erred by granting preliminary and mandatory injunctive relief dispossessing plaintiff of a golf course was moot where plaintiff had regained control of the golf course.

Judge ERVIN concurring in part and concurring in the result in part.

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Appeal by plaintiff from orders entered 22 July 2010 and 30 September 2010 and opinion and order entered 29 December 2010 by Judge John R. Jolly, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 11 January 2012.

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

Williams Mullen, by Camden R. Webb and Brian C. Vick, for defendant-appellee JMR Golf, LLC.

BRYANT, Judge.

Where a modification to the option to purchase was not supported by adequate consideration, the revised option to purchase was unenforceable. Therefore, the trial court did not err in entering summary judgment in favor of defendants. Where plaintiff has regained possession of the golf course and the court has yet to determine the compensation to be paid to plaintiff for previously surrendering golf course operating equipment, the plaintiff's contentions regarding the trial court's entry of preliminary and mandatory injunctive relief are moot and premature, respectively, and are accordingly dismissed.

Facts and Procedural History

On 21 December 2009, plaintiff NRC Golf Course, LLC, (NRC) filed a complaint against JMR Golf, LLC, (JMR); Robert B. Hobbs, Jr.; and The Bank of Currituck (the Bank) seeking a declaratory judgment regarding the rights and obligations of the parties under a lease agreement between JMR and NRC which included an option to purchase the North River Golf Course (the golf course) in Carteret County.

According to the complaint, JMR purchased the golf course from Guide Group, LLC, (Guide Group) in July 2006. Upon purchase, JMR agreed to lease the golf course to NRC (a wholly owned subsidiary of Guide Group). The Triple Net Lease Agreement (the Lease Agreement) entered into by JMR and NRC, dated 17 July 2006, included an Option to Purchase whereby NRC could purchase the golf course from JMR.

The original Option to Purchase, as executed with the Lease Agreement on 17 July 2006, granted NRC the right to purchase the golf course for \$2,500,000.00 at any time before the expiration of the Lease Agreement (Option A). Pursuant to the advice of Goodman & Company, the accountants for Guide Group and NRC, the price term in the original Option to Purchase was modified in order to achieve

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tax advantages. The revised Option to Purchase, executed on 7 March 2007 and deemed effective as of 17 July 2006, granted NRC the option to purchase the golf course at a price based on the fair market value of the property on the exercise date (Option B or revised option).

In November 2007, JMR granted the Bank a lien on the golf course to secure a loan. The lien was evidenced in the deed of trust and the deed of trust listed Robert B. Hobbs, Jr., as trustee.

Pursuant to the Lease Agreement, NRC made monthly lease payments of \$16,666.00 to JMR from August 2006 until October 2009. By letter dated 28 October 2009, NRC notified JMR of its intention to exercise the Option to Purchase the golf course under the Lease Agreement. As a member of NRC's parent company—Guide Group—and pursuant to NRC's operating agreement as a wholly owned subsidiary of Guide Group, JMR demanded access to NRC's financial records. NRC rejected JMR's demand for access to its financial records.

On 21 December 2009, NRC filed its complaint. On 2 February 2010, NRC filed a Motion to Require Deposit of Funds requesting that the court order NRC's \$16,666.00 monthly payments to be deposited in an interest bearing account or with the Carteret County Clerk of Superior Court.

On 11 June 2010, JMR filed with the trial court a Motion for Affirmative Emergency Injunctive Relief to Require Monthly Payments. JMR requested that the court enter an order requiring NRC to make all lease payments for the months of February, March, April, May, and June 2010 and to require NRC to make monthly lease payments in the amount of \$16,666.00 during the pendency of the litigation.

On 22 July 2010, the trial court entered an Order Granting Preliminary Injunction in which it ordered NRC to pay \$99,996.00 for golf course lease payments not made between February 2010 and July 2010, as well as make monthly payments in the amount of \$16,666.00 beginning 1 August 2010 until the injunction was dissolved or NRC surrendered possession of the golf course to JMR.

On 28 September 2010, NRC filed a Motion for Assistance in Surrender of Golf Course, requesting a hearing as "the parties [had] been unable to agree to material terms" of NRC's surrender of the golf course. On 29 September 2010, NRC filed a motion for summary judgment.

On 30 September 2010, the trial court entered an order, the purpose of which was "only to preserve the status quo between NRC and JMR during the pendency of [the] litigation."

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[The court ordered that] [u]pon surrender of the Golf Course to JMR, NRC also immediately shall surrender to JMR possession of all Golf Course Operating Equipment. . . . Reasonable compensation to NRC for possession and use of the Operating Equipment by JMR will be determined by the court upon resolution of this action.

On 19 November 2010, NRC filed a new motion for summary judgment “as to a declaration of the respective rights and obligations of NRC and [JMR] under . . . the Option to Purchase, to the [Lease Agreement] dated July 17, 2006 between NRC and JMR . . .”.

On 29 December 2010, the trial court entered an Opinion and Order in which it concluded that the revised Option to Purchase contained in the Lease Agreement between JMR and NRC was not enforceable; that even if it had been enforceable, NRC’s title would still be subordinate to the Bank’s deed of trust; and NRC was not entitled to additional security with regard to operation of the golf course by JMR. The court further ordered that it would hold a later hearing to consider and/or determine the remaining issues between the parties, including the future possession and control of the golf course and the compensation, if any, due to NRC by JMR for use of the golf course operating equipment. NRC appeals.

On appeal, NRC contends that the trial court erred in (I) denying its motion for summary judgment and granting summary judgment in favor of JMR and the Bank and (II) granting JMR preliminary and mandatory injunctive relief.

*Order granting dismissal of appeal as to the Bank and
Robert B. Hobbs, Jr.*

We note that on 21 October 2011, subsequent to NRC filing the record on appeal and its brief with this Court, NRC and the Bank filed a Joint Rule 37(e)(2) Motion for Partial Withdrawal of Appeal requesting an order from this Court dismissing the appeal as to the Bank and the trustee under the deed of trust, Robert B. Hobbs, Jr. The motion was granted and an order was entered dismissing the Bank and Robert B. Hobbs, Jr., from this appeal on 7 November 2011. Therefore, we consider NRC’s contentions on appeal only as they may apply to JMR, the sole remaining defendant in this matter.¹

1. We do not address the argument in Section II, Subparagraph F of plaintiff’s brief as it concerns only the rights between plaintiff and the Bank and has been withdrawn from consideration.

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Appeal of orders granting injunctions and partial summary judgment

[1] Yet, before we reach the merits of NRC’s arguments, we must consider whether the orders appealed from are properly before this Court. On 13 January 2011, NRC filed with the Carteret County Clerk of Superior Court a notice of appeal from the following orders: the 22 July 2010 order granting a preliminary injunction in favor of JMR; the 30 September 2010 order granting mandatory injunctive relief in favor of JMR with respect to NRC’s motion for assistance in obtaining surrender of the golf course; and the 29 December 2010 order denying NRC’s motion for summary judgment, granting summary judgment in favor of JMR and the Bank, and denying NRC’s motion for an order requiring additional security.

However, in the trial court’s 29 December 2010 order, the trial court further ordered that:

On January 18, 2011, . . . the court will hold a hearing and status conference with all parties for the purpose of considering and/or determining then-remaining issues between the parties, including but not limited to (a) future possession and control of the Golf Course and (b) present and future compensation, if any, to be paid by JMR to NRC for use of the Golf Course Operating Equipment at times material to this civil action.

In addition, the trial court stated that “[a]fter such hearing and status conference, the court anticipates entering a final disposition Order[.]”

Because the trial court order did not completely dispose of the case, its order is effectively an order of partial summary judgment and therefore interlocutory. *Wood v. McDonald’s Corp.*, 166 N.C.App. 48, 53, 603 S.E.2d 539, 543 (2004). There is generally no right to appeal from an interlocutory order, *Id.*; but cf. *Southern Uniform Rentals v. Iowa Nat’l Mutual Ins. Co.*, 90 N.C.App. 738, 740, 370 S.E.2d 76, 78 (1988) (an interlocutory order is immediately appealable when it affects a substantial right), because most interlocutory appeals tend to hinder judicial economy by causing unnecessary delay and expense, *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 146 (1982). However, because the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits. *Ziglar v. Du Pont Co.*, 53 N.C.App. 147,

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149, 280 S.E.2d 510, 512, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981); N.C.R. App. P. 21(a)(1).

Carolina Bank v. Chatham Station, Inc., 186 N.C. App. 424, 428, 651 S.E.2d 386, 388-89, (2007).² In the instant case, we treat the interlocutory appeal as a petition for writ of certiorari and consider the merits of the appeal.

I

Reaching the merits of the case, NRC contends that the trial court erred in denying its motion for summary judgment and granting summary judgment in favor of JMR. NRC specifically assigns error to the trial court's findings, which are actually conclusions of law, in paragraphs 48³, 53⁴, and 55⁵ of its 29 December 2010 opinion and order.

2. See N.C. R. App. P. 21(a)(1) (4/15/12) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists . . .").

3. Finding of fact 48. "Here, Option B does not set forth an objective process or mechanism for determining a purchase price for the Golf Course. It simply provides that the purchase price for the Golf Course 'shall be based on fair market value at exercise date *validated* by an independent third party appraisal.' (emphasis added). While there is a bare bones agreement as to use of a third party appraisal, there is no agreement as to what fair market value the appraisal is to 'validate.' Among other things there is no agreement as to how or what an initial determination of fair market value is to be made, how the parties would select an appraiser or that—as NRC contends and JMR disputes—a single party unilaterally could designate an appraiser and impose that person's appraisal on the other party. In the absence of such an agreement, upon NRC's decision to exercise Option B, there was nothing to prevent JMR from engaging its own appraiser and presenting an opposing contended fair market value. If that happened, the agreement does not contain any mechanism for resolving any discrepancies in the fair market value opinions of different appraisers. 'With no specification in the agreement as to how to address such greatly varying estimates in the value of [JMR's] property, the price term is not, as it must be, certain and definite.' [*Connor v. Harless*, 176 N.C. App. 402, 406, 626 S.E.2d 755, 758 (2006)]."

4. Finding of fact 53. "NRC's argument is misplaced. The rent payments paid by NRC to JMR were required under the Lease agreement, not under Option A or Option B."

5. Finding of fact 55. "[*Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991)] and [*Pure Oil Co. of the Carolinas v. Baars*, 224 N.C. 612, 31 S.E.2d 854 (1944)] are materially distinguishable from the instant case. Unlike the agreements at issue in those cases, the Lease Agreement and Option B before the court do not constitute an integrated single contract or agreement. Option B was not executed until eight months after the parties entered in to [sic] the Lease Agreement. Further, JMR's acceptance of rent payments due under ther Lease Agreement is not inconsistent with its position that Option B is not enforceable."

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“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 quotations omitted). “If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision.” *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996) (citing *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)). “Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and summary judgment is appropriate.” *Mosely v. WAM, Inc.*, 167 N.C. App. 594, 597, 606 S.E.2d 140, 142 (2004) (citing *Corbin v. Langdon*, 23 N.C. App. 21, 27, 208 S.E.2d 251, 255 (1974)).

A.

[2] Addressing NRC’s arguments in the order they are raised in NRC’s brief, NRC first contends that the trial court erred in treating the Lease Agreement and the revised Option to Purchase as separate transactions. Pursuant to this argument, NRC assigns error to paragraphs 53 and 55 of the trial court’s 29 December 2012 opinion and order. We agree that the revised Option to Purchase was not a separate transaction, but instead a modification of the original Option to Purchase, which was a component of the overall agreement.⁶

As a general rule of contract construction, “[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken.” *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969) (citations omitted). It is under this general rule that plaintiff claims the Lease Agreement and the revised Option to Purchase are both components of a single contract. In support of its argument, plaintiff relies on *Pure Oil Co. of the Carolinas v. Baars*, 224 N.C. 612, 31 S.E.2d 854 (1944).

The plaintiff in *Pure Oil* conveyed property to the defendants by deed, and the defendants granted the plaintiff an option to repurchase the same property. *Id.* at 613, 31 S.E.2d at 855. “Within eleven months the [defendants] fell behind in [their] open account with the plaintiff” and “the parties entered into a further agreement permitting

6. Whether the modification is valid and enforceable is considered later in the opinion.

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the plaintiff to exercise its option to purchase the property, to be avoided, however, upon payment of the open account on or before [a specified date] . . .” *Id.* at 614, 31 S.E.2d at 855. When the open account was not paid within the specified time, the plaintiff sought to enforce the exercised option. *Id.* One defendant refused. *Id.* at 614, 31 S.E.2d at 856. Our Supreme Court held that “the option [was] an integral part of the transaction, and it would be inequitable to allow the defendants to claim the property under deed from the plaintiff and at the same time annul the essential terms of its acquisition.” *Id.* at 615, 31 S.E.2d at 856. “[T]he several instruments, which were executed contemporaneously and which pertain to the same transaction, are to be considered as component parts of the understanding between the parties.” *Id.* Thus, “the whole contract stands or falls together.” *Id.* (citation omitted).

In the case *sub judice*, the trial court determined that *Pure Oil* was distinguishable in that “the Lease Agreement and [the revised Option to Purchase] before the court do not constitute an integrated single contract or agreement.” The trial court reasoned that “[the revised Option to Purchase] was not executed until eight months after the parties entered in to the Lease Agreement.” We agree with the trial court that this case is distinguishable from *Pure Oil*. Yet, if the modification is determined to be valid, the Lease Agreement and revised Option to Purchase would seem to constitute an integrated single contract or agreement because “the option [was] an integral part of the transaction.”

In *Pure Oil*, the Supreme Court found that the option, as executed contemporaneously with the conveyance of property by deed, was exercised at the point in time when the parties further agreed to allow the option to be avoided if the delinquent account was paid. *Id.* Thus, the option as originally executed was exercised in *Pure Oil*. This is evident from the court’s statement that “the option was exercised on January 23, 1940[,]” the date the parties came to a further agreement. *Id.* In the present case, the price term in the Option to Purchase was modified on 7 March 2007, eight months after the Lease Agreement and original Option to Purchase were executed. Thus, the revised Option to Purchase was not executed contemporaneously with the Lease Agreement. Nevertheless, the Lease Agreement and the revised Option to Purchase may constitute a single agreement where the revised Option to Purchase only modified the price term in the original Option to Purchase. See *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616 (1985).

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The Lease Agreement and the original Option to Purchase were executed contemporaneously on 17 July 2006 and pertain to the sale of the golf course. Additionally, section 26 of the Lease Agreement, “Option to Purchase,” provides that “[s]imultaneously with the execution of this Lease, the parties shall execute an option to purchase the Property, said Option attached hereto as Exhibit B which is incorporated and made a part of this Lease.” Thus, where the Lease Agreement and the original Option to Purchase were entered into in furtherance of a common purpose and where the Lease Agreement references and incorporates the original Option to Purchase, it is clear that the original agreements are components of a single transaction.

It is well settled that “[p]arties to a contract may agree to change its terms[.]” *Southern Spindle and Flyer Co., Inc. v. Milliken & Co.*, 53 N.C. App. 785, 788, 281 S.E.2d 734, 736 (1981) (citation omitted). Here, the only change to the Option to Purchase was a modification of the price term. This change was made pursuant to advice from the accountants for Guide Group and NRC that the Option to Purchase as originally drafted was not adequate to obtain the desired tax treatment. Therefore, on 7 March 2007, eight months after the execution of the Lease Agreement, in order to achieve the purpose for which the contract was entered, the original price term of \$2,500,000.00 was changed to the “fair market value at exercise date[.]” The revised Option to Purchase was agreed upon by all parties and replaced the original Option to Purchase. Additionally, although the revised Option to Purchase was executed 7 March 2007, it was dated to be effective as of 17 July 2006—the date the Lease Agreement and original Option to Purchase were executed.

Defendants argue that the trial court’s conclusion that the Lease Agreement and Option to Purchase were two separate contracts is confirmed by the integration clause in the Lease Agreement. Defendants recite the following portion of the clause in their argument: “This Lease and all Exhibits and Addenda hereto contains all agreements of the parties with respect to any matter mentioned herein. No prior or contemporaneous agreement or understanding pertaining to any such matter shall be effective.” Defendants conveniently omit the last sentence of the clause, which states “[t]his Lease maybe [sic] modified in writing only, signed by the parties in interest at the time of the modification.” Where the Lease Agreement specifically allows for modification, the integration clause does not prevent the revised Option to Purchase from being considered a part of the original agreement between the parties.

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Thus, as our Supreme Court found in *Pure Oil*, “the option [was] an integral part of the transaction, and it would be inequitable to allow the defendants to claim the property under deed from the [Guide Group] and at the same time annul the essential terms of its acquisition.” *Pure Oil Co.*, 224 N.C. at 615, 31 S.E.2d at 856. Therefore, we disagree with the trial court’s finding that the Lease Agreement and the Option to Purchase were separate agreements.

B.

[3] Although the revised Option to Purchase may be considered a component of the larger transaction, the requirements for modifying a contract must be met for the revised Option to Purchase to be valid and enforceable. NRC contends that the revised Option to Purchase was supported by consideration in the form of lease payments. Again, NRC specifically takes exception to paragraphs 53 and 55 of the trial court’s 29 December 2010 opinion and order. We disagree.

“Parties to a contract may agree to change its terms; but the new agreement, to be effective, must contain the elements necessary to the formation of a contract.” *Southern Spindle and Flyer Co.*, 53 N.C. App. at 788, 281 S.E.2d at 736 (citation omitted). Therefore, “a modification to a contract must be supported by consideration.” *Sessler v. Marsh*, 144 N.C. App. 623, 634, 551 S.E.2d 160, 166-67 (2001) (citing *Labarre v. Duke University*, 99 N.C. App. 563, 393 S.E.2d 321 (1990)). “Consideration can be found in benefit to the promisor or detriment to the promisee.” *Brenner v. Little Red School House, Ltd.*, 59 N.C. App. 68, 70, 295 S.E.2d 607, 609 (1982); *see also Sessler*, 144 N.C. App. at 634, 551 S.E.2d at 167 (“Consideration ‘consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.’” (quoting *Lee v. Paragon Group Contractors, Inc.*, 78 N.C. App. 334, 338, 337 S.E.2d 132, 134 (1985))).

Plaintiff contends that its payments under the Lease Agreement were sufficient consideration to support the Option to Purchase. In support of its argument, plaintiff cites *First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946).

In *Frazelle*, the court addressed a situation where the defendant’s decedent father leased real property to the plaintiff for a term of one year, with the plaintiff receiving a privilege to renew the lease at its expiration for additional one-year periods for nine successive years. *Id.* at 725-26, 40 S.E.2d at 369. The lease also granted the plaintiff the option to purchase the property at any time during the term of the

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lease, or extensions thereof. *Id.* However, when the plaintiff sought to exercise the option the defendant refused. *Id.* In coming to the conclusion that the option was enforceable, our Supreme Court stated that “[t]he continued occupancy of the premises by the plaintiff and the payment of rent in accordance with the terms of the lease, constituted renewals or extensions thereof.” *Id.* at 727, 40 S.E.2d 370. Thus, where the plaintiff was still leasing the property, the Court held that “[t]he lease is a sufficient consideration to support specific performance of the option of purchase granted therein.” *Id.* at 728, 40 S.E.2d 370.

The issue now before this Court is whether the lease payments are sufficient consideration to support the modification of the Option to Purchase. We think not. As a result, NRC’s reliance on *Frazelle* is misplaced.

First, there are no modifications to the agreements in *Frazelle*, 226 N.C. 724, 40 S.E.2d 367. Here, we are dealing with a modification to the Option to Purchase. Second, *Frazelle* addresses whether continued occupancy and payments after the expiration of a lease are sufficient consideration for renewal of the lease. *Id.* And, in *Frazelle*, the lease was for a one-year term with an option to renew at the expiration of the lease for additional one-year terms for nine successive years. *Id.*

In the instant case, the Lease Agreement specified a five-year term, beginning on 1 August 2006 and ending 21 July 2011. The Lease Agreement in *Frazelle* included an option to renew, but renewal is not at issue before this Court. NRC sought to exercise the Option to Purchase on 28 October 2009 within the original five-year term of the agreement.

While NRC’s payments under the terms of the Lease Agreement may have been sufficient consideration to support the inclusion of the original Option to Purchase, the lease payments are not sufficient consideration to support a modification to the Option to Purchase. Under the Lease Agreement, NRC was legally obligated to make monthly payments to JMR for the five-year term. Where NRC was already legally obligated to make the lease payments, the payments are not adequate consideration to support a modification to the Option to Purchase. See *Anthony Tile & Marble Co., Inc. v. H. L. Coble Const. Co.*, 16 N.C. App. 740, 744, 193 S.E.2d 338, 341 (1972) (“It is generally established that a promise to perform an act which the promisor is already bound to perform is insufficient consideration for

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a promise by the adverse party.” (citing *Sinclair v. Travis*, 231 N.C. 345, 57 S.E.2d 394 (1950)).

Thus, where no new consideration was provided to support the modification to the Option to Purchase, the revised Option to Purchase, as executed on 7 March 2007, is not enforceable.

C.

[4] NRC also argues that the trial court erred in determining that the doctrine of quasi-estoppel did not estop JMR from contesting the validity and enforceability of the revised Option to Purchase. We disagree.

“[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions.” *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001). Thus, “[u]nder a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument.” *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 15, 18, 591 S.E.2d 870, 881-82 (2004). In applying the doctrine, it is important to keep in mind that “quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation.” *Id.* at 18, 591 S.E.2d at 882.

In this case, although we have determined that the Lease Agreement and Option to Purchase are components of a single transaction, we have also determined that the modification to the Option to Purchase is invalid and unenforceable for lack of consideration. Therefore, the revised Option to Purchase was never a part of the agreement.

“[Q]uasi-estoppel ‘is directly grounded . . . upon a party’s acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts.’ ” *Id.* at 19, 591 S.E.2d at 882 (citation omitted). Here, there is no evidence that JMR accepted any benefit under the revised Option to Purchase. The only potential benefit to JMR under the revised Option to Purchase is the payment of the fair market value for the golf course at the exercise date. However, when NRC sought to exercise the revised Option to Purchase, JMR refused and never accepted any payment under the option.

The sole benefit received by JMR under the entire agreement was a monthly lease payment made by NRC under the terms of the Lease Agreement. NRC argues that JMR’s acceptance of the monthly lease

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payments is acceptance of the benefits of the revised Option to Purchase. We disagree because these payments were not required under the terms of the revised Option to Purchase.

D.

[5] NRC's final contention in arguing the trial court erred in denying its motion for summary judgment and granting summary judgment in favor of JMR is that the Option to Purchase was facially valid. Where the modification to the Option to Purchase is invalid and unenforceable for lack of adequate consideration, summary judgment is appropriate and we need not reach this additional argument.

II

[6] NRC also contends the trial court erred in granting JMR's request for preliminary and mandatory injunctive relief. NRC specifically assigns error to the trial court's findings in paragraph 28 of its 22 July 2010 order and paragraph 9 of its 30 September 2010 order. We need not address this portion of NRC's argument because NRC has regained possession of the golf course, thus rendering the issue moot.

"[G]enerally, an 'appeal presenting a question which has become moot will be dismissed.'" *In re Hackley*, ___ N.C. App. ___, ___, 713 S.E.2d 119, 121 (2011) (quoting *Mattheus v. North Carolina Dep't of Transp.*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978) (citation omitted)).

Our Supreme Court has stated that "[a] case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (citation and quotation marks omitted). When the questions originally at issue in a case are no longer at issue when the case is on appeal, the appeal is moot and should be dismissed. *N.C. Press Assoc., Inc. v. Spangler*, 87 N.C.App. 169, 171, 360 S.E.2d 138, 139 (1987).

Id.

Here, NRC has challenged the trial court's 22 July 2010 and 30 September 2010 orders granting preliminary and mandatory injunctive relief. The 22 July 2010 order required NRC to pay JMR \$99,996.00 for lease payments due to JMR between February 2010 and July 2010 or surrender possession of the golf course to JMR. The order further required NRC to make monthly lease payments of \$16,666.00 to JMR until the preliminary injunction was dissolved or

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NRC surrendered possession of the golf course to JMR. The 30 September 2010 order required that, upon the surrender of the golf course by NRC to JMR, NRC additionally would surrender possession of all golf course operating equipment to JMR, for use by JMR in the operation of the golf course during the pendency of the litigation.

NRC claims this preliminary and mandatory injunctive relief was granted in error. However, NRC has regained possession of the golf course since it filed its brief with this Court. As described in NRC's and the Bank's Joint Rule 37(e)(2) Motion For Partial Withdrawal of Appeal filed with this Court on 21 October 2011, the Bank foreclosed on its lien on the golf course on 18 August 2011, and JMR surrendered title to the golf course on 30 August 2011. NRC has reached a settlement with the Bank, pursuant to which NRC has regained possession of the golf course. Therefore, the question of whether the trial court erred by granting preliminary and mandatory injunctive relief dispossessing NRC of the golf course is moot.

In the Joint Rule 37(e)(2) motion, NRC "further contends that this Court [should] remand [this case] to the trial court for a determination of damages suffered by NRC as a result of the wrongful mandatory injunction dispossessing NRC of the golf course and transferring its assets to JMR." However, we need not address issues of compensation where the trial court further ordered that it:

will hold a hearing and status conference with all parties for the purpose of considering and/or determining then-remaining issues between the parties, including but not limited to . . . present and future compensation, if any, to be paid by JMR to NRC for use of the Golf Course operating Equipment at times material to this civil action.

The trial court's entry of summary judgment in favor of defendants is affirmed. NRC's appeal of the preliminary and mandatory injunctive relief is dismissed as moot.

Affirmed in part; dismissed in part.

Judge ELMORE concurs.

Judge ERVIN concurs in part and concurs in result only in part by separate opinion.

ERVIN, Judge, concurring in part and concurring in the result in part.

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Although I concur in the Court's decision to limit our consideration of Plaintiff's challenge to the trial court's order to the matters at issue between Plaintiff and Defendant JMR; the Court's decision to treat Plaintiff's interlocutory appeal as a petition for the issuance of a writ of *certiorari* and to issue the requested writ in order to reach the merits of the dispute between Plaintiff and Defendant JMR; and the Court's holdings that the trial court did not err by failing to find that Defendant JMR's challenge to the validity of the modified purchase option was barred by the doctrine of quasi-estoppel, that Plaintiff's challenge to the preliminary and mandatory injunctive relief granted in the trial court is moot given the fact that Plaintiff has regained control of the golf course, and that the issue of the amount of compensation that should be paid for the use of certain golf course property is not properly before us at this time, I am unable to agree with the Court's determination that the modified purchase option was not supported by adequate consideration. However, given that the price term contained in the modified purchase option was not sufficiently definite to create an enforceable contractual provision, I concur in the Court's ultimate decision to affirm the trial court's decision to enter summary judgment in favor of Defendant JMR. Moreover, given that a determination that the modified purchase option is invalid obviates the necessity to determine whether the modified purchase option is a separate contract or a part of the original contract, I do not believe that we should reach that issue. As a result, I concur in the Court's decision in part and concur in the result reached by the Court in part.

Consideration

According to basic principles of contract law:

An enforceable contract is one supported by consideration. Moreover, where a contract has been partially performed, as is the case here, a modification of its terms is treated as any other contract and must also be supported by consideration. It is well established that consideration sufficient to support a contract or a modification of its terms consists of "any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee."

Lee v. Paragon Group Contractors, 78 N.C. App. 334, 337-38, 337 S.E.2d 132, 134 (1985) (citing *Investment Properties v. Norburn*, 281 N.C. 191, 196, 188 S.E. 2d 342, 345 (1972) and quoting *Brenner v. School House, Ltd.*, 302 N.C. 207, 215, 274 S.E. 2d 206, 212 (1981)

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(other citation omitted)), *disc. review denied*, 316 N.C. 195, 345 S.E.2d 383 (1986). Mutual promises exchanged between contracting parties constitute sufficient consideration to support an enforceable agreement. *See, e.g., Howe v. O'Mally*, 5 N.C. (1 Mur.) 287, 289 (1809):

A conveyed to B a tract of land, containing 221 acres, more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than 221 acres, the defendant should pay the Plaintiff ten dollars per acre for the excess: if it fell short, Plaintiff to refund to Defendant at the same rate. Here are mutual promises, and one is a good consideration, to support the other.

See also, e.g., Penley v. Penley, 314 N.C. 1, 16, 332 S.E.2d 51, 60 (1985) (stating that the parties' "mutual promises to accept the division of shares and to continue to operate the business as before, followed by the transfer of jointly owned property," constituted sufficient "consideration to support the promise, on the part of each of the parties, to split the shares in the incorporated business equally"); *Brenner*, 302 N.C. at 215, 274 S.E.2d at 212 (stating that a modification to a contract between a school and a parent was supported by adequate consideration when, "[i]n return for defendant's promise to refund the tuition paid, plaintiff would relinquish his right to have his child educated in defendant school"); *IWTMM, Inc. v. Forest Hills Rest Home*, 156 N.C. App. 556, 562, 577 S.E.2d 175, 179 (2003) (stating that "consideration need not consist of a promise to pay money for goods or services" and that consideration can, "[i]nstead, . . . take the shape of mutual promises to perform some act or to forbear from taking some action."); *Brumley v. Mallard, L.L.C.*, 154 N.C. App. 563, 568, 575 S.E.2d 35, 38 (2002) (finding "ample consideration to support the modification of the contract at the property closing" in a situation in which the plaintiff "accepted a different buyer" and the defendant "agreed to guarantee the transactions"), *aff'd*, 357 N.C. 247, 580 S.E.2d 691 (2003); *Martin v. Vance*, 133 N.C. App. 116, 122, 514 S.E.2d 306, 310 (1999) (stating that "[m]utual binding promises provide adequate consideration to support a contract.") (citations omitted). As long as both parties promise to give up an otherwise existing right at the time that they entered into a contract modification, that modification is supported by sufficient consideration.

According to the record, the original purchase option provided that Plaintiff would be entitled to purchase the golf course for \$2,500,000.00 at any time before the expiration of the Lease Agreement. The modified purchase option, on the other hand, pro-

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vided that Plaintiff could purchase the golf course for its fair market value as of the exercise date. As a result, at the time that it entered into the modified purchase option, Defendant JMR relinquished the right to sell the golf course for \$2,500,000.00 and agreed to sell the golf course for its fair market value at the time the modified purchase option was exercised. Plaintiff, on the other hand, relinquished the right to buy the golf course for \$2,500,000.00 and promised to pay a purchase price based on fair market value. Thus, the record clearly establishes that both parties agreed to relinquish the right to sell or to purchase the golf course for \$2,500,000.00 and to accept or pay fair market value in lieu thereof. Thus, both parties made mutual promises, relinquished existing rights, and obtained new rights at the time that they entered into the modified purchase option, demonstrating, contrary to the result reached by my colleagues, that the modified purchase option was supported by adequate consideration.¹

Enforceability of the Modified Purchase Option Price Term

“One of the essential elements of every contract is mutual[ity] of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, there is no agreement. . . . A contract, and by implication[,] a provision, leaving material portions open for future agreement is nugatory and void for indefiniteness. . . . Consequently, any contract provision . . . failing to specify either directly or by implication a material term is invalid as a matter of law.”

Rosen v. Rosen, 105 N.C. App. 326, 328, 413 S.E.2d 6, 7 (1992) (quoting *MCB Ltd. v. McGowan*, 86 N.C. App. 607, 608-09, 359 S.E.2d 50, 51 (1987)). The price term set out in the modified purchase option provided that Plaintiff would be entitled to repurchase the golf course at a purchase price “based on fair market value at exercise date validated by an independent third party appraisal.” As stated by the trial court in Finding of Fact No. 48²:

1. In its brief, Plaintiff argues that the modified purchase option was supported by its periodic lease payments required under the terms of the original lease. I agree with the Court’s determination that the periodic rent payments required under the original lease agreement do not adequately support the modified purchase option.

2. As should be obvious, Finding of Fact No. 48 is a conclusion of law rather than a finding of fact.

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Here, Option B does not set forth an objective process or mechanism for determining a purchase price for the Golf Course. It simply provides that the purchase price for the Golf Course “shall be based on fair market value at exercise date *validated* by an independent third party appraisal.” (emphasis added) While there is a bare bones agreement as to use of a third party appraisal, there is no agreement as to what fair market value the appraisal is to “validate.” Among other things, there is no agreement as to how or [when] an initial determination of fair market value is to be made, how the parties would select an appraiser or that—as NRC contends and JMR disputes—a single party unilaterally could designate an appraiser and impose that person’s appraisal on the other party. In the absence of such an agreement, upon NRC’s decision to exercise Option B, there was nothing to prevent JMR from engaging its own appraiser and presenting an opposing contended fair market value. If that happened, the agreement does not contain any mechanism for resolving any discrepancies in the fair market value opinions of different appraisers. “With no specification in the agreement as to how to address such greatly varying estimates in the value of [JMR’s] property, the price term is not, as it must be, certain and definite.” *Connor [v. Harless]*, 176 N.C. App. [402,] 406, 626 S.E.2d [755,] 758 [(2006), *disc. review denied*, 361 N.C. 219, 642 S.E.2d 247 (2007)].

I agree with the trial court’s conclusion that, because the modified purchase option fails to specify the manner in which an appraiser would be selected or how the fair market value of the golf course would be determined, it is invalid and unenforceable. The fact that the parties might, in the abstract, be able to obtain a determination of the property’s fair market value through litigation does not, at least to my way of thinking, necessitate the adoption of a different result given that there is little or no difference in principle between that result and an unenforceable agreement to agree. As a result, I agree with the Court, albeit for a different reason, that the modified purchase option was unenforceable and that the trial court properly granted summary judgment in favor of Defendant JMR. Having made this determination, I see no need to address the issue of whether the documents executed by the parties constitute a single contract or multiple contracts, since Defendant would be entitled to prevail regardless of the manner in which that issue was resolved.

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Conclusion

Thus, I concur with the Court's preliminary rulings concerning the scope of the issues that are properly before us in this case and the extent to which we should address the enforceability of the modified purchase option on the merits. In addition, I concur with the Court's ultimate decision that the trial court's order should be affirmed given that the price term set out in the modified purchase option is too indefinite to be enforceable. However, I do not agree that the Court needs to address the issue of whether the modified purchase option constitutes a separate contract or part of the original lease, or with the Court's holding that the modified purchase option is not supported by adequate consideration. As a result, I respectfully concur in the Court's opinion in part and concur in the result reached by the Court in part.

SHERIF A. PHILIPS, M.D., PLAINTIFF v. PITT COUNTY MEMORIAL HOSPITAL INCORPORATED, PAUL BOLIN, M.D., RALPH E. WHATLEY, M.D., SANJAY PATEL, M.D., AND CYNTHIA BROWN, M.D., DEFENDANTS

No. COA11-1482

(Filed 21 August 2012)

1. Contracts—tortious interference—loss of medical privileges—medical review testimony—protective order

The trial judge did not err in an action involving plaintiff's loss of hospital privileges by granting summary judgment for defendants, Doctors Whatley and Bolin, on a claim for tortious interference based upon their testimony at a medical review committee. Plaintiff did not appeal a protective order barring discovery of testimony before that committee.

2. Statute of Limitation and Repose—tortious interference with contract—hospital privileges—discovery rule

Plaintiff's claim for tortious interference with contractual relationships against defendant Dr. Whatley arising from plaintiff's loss of hospital privileges and Dr. Whatley's communication with a patient's spouse was barred by the statute of limitations. The discovery rule did not save plaintiff's tortious interference claim because it applies only to torts for personal injury or physical damage to property.

3. Hospitals and Other Medical Facilities—hospital privileges—tortious interference—statute of limitations—protective order

The trial court correctly granted summary judgment for defendant on tortious interference claims against a hospital arising from plaintiff's loss of privileges at that hospital. Plaintiff's claims were barred by the statute of limitations or blocked by a protective order that prevented discovery of the proceedings and records of a medical review committee.

4. Fraud—upcoding hospital records—statute of limitations

Plaintiff's fraud claim against a hospital for "upcoding" medical records, so that patients were charged for treatments and procedures that were not performed, was barred by the statute of limitations.

5. Administrative Law—exhaustion of remedies—tortious interference with contract—doctrine not applicable

The doctrine of exhaustion of administrative remedies did not save the tortious interference claim of a doctor who lost his hospital privileges. That doctrine does not apply where a plaintiff seeks damages and the administrative remedies are non-monetary in nature.

6. Contracts—Loss of hospital privileges—hospital bylaws

The trial court correctly granted summary judgment for defendant hospital on plaintiff's breach of contract claim arising from the loss of his hospital privileges where he alleged that the hospital failed to comply with its bylaws in reviewing his privileges. The hospital substantially complied with its bylaws and there were no substantial issues of fact as to the alleged breaches plaintiff brought forward on appeal.

7. Libel and Slander—defamation—loss of hospital privileges—claims against doctors—statute of limitations—medical review committee testimony

The trial court correctly granted summary judgment for defendants Whatley and Bolin on defamation claims arising from plaintiff's loss of hospital privileges. Any statements by defendants before the medical review committee were privileged and covered by a protective order, the single alleged incident of defamation that occurred outside the proceedings was barred by the one-year statute of limitations, and neither the doctrines of

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exhaustion of administrative remedies nor continuing wrong were applicable.

8. Libel and Slander—defamation—reporting loss of hospital privileges—protective order

Summary judgment was properly granted for defendant hospital on a defamation claim arising from the reporting of plaintiff's loss of staff privileges to the National Practitioners' Data Bank and North Carolina Medical Board. Plaintiff argued that he demonstrated during the peer review proceedings that the claims against him were false but he was barred by a protective order from presenting any evidence of the proceedings or evidence before the medical review committees.

Appeal by Plaintiff from orders entered 31 March 2010 and 17 May 2011 by Judge Richard L. Doughton in Pitt County Superior Court. Heard in the Court of Appeals 6 June 2012.

Crouse Law Offices, by James T. Crouse, and Guirguis Law, P.A., by Nardine Mary Guirguis, for Plaintiff.

Harris, Creech, Ward and Blackerby, P.A., by Jay C. Salsman, C. David Creech, and Luke A. Dalton, for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This matter arises from the suspension and then revocation of the medical staff privileges of Plaintiff Sherif A. Philips, M.D., by Defendant Pitt County Memorial Hospital (“the hospital”). During 2003 and 2004, the Risk Management Department of the hospital received complaints about Plaintiff, a nephrologist with active medical staff privileges at the hospital. The complaints involved, *inter alia*, failing to examine patients and making false entries on medical records, and occurred at about the same time the hospital became aware of a consent order Plaintiff entered into with the North Carolina Medical Board (“NCMB”), in which Plaintiff accepted a reprimand for failing to provide assistance to a patient in cardiopulmonary arrest.¹ As a result of the consent order and the complaints, on 26 August 2004, Defendant Ralph Whatley, M.D., then chief of the

1. This incident occurred in May 2000 at a freestanding dialysis unit operated by Total Renal Care in New Bern and unaffiliated with the hospital. At the time, Plaintiff served as medical director for the dialysis unit.

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internal medicine service (which included nephrology), requested an investigation prior to corrective action pursuant to Article VII, § 2 of the hospital's Medical Staff Bylaws, Rules, and Regulations ("the bylaws").²

Charles Barrier, M.D., then chief of staff at the hospital, notified Plaintiff in writing that the request for investigation would be presented to the hospital's medical executive committee ("the executive committee") on 20 September 2004, that he had the right to be present, and of his obligations under the bylaws. The executive committee determined that the allegations in the request for investigation, if confirmed, could warrant action regarding Plaintiff's privileges, and as a result, it directed Whatley to form an ad hoc committee ("the first ad hoc committee") to investigate four issues further: (1) documentation of Plaintiff's physical examinations of four patients, (2) billing related to those four patients, (3) the consent order entered into with the NCMB, and (4) termination of Plaintiff's privileges at another hospital. Whatley appointed the first ad hoc committee, which held multiple investigatory hearings. The first ad hoc committee presented its final written report to the executive committee on 15 November 2004. Plaintiff was again given notice of his right to attend the presentation, make a statement, ask questions, and present evidence. Plaintiff met with the executive committee on 15 November 2004, after which the executive committee issued a report recommending a letter of reprimand and a six-month suspension of Plaintiff's privileges, the latter to be "suspended."

On 17 November 2004, the executive committee notified Plaintiff that it had taken action on the recommendation of the first ad hoc committee, and advised Plaintiff of his appeal rights. When Plaintiff appealed pursuant to the bylaws, a fair hearing committee was appointed, and multiple hearings were held over the next several months. Whatley and Defendant Paul Bolin, M.D., another physician with medical staff privileges at the hospital, provided testimony during the hearings. The hearing committee issued a written report recommending a corrective action (but not a suspension of Plaintiff's

2. In pertinent part, the bylaws provide: "Whenever the Chief of any clinical service . . . believes the activities or professional conduct of any practitioner with clinical privileges is considered to be lower than the standards of the medical staff, disruptive to the operation of the hospital or could affect adversely the health or welfare of a patient, [the Chief] may request an investigation. The request must be made in writing . . . to the PCMH Executive Committee . . . and shall contain documentation of the specific activities or conduct which constitutes the grounds for the request." Art. VII, § 2(a).

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privileges) which was presented to the executive committee on 4 April 2005. The executive committee took action on the same date and accepted the fair hearing panel's recommendation.

Plaintiff elected not to appeal the executive committee's decision to the Board of Trustees, which under the bylaws, retained the power to make final decisions in any corrective action proceedings. However, because it declined to accept the recommendation of the executive committee, as directed by the bylaws, the Board of Trustees then referred the matter to the chief of staff, chief of staff—elect, secretary, and chairman of the Credentials Committee (“the committee of four”) for a recommendation.³ The committee of four issued a written report and recommendation to the Board of Trustees on 21 June 2005. On the same date, the Board of Trustees made its final decision. At that time, Plaintiff's medical staff privileges were up for a regular biennial renewal. The Board of Trustees elected to renew Plaintiff's privileges, subject to certain conditions, including a 90-day suspension of his privileges, 31 days of which would be active and the remaining 59 days suspended, and requirements that Plaintiff make precise chart notes, have his practice patterns reviewed, and adhere to a call schedule.⁴ Plaintiff accepted the terms of the conditional renewal of his medical staff privileges. As required by state and federal law, the hospital reported Plaintiff's suspension to the NCMB and the National Practitioners' Data Bank (“NPDB”).

Subsequently, the hospital learned that Plaintiff had failed to adhere to a call schedule, one of the conditions of the renewal of his privileges. Specifically, a private investigator hired by the hospital discovered that Plaintiff was out of the county several times when he was scheduled to be on call for the hospital, and that on at least three occasions, the physician purportedly providing call coverage for Plaintiff was also outside the county. Based on this failure to comply with the conditions of renewal, another request for investigation was submitted. In addition, as provided in the bylaws,⁵ the hospital's chief

3. “If this decision [by the Board of Trustees] is contrary to the PCMH Executive Committee's last such recommendation, the [Board of Trustees] shall refer the matter to the Chief of Staff, Chief of Staff—Elect, Secretary, and Chairman of the Credentials Committee of the Medical Staff for further review and recommendation within 30 days. . . .” Art. VIII, § 11(a).

4. To provide continuous patient care, the hospital requires its physicians to remain in Pitt County (“the county”) when scheduled on call, or to have another physician agree to “cover” the call as scheduled.

5. “[W]henever action must be taken immediately in the [best interest of patient care in the hospital or of the public welfare, the Chief of Staff acting on his own

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of staff determined that a summary suspension of Plaintiff's privileges was necessary to protect patient safety.

A second ad hoc committee was appointed to investigate Plaintiff's noncompliance with the conditions of renewal. The second ad hoc committee submitted a written report and recommendation to the executive committee, which took action on the recommendation to invoke the remaining 59 days of Plaintiff's previous suspension. Plaintiff again appealed, leading to the appointment of a second hearing committee, which again held multiple hearings on the matter. The second hearing committee reported to the executive committee which took action on 19 December 2006. Plaintiff appealed to the Board of Trustees, which upheld the recommendation of the executive committee and permanently revoked Plaintiff's medical staff privileges.

Plaintiff has previously filed two lawsuits against Defendants⁶ in the United States District Court for the Eastern District of North Carolina, each of which was dismissed pursuant to Rule 12(b)(6) and for lack of subject matter jurisdiction. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176 (4th Cir. 2009) (affirming the dismissals). The state action here was filed on 12 August 2009. The trial court dismissed Plaintiff's claims for fraud and tortious interference with contract pursuant to Rule 12(b)(6) on 31 March 2010, and granted Defendants' motion for summary judgment on Plaintiff's remaining claims for breach of contract, defamation, injunctive relief, and punitive damages on 17 May 2011. Plaintiff appeals.

Discussion

Plaintiff brings forward two arguments on appeal: that the trial court erred in (1) dismissing his claims for fraud and tortious interference with contract pursuant to Rule 12(b)(6), and (2) granting summary judgment for Defendants on Plaintiff's claims for breach of contract, defamation, punitive damages, and injunctive relief because there existed disputed issues of material fact. As discussed below, we affirm.

authority . . . may . . . suspend all or any portion of the clinical privileges of a practitioner" Art. VII, § 8(a).

6. Plaintiff's first federal lawsuit also included Sanjay Patel, M.D., and Cynthia Brown, M.D., as defendants. Brown and Patel were named defendants in this action as well, but were voluntarily dismissed with prejudice by Plaintiff on 7 May 2011, and thus, are not participants in this appeal.

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Standards of Review

Pursuant to Rule 12(b)(6),

[d]ismissal 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 (citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted). Further,

[i]n order to bear its burden, a defendant is required to present a forecast of the evidence which is available at trial and which shows that there is no material issue of fact concerning an essential element of the plaintiff's claim and that such element could not be proved by the plaintiff through the presentation of substantial evidence. An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate that he will be able to sustain his claim at trial.

McKeel v. Armstrong, 96 N.C. App. 401, 406-07, 386 S.E.2d 60, 63 (1989). Finally, if a trial court's grant of summary judgment can be sustained on any grounds, we must affirm it on appeal. *Shore v.*

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Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). “If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.” *Id.*

Protective Order

On 5 May 2010, Defendants moved for a protective order pursuant to section 131E-95(b) of the Hospital Licensure Act:

The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, “ ‘Public records’ defined”, and shall not be subject to discovery or introduction into evidence in any civil action against a hospital, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about the person’s testimony before the committee or any opinions formed as a result of the committee hearings.

N.C. Gen. Stat. § 131E-95(b) (2011). On 20 June 2010, the trial court entered a protective order pursuant to section 131E-95(b). In the order, the court provided that the following materials were privileged: “documents reflecting the proceedings of any of these committees;⁷ records and materials produced by any of these committees; or

7. The ad hoc and executive committees, as well as the committee of four, were covered as medical review boards. However, the Board of Trustees is not covered by section 131E-95 or the protective order, and thus, as noted therein, “[i]nformation, records, documents[,] and materials” produced by the Board of Trustees do *not* fall under the statutory privilege.

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materials considered by any of these committees.” The order further noted that, while information from original sources other than the various medical review boards was not privileged simply because it had been presented to the committees, the privilege did extend to information or documents “generated specifically at the request of the committee[s.]” Plaintiff has failed to appeal from this order. Thus, the findings of fact, conclusions of law, and decrees contained in the protective order are binding on appeal. As a result, in arguing error in the dismissal of or summary judgment on his claims, Plaintiff cannot rely on allegations or assertions which rest upon any of the privileged information, documents, or testimony covered by the protective order.

I. Dismissal of Claims Pursuant to Rule 12(b)(6)

Plaintiff argues that the trial court erred in dismissing his claims for tortious interference with existing contractual relationships against all Defendants and for fraud against the hospital pursuant to Rule 12(b)(6). We disagree.

A. Tortious interference claims against Bolin and Whatley

[1] As noted *supra*, pursuant to section 131E-95(b), the trial court entered a protective order barring discovery of “documents reflecting the proceedings of any of [all relevant medical review] committees; records and materials produced by any of these committees; or materials considered by any of these committees[.]” Further, section 131E-95(b) specifically provides that “a person who testifies before the committee may testify in a civil action but cannot be asked about the person’s testimony before the committee.” Thus, Plaintiff cannot produce *any* evidence regarding the sole factual allegation that forms the basis for his tortious interference claim against Bolin, to wit, “[a]s a direct consequence of testimony provided by Whatley and Bolin at the Fair Hearing, findings and recommendations were made by the hearing panel, and corrective action that suspended and then terminated [Plaintiff’s] medical staff privileges was taken.” Because Plaintiff’s “complaint discloses [a] fact that necessarily defeats the [] claim[.]” dismissal was proper. *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 429. Likewise, to the extent Plaintiff’s tortious interference claim against Whatley is based upon Whatley’s testimony before the medical review committees, dismissal of that claim was proper.

[2] Plaintiff’s tortious interference claim against Whatley is also based upon the allegation that “Whatley contacted one of [Plaintiff’s] patients (Patient C) and told the patient that he should look for another physician because [Plaintiff] was not available to his patients.”

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In their motion to dismiss, Defendants asserted the three-year statute of limitations on tort actions in this State as a defense. *See* N.C. Gen. Stat. § 1-52(1) (2011). “Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff.” *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted).

The record on appeal reveals an affidavit by Vivian Weston, the wife of one of Plaintiff’s dialysis patients, stating that Whatley called her “[i]n or around April 2005” and suggested she find her husband another doctor because Plaintiff had “a problem” at the hospital.⁸ Plaintiff’s complaint was not filed until 12 August 2009, more than three years after Whatley’s allegedly tortious conduct, and thus this claim is barred by section 1-52(1).⁹ Accordingly, the trial court did not err in dismissing Plaintiff’s tortious interference claims against Whatley.

B. Tortious interference claims against the hospital

[3] Plaintiff’s tortious interference claims against the hospital are based upon allegations that the hospital (1) “initiated an investigation of [Plaintiff], which resulted in subsequent corrective action that suspended and then terminated” Plaintiff’s medical staff privileges, and that the hospital (2) “was not justified in taking [the] corrective action[.]” In addition, Plaintiff alleges that the hospital’s conduct “was intended to induce patients not to continue seeking medical care . . . from [Plaintiff] and . . . to deprive [Plaintiff] of his ability to provide medical care . . . to his patients.”

“When the right of a party is once violated, even in ever so small a degree, the injury . . . at once springs into existence and the cause of action is complete.” *Stewart v. Se. Reg’l Med. Ctr.*, 142 N.C. App. 456, 461, 543 S.E.2d 517, 520 (2001) (citation and quotation marks omitted). As noted, *supra*, Plaintiff did not assert these claims until August 2009. Accordingly, to the extent that Plaintiff’s claim against

8. Although Weston’s husband is not explicitly identified as “Patient C,” the record before us contains no evidence suggesting that Whatley contacted any of Plaintiff’s other patients or their family members.

9. Plaintiff notes that he did not discover this alleged tort until at least 8 May 2006, and asserts that his claim is saved by the discovery rule. We note that the so-called “discovery rule” is inapplicable here, as it tolls the running of the statute of limitations only for torts alleging “personal injury or physical damage to claimant’s property[.]” N.C. Gen. Stat. § 1-52(16); *see also Birtha v. Stonemor, N.C., LLC*, ___ N.C. App. ___, ___, 727 S.E.2d 1, 11-12 (2012) (holding the discovery rule inapplicable where the “[p]laintiffs do not allege bodily harm or physical damage to [their] property”).

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the hospital is based on the initiation of the investigation in September 2004, it is barred by the statute of limitations. N.C. Gen. Stat. § 1-52.

As to any claim based on the allegation that the corrective actions taken by the hospital (through its Board of Trustees) was not justified, Plaintiff cannot forecast any evidence to support that claim. The elements of tortious interference with contract are:

- (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person;
- (2) the defendant knows of the contract;
- (3) the defendant intentionally induces the third person not to perform the contract;
- (4) and in doing so acts without justification;
- (5) resulting in actual damage to [the] plaintiff.

United Lab., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citation omitted). The Board of Trustees' decisions regarding corrective action were based upon the findings and recommendations of the medical review committees, the proceedings and records of which are privileged by the protective order as discussed *supra*. Without the ability to discover those materials or present them at trial, Plaintiff cannot show that any recommendations produced by the medical review committees were unjustified, and without being able to show fault in those recommendations, Plaintiff cannot show that the Board of Trustees acted without justification in relying upon those recommendations in suspending and then terminating his medical staff privileges. Accordingly, this argument is overruled, and the trial court's dismissal of Plaintiff's tortious interference with contract claims is affirmed.

C. Fraud claim against the hospital

[4] Plaintiff also contends that the trial court erred in dismissing his claim for fraud against the hospital. In his complaint, Plaintiff asserted that the hospital "upcoded" the records of two of Plaintiff's patients, such that they were charged for treatments and procedures which were not actually performed. According to Plaintiff's complaint, these upcodings later served as a material part of the allegations against him for making false entries in patient medical records during the medical review process. However, in his deposition, Plaintiff stated that these instances of upcoding occurred in 2004 and earlier, more than three years prior to the filing of his complaint in August 2009. In addition, Plaintiff's complaint states that he met with Whatley and others in July 2004 to discuss the upcoding issue, indi-

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cating that Plaintiff was aware of the hospital's allegedly fraudulent actions at that time. As such, Plaintiff's fraud claim is barred by the three-year statute of limitations. N.C. Gen. Stat. § 1-52(9).

D. Exhaustion of Remedies Doctrine

[5] Plaintiff contends that any claims dismissed as violating the statute of limitations are saved by the exhaustion of administrative remedies doctrine. Plaintiff asserts that the statute of limitations was tolled under the doctrine until the final decision to terminate Plaintiff's medical staff privileges was made by the Board of Trustees on or about 29 December 2006. We are not persuaded.

Under the doctrine, "[w]hen an effective administrative remedy exists, that remedy is exclusive. However, when the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court." *Johnson v. First Union Corp.*, 128 N.C. App. 450, 456, 496 S.E.2d 1, 5 (1998) (citation and quotation marks omitted). Specifically, the doctrine does not apply where a plaintiff seeks damages and the administrative remedies are non-monetary in nature. *White v. Trew*, ___ N.C. App. ___, ___, 720 S.E.2d 713, 719 (2011).

Here, Plaintiff sought monetary damages for his claims of tortious interference with contract and fraud. However, the hospital's bylaws, which govern the administrative review and appeals process at issue, do not provide for monetary damages. Accordingly, the doctrine of the exhaustion of administrative remedies is inapplicable.

II. Summary Judgment

Plaintiff also argues that the trial court erred in granting summary judgment to Defendants on Plaintiff's claims for breach of contract against the hospital; defamation against Whatley, Bolin, and the hospital; injunctive relief against the hospital; and punitive damages against Whatley, Bolin, and the hospital.¹⁰ We disagree.

10. We note that, on appeal, Plaintiff makes several different contentions in support of his argument that summary judgment was not proper, including, *inter alia*, that the hospital was not entitled to immunity under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11111(a) (2011). Although we touch briefly on a reporting requirement contained in a different section of HCQIA in our discussion of Plaintiff's defamation claim, we uphold the trial court's grant of summary judgment on the basis of our State's statutory and case law and accordingly do not reach any question of immunity under HCQIA.

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A. *Breach of Contract Claim*

[6] Plaintiff contends the hospital breached its contract with him by failing to comply with the bylaws in conducting the medical review of his medical staff privileges. After careful review, we reject Plaintiff's arguments.

As this Court has noted,

[b]y statute, regulation, and case law, the authority to make corrective action decisions rests with the governing body of a hospital. It is not the role of this Court to substitute our judgment for that of the hospital governing body, which has the responsibility of providing a competent staff of physicians under N.C. Gen. Stat. § 131E-85. As long as the governing body's suspension of privileges is administered with fairness, geared by a rationale compatible with hospital responsibility and unencumbered with irrelevant considerations, this Court should not interfere.

Lohrmann v. Iredell Mem'l Hosp., Inc., 174 N.C. App. 63, 77, 620 S.E.2d 258, 266 (2005) (citations and quotation marks omitted), *disc. review denied*, 360 N.C. 364, 629 S.E.2d 853 (2006). Accordingly, summary judgment is proper where a hospital substantially complies with its bylaws in conducting a medical review process which leads to corrective action against a physician. *Id.* at 73, 620 S.E.2d at 263. Our review indicates that the hospital substantially complied with its bylaws in conducting the investigation of and applying a corrective action to Plaintiff. Further, as to the alleged breaches Plaintiff brings forward on appeal, the record evidence reveals no genuine issues of material fact.

Plaintiff asserts breach in that, as part of its investigations, the hospital allowed nurses to shadow him and report back to the medical review committees, hired a private investigator to report on Plaintiff's whereabouts during scheduled on-call periods, and did not interview certain patients or their spouses. Our review of the bylaws reveals no provisions relating to any of these assertions. Plaintiff also asserts that the hospital unilaterally cut short his term of appointment, so as to cause him to come up for renewal of privileges in 2005 rather than 2006. However, the evidence in the record is undisputed that the hospital reappointed all physicians in 2001, and then subjected all physicians (including Plaintiff) to the reappointment process every two years thereafter, including in 2003. Accordingly,

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Plaintiff, along with every other physician on the hospital's medical staff, was due for biennial renewal of privileges in 2005.

Plaintiff contends that the hospital prevented him from appealing when it notified him that a decision on his reappointment could be delayed if he appealed the executive committee's decision. However, a letter dated 16 May 2005 from Plaintiff's then-counsel to the hospital's counsel *thanks* the hospital for "its insights concerning" possible scheduling conflicts between the committee meetings for the appeal and the reappointment process, and notifies the hospital that Plaintiff has elected not to appeal. Nothing in the record suggests that the hospital attempted to prevent Plaintiff from pursuing an appeal, and nothing in the bylaws requires any different appeal process in the event that proceedings related to a corrective action coincidentally fall at the same time a physician is up for renewal of privileges.

Plaintiff also asserts breach in the Board of Trustees' decision to impose a harsher sanction than that recommended by the first fair hearing panel and accepted by the first medical review committee. However, nothing in the bylaws requires the Board of Trustees to accept such recommendations, and the bylaws explicitly give the Board of Trustees the final decision-making power in corrective actions.

Plaintiff next asserts breach by the hospital in its imposition of a 90-day suspension of his medical staff privileges with a 31-day active suspension and its later invocation of the remaining 59 days of suspension. Plaintiff also explicitly asserts that the 22 June 2005 reappointment letter containing conditions for renewal of his privileges formed a binding contract with the hospital. However, among the conditions Plaintiff explicitly agreed to were imposition of a 90-day suspension of his medical staff privileges with a 31-day active suspension and the right to invoke the remaining 59 days of suspension if Plaintiff failed to comply with the conditions of renewal. Accordingly, imposition of these two *terms* of the contract is not a breach. In addition, Plaintiff is estopped from challenging terms of the contract. *See B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001) (holding that the theory of quasi-estoppel prevents a party from accepting benefits from a contract while simultaneously denying the effect of other terms of the same agreement).

Finally, section 131E-95 provides that "[a] member of a duly appointed medical review committee *who acts without malice or fraud* shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or

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performed within the scope of the functions of the committee.” N.C. Gen. Stat. § 131E-95(a) (emphasis added). In determining whether a plaintiff has adequately alleged malice or fraud under the statute, this Court has noted:

Malice is defined as: The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

The North Carolina Supreme Court states “malice in law” is presumed from tortious acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others.

The essential elements of fraud [are]

(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that plaintiff reasonably relied upon the representation, and acted upon it; and (5) that plaintiff thereby suffered injury.

McKeel, 96 N.C. App. at 406, 386 S.E.2d at 63. In *McKeel*, the plaintiff alleged malice and fraud by a hospital and others, alleging that a medical review process had been unfair and that his economic competitors had been allowed to serve on the medical review committee. *Id.* at 407-08, 386 S.E.2d at 63-64. In affirming summary judgment for all defendants, we noted that

[a]ll the allegations raised by [the] plaintiff point to areas of the internal investigation process where possible conflicts of interest could arise. As in almost any situation of this nature, opportunities existed here to compromise the investigation if the persons involved had been motivated by malicious intent. In this case, however, [the] plaintiff has failed to produce any evidence of such intent.

Id. at 408, 386 S.E.2d at 64.

Similarly, Plaintiff’s contentions of malice and fraud are largely based on allegations that Whatley, Bolin, and other medical staff who

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served on or testified to the various committees were economic competitors and/or biased against him. However, Plaintiff presents no evidence that any person was motivated by malicious intent. Further, many of the purported actions or omissions of Whatley, Bolin, and others concern their participation with the committees involved in the investigations of and corrective actions against Plaintiff. As such, under the terms of the protective order, Plaintiff cannot discover or present evidence as to any of these allegations. Thus, Plaintiff cannot meet his “responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate that he will be able to sustain his claim[s] at trial.” *Id.* at 407, 386 S.E.2d at 63.

B. Defamation Claims Against Whatley and Bolin

[7] Plaintiff also alleged defamation by Bolin and Whatley in their testimony before the committees and by Whatley in a statement made to one of Plaintiff’s patients. “To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed.” *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993). In addition, “[t]o escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, . . . and the action accrues at the date of the publication of the defamatory words, regardless of the [date of discovery by the plaintiff].” *Gibson v. Mut. Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 287, 465 S.E.2d 56, 58 (1996) (citations and quotation marks omitted).

As noted *supra*, any testimony by Bolin and Whatley before the medical review committees is privileged and covered by the trial court’s protective order. *See* N.C. Gen. Stat. § 131E-95(b) (“[A] person who testifies before the committee may testify in a civil action but cannot be asked about the person’s testimony before the committee.”). Without the ability to introduce the allegedly defamatory statements at trial, Plaintiff patently cannot “sustain his claim[s] at trial.” *McKeel*, 96 N.C. App. at 407, 386 S.E.2d at 63.

Plaintiff also alleged a single incident of defamation outside the proceedings of the medical review committees, to wit, the allegedly defamatory statement by Whatley to Patient C in April 2005. Plaintiff contends that he did not discover this alleged tort until at least 8 May 2006 and notes this defamation claim was first asserted in his second federal lawsuit in March 2007. Plaintiff cites no authority for his assertion that “[d]efamation claims against individuals are not barred by the one[-]year statute of limitations for defamation [N.C. Gen. Stat.

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§ 1-54(3),]” and we know of none. Rather, as noted *supra*, such “an action . . . accrues at the date of the publication of the defamatory words, regardless of the [date of discovery by the plaintiff].” *Gibson*, 121 N.C. App. at 287, 465 S.E.2d at 58. Accordingly, because Plaintiff did not assert this claim until more than two years following Whatley’s allegedly defamatory statement, this claim is barred by the one-year statute of limitations. *Id.*

Plaintiff’s assertion that his claim is saved by the doctrine of the exhaustion of administrative remedies is likewise unavailing, as the appeals process provided for in the bylaws concerned Plaintiff’s medical staff privileges, and the alleged statement was not part of that process. Further, Plaintiff’s invocation of the doctrine also fails in that Plaintiff sought monetary damages from Whatley for the purported defamation, a remedy not available under the bylaws. *See Johnson*, 128 N.C. App. at 456, 496 S.E.2d at 5 (“[W]hen the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court.”). In addition, we reject Plaintiff’s assertion that this claim is saved by the “continuing wrong doctrine,” as that doctrine applies only where the unlawful acts continue, not where, as here, there are purported continual bad effects arising from a single, discrete act alleged to have been unlawful. *See, e.g., Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003). Accordingly, the court did not err in granting summary judgment to Bolin and Whatley on Plaintiff’s defamation claims.

C. Defamation Claim Against the Hospital

[8] Plaintiff’s defamation claim against the hospital is based on his allegation that the hospital’s reports regarding suspension of his medical staff privileges to the NPDB and the NCMB were false. Because Plaintiff cannot forecast evidence to prevail on this claim, the trial court’s grant of summary judgment was proper.

Under HCQIA, the hospital was required to report to the NPDB any professional review action adversely affecting the medical staff privileges of a physician for more than 30 days. 42 U.S.C. § 11133(a)(1)(A) (2011). The information reported includes the name of the physician, the action taken, and the reasons for the action. *Id.* § 11133(a)(3). A hospital complying with this requirement cannot be “held liable in any civil action with respect to any report made under [42 U.S.C. §§ 11131 *et seq.*] . . . without knowledge of the falsity of the information contained in the report.” *Id.* § 11137(c) (2011). In addition,

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under N.C. Gen. Stat. § 90-14.13(a)(2) (2011), hospitals must report any suspension or revocation of medical staff privileges to the NCMB.

Here, Plaintiff does not argue that the reports were false in stating that he was suspended for more than 30 days or that the reports incorrectly stated the basis for his suspension as determined during the corrective action process. Rather, he alleges that he demonstrated “during the peer review proceedings” that various allegations against him which led to the eventual corrective actions were false. As discussed *supra*, Plaintiff is barred from presenting any evidence of the proceedings or evidence before the medical review committees, and as such, he cannot establish the falsity of the decision of the committees. *See Andrews*, 109 N.C. App. at 274, 426 S.E.2d at 432. Accordingly, the trial court did not err in granting summary judgment to the hospital on this claim.

D. Injunctive Relief and Punitive Damages Claims

In light of our affirmance of the court’s grant of summary judgment to Defendants on Plaintiff’s claims for breach of contract and defamation, we likewise affirm summary judgment on Plaintiff’s request for injunctive relief and punitive damages.

AFFIRMED.

Judges BRYANT and THIGPEN concur.

RL REGI NORTH CAROLINA, LLC, PLAINTIFF-APPELLANT v. THE ESTATE OF DAN L. MOSER, AND MILEY W. GLOVER, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE, DEFENDANTS-APPELLEES

No. COA11-1470

(Filed 21 August 2011)

Estates—powers of executors—loan guaranty—purposes of will

The trial court did not err by granting defendants’ motion for summary judgment in an action against an estate and its executor on a guaranty that was signed by previous co-executors. The language of the will clearly granted the co-executors the authority to bind the estate as guarantor of a loan to carry out the purposes of the will,

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which was to make specific gifts, not to keep the estate open indefinitely. An accompanying trust did not speak to the powers of the executors.

Appeal by Plaintiff from judgment entered 24 August 2011 by Judge W. Erwin Spainhour in Superior Court, Union County. Heard in the Court of Appeals 20 March 2012.

Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake and Kelli Goss Hopkins, for Plaintiff-Appellant.

Perry, Bundy, Plyler, Long & Cox, L.L.P., by H. Ligon Bundy and Melanie D. Cox, for Defendants-Appellees.

McGEE, Judge.

RL Regi North Carolina, LLC (Plaintiff), filed a complaint on 2 December 2010, seeking to recover damages arising out of an alleged breach of guaranty by the Estate of Dan L. Moser and Miley W. Glover in his capacity as Administrator of the Estate (Defendants). Defendants filed an answer on 21 January 2011. Plaintiff filed a motion for summary judgment on 21 June 2011 and Defendants filed a motion for summary judgment on 19 July 2011. The trial court granted Defendants' motion for summary judgment by order entered 24 August 2011. Plaintiff appeals.

I. Factual Background

The parties stipulated that there were no issues of material fact and, in its order granting Defendants' motion for summary judgment, the trial court summarized the undisputed facts. The following is a paraphrasing of the trial court's summary of the facts.

Dan L. Moser (Mr. Moser) was the sole shareholder of Dan Moser Company, Inc. (DMC), a real estate development company. Mr. Moser died testate on 20 February 2006. In his will (the Will), Mr. Moser named his attorney, Richard R. Hutaff (Mr. Hutaff) and his accountant, Thomas M. Moyer, III (Mr. Moyer), as co-executors of his estate (the Estate). Mr. Hutaff and Mr. Moyer were issued Letters Testamentary on 23 February 2006.

The Estate included total assets of \$13,490,723.50, including \$5,619,829.35 in bank accounts and certificates of deposit, and \$7,294,949.92 in securities. The majority of the securities in the Estate consisted of DMC stock valued at \$6,153,003.00. After being appointed co-executors of the Estate, Mr. Hutaff and Mr. Moyer began to man-

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age the affairs of DMC. They distributed the stock of DMC to themselves, elected themselves directors of DMC, and elected Mr. Moyer as chairman of the board on 15 March 2006.

DMC owned several tracts of land that were in various stages of development as residential subdivisions, including at least one tract of undeveloped land located in Cabarrus County (Meadow Creek 2). Meadow Creek 2 consisted of approximately 54.68 acres that DMC had owned since 2001. Mr. Hutaff and Mr. Moyer caused DMC to begin negotiations with a homebuilder, Royce Homes (Royce), to purchase DMC's inventory of residential lots. A contract with Royce (the contract) was approved by DMC's board of directors and signed by DMC on 18 April 2006.

Under a "take down schedule" in the contract, Royce was obligated to buy approximately 567 lots in various DMC subdivisions. The take down schedule required DMC to sell to Royce 130 lots in Meadow Creek 2 over a period of forty-two months, beginning one year from the date of the contract, although Meadow Creek 2 was undeveloped land and was not a developed subdivision at the time the contract was signed.

DMC applied to Regions Bank, Plaintiff's predecessor in interest, for a loan on 3 May 2006 for the purpose of developing Meadow Creek 2 into a subdivision. DMC made the final decision to borrow the money from Regions Bank on 2 August 2006. Regions Bank's file regarding this loan transaction contained a document dated 20 September 2006 and titled "Credit Offering Memorandum." This Credit Offering Memorandum contained details concerning the proposed loan transaction, which the trial court summarized as follows:

- A. Regions [Bank] knew that [Mr.] Moser was deceased, and that [Mr.] Hutaff, [Mr.] Moser's attorney, and [Mr.] Moyer, [Mr.] Moser's accountant, were managing DMC.
- B. Regions [Bank] proposed to lend the sum of \$2,928,000.00 to DMC.
- C. Meadow Creek 2 was "raw land" and was worth \$750,000.00.
- D. The loan was to be used to develop Meadow Creek 2 into a 130 lot residential subdivision which, when developed, would be worth \$3,905,000.00.
- E. DMC had a contract to sell the lots in Meadow Creek 2 to Royce for \$4,938,000.00 pursuant to the Royce Contract.

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F. Royce was also a customer of Regions [Bank].

G. [Mr.] Moyer had agreed to have the Estate to guarantee the loan.

Regions Bank offered to make the loan to DMC on 22 September 2006. Regions Bank required the Estate to guarantee the loan. DMC closed the loan on 18 January 2007 and signed loan documents, including: (1) a promissory note in the amount of \$2,928,000.00; (2) a deed of trust on Meadow Creek 2; and (3) a loan agreement.

Pursuant to the loan documents, development of Meadow Creek 2 was to be completed within two years, and the loan was to be paid in full at that time. Mr. Hutaff and Mr. Moyer, as co-executors of the Estate, also signed a guaranty obligating the Estate to guarantee repayment of the loan. Mr. Hutaff and Mr. Moyer resigned as co-executors of the Estate on 3 December 2007 and Miley W. Glover was appointed Administrator of the Estate on 6 December 2007.

The loan matured on 17 January 2009 and DMC subsequently defaulted on the loan and filed bankruptcy. Regions Bank foreclosed upon Meadow Creek 2 and purchased the property for \$1,289,288.00 at a foreclosure sale. Pursuant to the guaranty against the Estate, Regions Bank filed a notice of claim on 19 March 2010 in the amount of \$2,615,051.13 with the Union County Clerk of Court. A Denial of Claim was filed by the Estate on 2 September 2010. Plaintiff purchased the loan documents from Regions Bank, which executed an assignment to Plaintiff on 30 September 2010. The outstanding balance of the loan as of 9 June 2011 was \$1,624,479.33.

The Estate's file did not contain any order approving, or otherwise authorizing, Mr. Hutaff and Mr. Moyer to enter into the guaranty. Plaintiff does not contend that Mr. Hutaff and Mr. Moyer obtained court approval to enter into the guaranty.

The Will contains the following pertinent provisions:

ITEM I

Direction to Pay Debts with Discretionary Refinancing by Executor. I direct that all my legally enforceable debts, secured and unsecured, be paid as soon as practicable after my death. I direct that my Executor may cause any debt to be carried, renewed and refinanced from time to time upon such terms and with such securities for its repayment as my Executor may deem advisable taking into consideration the best interest of the beneficiaries hereunder. If at the time of my

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death any of the real property, except [t for my residence located at 718 Eagle Point Circle, Weddington, NC 28107 (Lot #438 Lake Providence North Subdivision), herein devised is subject to any mortgage, I direct that the devisee taking such mortgaged property shall take it subject to such mortgage and that the devisee shall not be entitled to have the obligation secured thereby paid out of my general estate. I direct my Executor and Trustee to payoff and satisfy any mortgage or mortgages on my said residence, out of the assets of my Estate or Trust estate, and the same not be charged against any recipient, beneficiary, transferee or owner of any such property or, interests in property included in my estate.

. . . .

ITEM VIII

Powers for Executor. By way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to Executors generally, my Executor is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this my Will: to allot, allocate between principal and income, assign, borrow, buy, care for, collect, compromise claims, contract with respect to, continue any business of mine, convey, convert, deal with, sell or dispose of either at public or private sale, enter into, exchange, hold, improve, incorporate any business of mine, invest, lease, manage, mortgage, grant and exercise options with respect to, take possession of, pledge, receive, release, repair, sell (at public or private sale), sue for, to make distributions or divisions in cash or in kind or partly in each without regard to the income tax basis of such asset, and in general, to exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right, upon such terms and conditions as to my Executor may seem best, and to execute and deliver any and all instruments and to do all acts which my Executor may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

Item III of the Will provided that Mr. Moser's wife receive all of the household goods. Item IV of the Will provided for the remainder of the Estate to pour over into an inter-vivos trust, as follows:

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ITEM IV

Pour-Over Gift to Trustee of Testator's Inter Vivos Trust. I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situate[d] and whether acquired before or after the execution of this Will, to the successor Trustee under that certain Trust Agreement as Amended and Restated between me as Settlor and me as Trustee executed prior to the execution of this Will on the 6th day of August, 2002. My Trustee shall add the property bequeathed and devised by this Item to the principal of the above Trust and shall hold, administer and distribute the property in accordance with the provisions of the Trust Agreement, including any amendments thereto made before my death.

After he signed the Will, Mr. Moser amended the 2002 Trust Agreement several times. The most recent amendment was dated 6 June 2005 and was titled "Third Amendment and Restatement of Trust Agreement of Dan L. Moser" (the Trust Agreement). The Trust Agreement appointed Mr. Hutaff and Mr. Moyer as co-trustees.

Pursuant to the Trust Agreement, Mr. Moser's ownership interest in a business known as Carolina Golf Developers, LLC was to be distributed to Mr. Moser's sister and her children. Mr. Moser's wife was to receive Mr. Moser's residence, debt free, and the sum of \$1,000,000.00. \$500,000.00 was to be distributed to a Charitable Remainder Trust for the benefit of Mr. Moser's father during his lifetime; upon his death, the balance of the Charitable Remainder Trust was to be distributed to Mr. Moser's church, the Mineral Springs United Methodist Church (the Church).

Pursuant to the Trust Agreement, the residue of the Trust assets, including DMC, was to be distributed to the Church. The pertinent portion of the Trust Agreement provided as follows:

Residue. The rest residue and remainder of the Trust estate, after satisfying the obligations of the Trust estate as set forth above, satisfying the specific bequests and specific devises set forth above and after funding and setting aside the Trusts set forth above, shall be paid over and distributed to my Trustees to have, to hold and distribute the same, for the benefit of the **MINERAL SPRINGS UNITED METHODISTS CHURCH** in Mineral Springs, North Carolina, as follows:

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As soon as it is reasonably practicable after my death, my Trustee is to sell, at public or private sale, my non-liquid assets, which consist of, but are not limited to, certain real estate and interests in various closely held stocks and other investments, and to use the net proceeds from the sale of my assets to invest the same in readily marketable assets, including but not limited to certificates of deposit, stocks and bonds, and pay all the net income therefrom in convenient installments but no less frequently than quarterly-annually to the **MINERAL SPRINGS UNITED METHODISTS CHURCH**. In addition, my Trustee shall pay to or apply for the benefit of the **MINERAL SPRINGS UNITED METHODISTS CHURCH** such sums from the principal of this residuary trust in convenient installments but no less frequently than annually (for no more than ten years) such sums as necessary so that the entire residuary of my Trust estate shall be paid to or applied for the benefit of the **MINERAL SPRINGS UNITED METHODISTS CHURCH** on or before the eleventh anniversary of my death.

When Mr. Hutaff and Mr. Moyer resigned as co-executors of the Estate, they filed an accounting with the Union County Clerk of Court. The accounting shows that, as of 29 November 2007, the stock of DMC had not been distributed to the Trust.

II. Procedural Background

Plaintiff filed its complaint seeking to recover from the Estate the remaining principal and interest due under the promissory note and the guaranty executed by the Estate. Defendants denied their liability on the grounds that Mr. Hutaff and Mr. Moyer were not authorized by the Will, any statute, or any court to sign a guaranty on behalf of the Estate. After filing cross-motions for summary judgment, the parties stipulated to the facts recited above. The trial court concluded “as a matter of law, that [Mr.] Hutaff [and Mr.] Moyer were not authorized as [c]o-[e]xecutors of the Estate of Dan L. Moser to enter into the Guaranty Agreement . . . , [and] that the Estate of Dan L. Moser is not obligated on the Guaranty[.]” The trial court granted summary judgment in favor of Defendants. Plaintiff appeals.

III. Issues on Appeal and Standard of Review

On appeal, Plaintiff contends the trial court erred by granting summary judgment in favor of Defendants for the following reasons: (1) Mr. Hutaff and Mr. Moyer were authorized by the express authority granted in the Will and the Trust Agreement to sign a guaranty for

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the Regions Bank loan to continue DMC's real estate development business; (2) the authority granted to Mr. Hutaff and Mr. Moyer was "consistent with the applicable North Carolina General Statutes[;]" (3) the Will and the Trust Agreement did not require "the immediate liquidation of the real estate assets of DMC[;]" and (4) the guaranty agreement was enforceable against the Estate. "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 omitted).

IV. Analysis

Plaintiff first argues that the provisions of the Will and the Trust Agreement expressly authorized Mr. Hutaff and Mr. Moyer to continue DMC's real estate development business and, therefore, to sign the guaranty on behalf of the Estate. We find that the primary dispute in this case concerns the meaning and interpretation of the Will and the Trust Agreement, despite the parties' numerous additional arguments.

This Court summarized the pertinent rules for the interpretation of a will in *Hammer v. Hammer*, 179 N.C. App. 408, 410-11, 633 S.E.2d 878, 881 (2006):

"The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778 (1951). The court looks at every provision of the will, weighing each statement, and gathering the testator's intent from the four corners of the instrument. *Holland v. Smith*, 224 N.C. 255, 257, 29 S.E.2d 888, 889 (1944). Extrinsic evidence may be considered if the plain words of a provision are insufficient to identify the person or thing mentioned therein. *Redd v. Taylor*, 270 N.C. 14, 22 153 S.E.2d 761, 766 (1967). However, extrinsic evidence may not be introduced " 'to alter or affect the construction' of the will." *Britt v. Upchurch*, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990) (citations omitted).

When the court must give effect to a will provision whose language is ambiguous or doubtful, it must consider the will "in the light of the conditions and circumstances existing *at the time the will was made*." *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956) (emphasis in original). This includes consideration of the circumstances attendant, that is,

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the relationships between testator and the named beneficiaries, as well as the condition, nature and extent of the testator's property. *Id.* By taking into account these factors, the court is said to " 'put itself in the testator's armchair,' " using extrinsic evidence to see the world from the testator's viewpoint, but not to divine his intent. *Id.* at 474, 91 S.E.2d at 250 (citations omitted). Rather, intent is to be determined in accordance with the established rules of construction. *Id.* at 478, 91 S.E.2d at 253.

According to our Supreme Court, extrinsic evidence is never competent to establish the intent of the testator. *Id.*; *Britt*, 327 N.C. at 458, 396 S.E.2d at 320 (holding other extrinsic evidence admissible to identify ambiguous property, but not attorney's affidavit as to testatrix's intent); *Redd*, 270 N.C. at 23, 153 S.E.2d at 767 (holding evidence of previous affiliations and contributions competent to identify beneficiary organization, but not declarations made by testatrix). The policy behind this principle is stated succinctly: "Wills are made by testators, not by witnesses." *Thomas v. Houston*, 181 N.C. 91, 94, 106 S.E. 466, 468 (1921).

In the present case, the Will provides:

my Executor is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this my Will: to . . . *borrow*, buy, . . . *contract with respect to*, *continue any business of mine*, . . . deal with, . . . enter into, exchange, hold, improve, incorporate any business of mine, *invest*, . . . *mortgage*, grant and exercise options with respect to, . . . and in general, to exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right, upon such terms and conditions as to my Executor may seem best, and to execute and deliver any and all instruments and *to do all acts which my Executor may deem proper or necessary to carry out the purposes of this my Will*, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

(emphasis added).

We therefore find that the language of the Will clearly granted the executors the authority to bind the Estate as guarantor of the loan, if doing so was deemed "proper or necessary to carry out the purposes" of the Will. We find nothing in the Will that indicates "the purposes" of the Will. However, the Will explicitly provides that Mr. Moser made

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a gift of the “remainder of [his] property of every kind and description (including lapsed legacies and devises), wherever situate[d] and whether acquired before or after the execution of this Will, to the successor Trustee” of the Trust. Reviewing the Will in its entirety, we hold that the purpose of the Will was to make various specific gifts as described above to, *inter alia*, Mr. Moser’s wife, and then to give the remainder of Mr. Moser’s “property of every kind and description” over to the Trust to be managed by the Trustee. Thus, the purpose of the Will was not to keep the Estate open indefinitely.

N.C. Gen. Stat. § 28A-13-2 provides that:

A personal representative is a fiduciary who, in addition to the specific duties stated in this Chapter, *is under a general duty to settle the estate of the personal representative’s decedent as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances.* A personal representative shall use the authority and powers conferred upon the personal representative by this Chapter, by the terms of the will under which the personal representative is acting, by any order of court in proceedings to which the personal representative is party, and by the rules generally applicable to fiduciaries, for the best interests of all persons interested in the estate, and with due regard for their respective rights.

N.C. Gen. Stat. § 28A-13-2 (2011) (emphasis added). In the absence of any provisions of the Will to the contrary, we conclude that Mr. Hutaff and Mr. Moyer were under the statutorily provided “general duty to settle [the Estate] . . . as expeditiously . . . as [was] reasonable under all of the circumstances.” *Id.*

Plaintiff contends that

when construed in their entirety, Moser’s Will and Trust Agreement did not require immediate liquidation of the real estate assets owned by DMC, nor do the Will and Trust Agreement require the immediate sale of any undeveloped real estate assets Instead, both the Will and Trust Agreement contain provisions evidencing Moser’s express intent that his Co-Executors continue the real estate development business of DMC.

Plaintiff directs our attention to the provisions of the Trust Agreement, including the following: “[a]s soon as it is reasonably practicable after my death . . . so that the entire residuary of my Trust

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estate shall be paid to or applied for the benefit of [the church] on or before the eleventh anniversary of my death.” We are not persuaded by Plaintiff’s argument. The terms of the Trust Agreement do not speak to the authority of the co-executors of the Estate. While the provisions of the Trust Agreement do appear to contemplate the carrying on of Mr. Moser’s business, we interpret those provisions as authorizing the Trustee of the Trust to carry on Mr. Moser’s business and not the co-executors of the Estate. We note that Mr. Hutaff and Mr. Moyer signed the guaranty in their capacities as co-executors of the Estate and *not* in their capacities as trustees of the Trust. The Trust was not involved in the signing of the guaranty.

Thus, we find the Trust Agreement and the provisions therein not to be relevant to our determination of Mr. Hutaff’s and Mr. Moyer’s authority as co-executors of the Estate. Mr. Hutaff and Mr. Moyer were authorized to act only “to carry out the purposes” of the Will, and were also under a “general duty to settle [the Estate] . . . as expeditiously . . . as [was] reasonable under all of the circumstances.” N.C.G.S. § 28A-13-2. We therefore conclude that the provisions of the Will did not authorize Mr. Hutaff and Mr. Moyer to sign the guaranty on behalf of the Estate and we hold the trial court did not err in granting Defendants’ motion for summary judgment.

Affirmed.

Judges CALABRIA and GEER concur.

CHAD LEE SIDES, PLAINTIFF V. CHARITY IKNER, (NOW SMITH), DEFENDANT
V. TAMARA LEONARD, INTERVENOR

No. COA12-165

(Filed 21 August 2012)

**1. Appeal and Error—jurisdiction—intervention order—
appeal only from custody order**

The Court of Appeals did not have jurisdiction to consider an intervention order in a child custody case where the appeal was only from the custody order.

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2. Child Custody and Support—intervention by grandmother—parent acting inconsistently with rights—failure to seek custody—adherence to prior order

The trial court erred by concluding that a child's father (plaintiff) acted inconsistently with his parental rights by allowing the intervenor (the maternal grandmother) to act as a parent without taking action to obtain custody himself. The father did not intentionally create a parental role for the grandmother, but merely followed an earlier custody order that gave the father joint legal custody and secondary physical custody. The father was involved in the child's life to the full extent allowed by the prior custody order and did not know that defendant (the mother) would be moving away from the grandmother's home permanently. He stated his objection to the child remaining with the grandmother as soon as he learned of defendant's move.

Appeal by plaintiff from order entered 30 August 2011 by Judge Jacquelyn L. Lee in District Court, Harnett County. Heard in the Court of Appeals 7 June 2012.

Terry F. Rose and George R. Murphy, for plaintiff-appellant.

Cecil B. Jones, for intervenor-appellee.

STROUD, Judge.

This appeal arises from a custody dispute between plaintiff, father of Luke¹ ("Father"), the minor child, and intervenor, maternal grandmother of Luke ("Grandmother"). The trial court awarded Grandmother primary physical custody of Luke and Father secondary physical custody. Father appealed. For the following reasons, we conclude that the trial court erred in concluding that Father "acted inconsistently with [his] parental rights and responsibilities and [his] constitutionally protected status[;]" thus, this case is reversed and remanded for entry of an order consistent with this opinion.

I. Background

This case began when Father filed a complaint against Defendant, Luke's mother, seeking custody of Luke on 17 November 2006. Father and Defendant agreed to an order entered on 2 April 2007 ("2007 Custody Order") which stated "[t]hat the parties share joint legal cus-

1. A pseudonym will be used to protect the minor child's identity.

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tody with the Defendant having primary physical custody and the Plaintiff having secondary physical custody[.]” The 2007 Custody Order set forth a detailed custodial schedule for the parents that gave Father physical custody on alternating weekends and holidays such as Easter, Thanksgiving, Christmas; all Father’s Days; and four weeks in summer. The 2007 Custody Order also contained other detailed provisions regarding Luke’s physical custody which are pertinent to the issues raised in this case:

4. All exchanges of the minor child shall occur at the Lillington McDonald’s. The parties agree and consent that because of their work schedules that either of the parties spouses or family members are authorized to conduct the exchanges.
5. Neither party shall allow the minor child to call the party’s significant other “Mom”, “Dad”, or similar appellation. Nor shall either party allow any third party to refer to the party’s significant other by such appellation. Each party shall make sure that they have explained this provision to their significant other and to their family members.

. . . .

9. That the following provisions shall apply:
 - a. The parties must agree with respect to major decisions concerning the health, education, religious training, extracurricular activities and general welfare of the minor child[.]. Day to day decisions of lesser import shall be made by the party having custody of the minor child[.] at the time the need for the decision arises;
 - b. Each party shall have direct access to the health care providers, teachers, counselors and religious advisors of the minor children the same as if she or he was the sole custodian of the child[.];
 - c. Each party shall have the right to authorize medical treatment for the minor child[.]. Any party making appointments for the minor child[.] with any doctor shall notify the other party of the appointment as soon as it is made so that party may be allowed to go to the appointment. Each party shall have to provide their own transportation;
 - d. Each party shall notify the other of any emergency situation involving . . . the minor child[.] as soon as practicable;

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e. Each party shall keep the other apprised at all times of their current residence address and all telephone numbers and shall promptly notify the other of any changes to the same within 5 days of said changes. Additionally, each party shall provide the other with their address, phone numbers and a list of who resides with them on March 27, 2007 and the parties have done so.

f. Neither party shall make plans for the minor child[] or schedule activities for the minor child[] during the other party's designated times without the prior permission of the other party;

g. Neither party shall threaten to withhold the minor child[] from the other party, to extend their designated time with the minor child[] or refuse to return the minor child[] at the end of their designated time with the child[];

....

[i.] Each party shall have reasonable telephonic access to the minor child[] when in the care of the other party;

j. Each party may take the minor child[] outside of the state of North Carolina during their designated times with the child[] however, the party removing the minor child[] from the state of North Carolina shall provide to the other party prior notification of this trip and shall provide the other party with contact information for the minor child[];

k. *If either party shall relocate more than fifty (50) miles from their current residence, they shall give the other 60 days notice and the parties may motion the court to review the issues of custody or visitation if they are unable to resolve the matters between themselves;*

....

n. *Both parties shall make each and every term of this Order regarding the custody and care of the minor children known to any future spouse, the minor child[]'s grandparents, aunts and uncles, and shall encourage all such persons to act in accordance therewith.*

(Emphasis added.)

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On 28 May 2010, Grandmother filed a motion to intervene in the custody case between Father and Defendant. On 8 July 2010, Father filed a motion to modify custody and a motion to dismiss Grandmother's motion to intervene. On 4 August 2010, Grandmother filed a "SUPPLEMENT TO MOTION" to her prior motion to intervene, stating that

[a]t the time of said filing, the proposed Intervenor truly believed the Plaintiff would consent to custody being placed with her. As such, the proposed Intervenor, while properly alleging that the Plaintiff "acted inconsistently with his constitutionally protected status as a parent," intentionally did not use that specific phrase. Nor did she set forth all facts over the past two or more years that support that contention.

The supplement went on to allege the facts Grandmother claimed supported her contentions. On 1 December 2010, after a hearing, the trial court entered an order ("intervention order") allowing Grandmother's motion to intervene and denying Father's motion to dismiss Grandmother's motion to intervene.

On 2 December 2010, Grandmother filed a motion for custody. On 30 August 2011, after a hearing, the trial court entered an order ("custody order"), including the following findings of fact:

1. That the Plaintiff and Defendant are the parents of minor child namely: . . . [Luke], born May 1, 2004.
2. That the Intervenor is the maternal grandmother of the minor child and resides in Harnett County, N.C.
3. That the Plaintiff is the natural father of the minor child and resides in Rowan County, N.C.
4. On April 2, 2007 an order was entered in this cause ordering that the Plaintiff and Defendant share joint legal custody of the minor child, . . . [Luke] born on May 1, 2004 with the Defendant having primary physical custody of the minor child and the Plaintiff having secondary physical custody in the form of visitation as set forth in the April 2, 2007 order.

. . . .

7. That in approximately July of 2004 the minor child and the Defendant were dropped off at the Intervenor's house by the Plaintiff and since said date has mainly resided at the home of the Intervenor

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. . . .

9. Since the entry of the April 2, 2007 order the Plaintiff has exercised the secondary physical custody awarded him by collecting the child every other Friday from the child's school or day-care and having the child reside with him . . . for the remainder of the weekend. The Plaintiff has exercised all holiday, summer and any other secondary physical custody granted him in the April 2, 2007 order since the entry of the order to date.

10. In May 2009, the Defendant informed the Plaintiff she was joining the United States Air Force Reserves and would be traveling to the State of Georgia for basic training for approximately eight weeks. The minor child continued to reside with the Intervenor during the Defendant's absence. The Plaintiff continued to see the minor child every other weekend during that period of time.

11. That prior to leaving for Georgia on May 9, 2009, the Defendant executed an "Educational Power of Attorney" that allowed the Intervenor to enroll the minor child in school and otherwise assist the minor child in obtaining his education. The Plaintiff was unaware of this Power of Attorney.

12. That in approximately August of 2009 the Plaintiff asked the Intervenor when the Defendant would be returning from basic training

. . . .

15. . . . [T]he Plaintiff was informed by the Defendant she had not joined the United States Air Force Reserves but had joined the United States Air Force and her husband was to be stationed in Germany. The Defendant requested the Plaintiff allow her to take the minor child with her to Germany. The Plaintiff refused and informed the Defendant if she was not going to be in Harnett County to care for the child he believed the child should be with him and not the Intervenor on a regular basis. The Intervenor also objected to this move.

16. On May 28, 2010 the Intervenor filed a Motion to Intervene and a Motion for Custody.

17. On July 8, 2010 the Plaintiff filed a Motion to Dismiss the Intervention, Motion to Dismiss the Motion for Custody and Motion to Modify Custody.

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. . . .

19. On August 9, 2010 the district court in Harnett County allowed the intervention by the maternal grandmother by order filed December 1, 2010.

. . . .

31. That the Intervenor arranged for the minor child to attend school and daycare and appropriately monitors the minor child's progress at both locations, often times volunteering and attending all activities and conferences.

32. The Plaintiff is aware of, has visited and approves of the daycare facility the minor child attends before and after school. The Plaintiff is also aware of, visits when he collects the child and approves of the school in which the minor child is enrolled. The Plaintiff has communicated with the teachers of the minor child regarding his progress.

. . . .

43. That the minor child is involved in Boy Scouts, karate, and attends church at Calvary Church with Intervenor and some of her [h]usband's family members.

. . . .

46. That there are numerous family members of the Intervenor's husband that reside nearby and have a close relationship with the minor child.

. . . .

49. That the Intervenor has arranged for all medical and dental care of the minor child for the last several years and notifies the Plaintiff of various activities concerning the minor child and informs him of occasions where he is sick or is in need of medication so that the same can be given to the minor child during visitations. The minor child is relatively healthy.

50. The April 2, 2007 order set child support for the minor child. The Plaintiff has paid child support each month since the entry of the order, is current with the child support order and has never been more than one month late on child support.

51. The Plaintiff remains married to the spouse to whom he was married at the time the April 2, 2007 custody order was

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entered. The Plaintiff continues to reside in an appropriate home with his wife and her son of whom she has sole custody. The Plaintiff has another son who he has every other weekend visitation with and with who he coordinates those weekend visits with visits with this minor child so the step-brothers may have a sibling relationship. This living situation was noted in the April 2, 2007 order and has not changed since that time.

52. The Plaintiff provides health insurance for the minor child and has provided health insurance for the minor child since birth except for one eighteen month period when the Plaintiff was unemployed due to a reduction in work force with a previous employer.

The trial court concluded that although both Father and Grandmother were “fit and proper persons to exercise the care, custody and control of the minor child[.]” Father had “acted inconsistently with [his] parental rights and responsibilities and [his] constitutionally protected status as demonstrated by clear and convincing evidence.” The trial court also concluded that “[i]t is in the best interests of the minor child that the Intervenor and the [Father] share joint legal custody of the minor child with the Intervenor having primary physical custody and the [Father] having secondary physical custody[.]” Father appealed.

II. Intervention Order

[1] Father brings forth three arguments on appeal regarding the intervention order. However, in Father’s notice of appeal he only appeals from the custody order. As Father failed to appeal from the intervention order, this Court does not have jurisdiction to consider that order, and thus we dismiss these arguments. *See Zairy v. VKO, Inc.*, ___ N.C. App. ___, ___, 712 S.E.2d 392, 393 (2011) (dismissing a portion of plaintiff’s appeal pursuant to North Carolina Rules of Appellate Procedure Rule 3(d) because without a notice of appeal designating the specific orders or judgments being appealed from, this Court did not have jurisdiction to consider the argument).

III. Custody Order

[2] Father appeals the custody order essentially contending that the trial court erred in concluding that he had “acted inconsistently with his parental rights and responsibilities and his constitutionally protected status to parent his child[.]”²

2. Though Father’s brief discusses various findings of fact, the crux of his argument focuses on the trial court’s conclusion that he had acted inconsistent with his

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A. General Law on Parent's Constitutional Paramount Right

“Whether conduct constitutes conduct inconsistent with the parents’ protected status presents a question of law and, thus, is reviewable *de novo*.” *Rodriguez v. Rodriguez*, ___ N.C. App. ___, ___, 710 S.E.2d 235, 242 (2011) (citation, quotation marks, ellipses, and brackets omitted).

This Court has recognized the paramount right of parents to the custody, care, and control of their children. In *Petersen*, this Court held that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of natural parents to custody, care, and control of their children must prevail.

In *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), this Court refined the holding in *Petersen*. *Price*, as in the case at bar, involved a custody dispute between a natural parent and a third party who was not a natural parent. This Court reaffirmed the position that natural parents have a constitutionally protected right in the care, custody, and control of their children, but noted, however, that while a fit and suitable parent is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right.

Where there are unusual circumstances and the best interest of the child justifies such action, a court may refuse to award custody to either the mother or father and instead award the custody of the child to grandparents or others. There may be occasions where even a parent’s love must yield to another if after judicial investigation it is found that the best interest of the child is subserved thereby.

This Court, in *Price*, further expounded as follows:

A natural parent’s constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

constitutionally protected paramount parental status. Presumably, the Father’s focus is not on the findings of fact as most are favorable to him. Furthermore, Grandmother does not cross-appeal challenging any of the findings of fact, and thus they are binding on appeal. See *Estroff v. Chatterjee*, 190 N.C. App. 61, 71, 660 S.E.2d 73, 79 (2008) (“Findings of fact are . . . binding on appeal . . . unless assigned as error.”)

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Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child.

In *Adams v. Tessener*, this Court reviewed the earlier principles set forth in *Petersen* and *Price* and stated:

Petersen and *Price*, when read together, protect a natural parent's paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status.

...

It is clear from the holdings of *Petersen*, *Price*, and *Adams* that a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status.

David N. v. Jason N., 359 N.C. 303, 305-07, 608 S.E.2d 751, 752-53 (2005) (citations and quotation marks omitted).

B. 2007 Custody Order

In this particular case, the custody order is also a modification of the prior 2007 Custody Order. Thus, the trial court's custody order must be considered in the context of the 2007 Custody Order which governed the conduct of Father and Defendant from 2007 until the entry of the present custody order. Several provisions of the 2007 Custody Order are particularly important.

First, Father had joint legal and secondary physical custody of Luke. The 2007 Custody Order required the parties to inform Luke's "grandparents, aunts, and uncles" of "each and every term" of the 2007 Custody "Order regarding the custody and care" of Luke; thus, unless Defendant violated her duty under the 2007 Custody Order, Grandmother was also aware of the provisions of the 2007 Custody

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Order. The 2007 Custody Order also required each party to notify the other at least 60 days in advance of relocating more than 50 miles from their residence at the time of entry of the 2007 Custody Order; accordingly, Defendant was required to inform Father of her impending relocation so that the parties could try to resolve the custody situation or file a motion with the court if they were unable to do so. The 2007 Custody Order further provided that other family members were allowed to conduct the exchanges of Luke. Thus, the 2007 Custody Order set out a comprehensive custodial plan which sought to protect the rights of both parents and their relationships with Luke but also permitted participation by third parties, such as Grandmother.

C. Grandmother's Contentions

Grandmother's primary argument on appeal centers on her contention that Father "allowed for the Intervenor to act as the parent of this minor child for most of his life without taking action to obtain custody himself." Grandmother's argument overlooks one very important fact: Father had joint legal and secondary physical custody of Luke under the 2007 Custody Order. In addition, according to the trial court's custody order which Grandmother did not appeal from, Father had met his child support obligations and "exercised *all* holiday, summer and any other secondary physical custody granted" by the 2007 Custody Order, despite the fact that he resided about 115 miles from Grandmother's home.³ (Emphasis added.)

3. We take judicial notice that based upon Father's and Grandmother's addresses provided in the record, Father and Grandmother live approximately 115 miles apart from one another. *State v. Saunders*, 245 N.C. 338, 342-43, 95 S.E.2d 876, 879 (1957) ("[W]e think the court should have taken judicial notice of these distances without proof. In the early case of *Furniture Co. v. Southern Express Co.*, 144 N.C. 639, 57 S.E. 458, decided in 1907, this Court said: It is generally held that the courts will take judicial notice of the placing of the important towns within their jurisdiction and especially of county seats and their accessibility by railroads connecting them with trunk lines of the country; and there is well considered authority to the effect that courts may also take such notice of the distance to prominent business centers of other states, etc. A much stronger case for taking such notice can be made out today when almost every town in the country is connected by a ribbon of concrete or asphalt over which a constant stream of traffic flows. Every filling station has maps available to the traveler without charge. Highway signs at road crossings give both distance and direction. In fact, so complete and so general is the common knowledge of places and distances that the court may be presumed to know the distances between important cities and towns in this State and likewise in adjoining states." (quotation marks and ellipses omitted)).

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In other words, Father had complied with the 2007 Custody Order; Defendant had not complied. In particular, as the trial court found, Defendant concealed the fact that she had joined the United States Air Force and that she would be moving to Germany until December of 2009. In May of 2009,⁴ prior to going to basic training, “Defendant executed an ‘Educational Power of Attorney’ that allowed the Intervenor to enroll the minor child in school[;]” “Plaintiff was unaware of this Power of Attorney.” Under the 2007 Custody Order, Father had an equal right to make educational decisions for Luke, and Defendant did not actually have the legal authority to grant the power of attorney without his participation. As such, due to Defendant’s and Grandmother’s actions, Father was deprived of the opportunity to participate fully in decisions regarding Luke’s education.

Though Grandmother may have largely provided for the day-to-day care of Luke, Father reasonably engaged in Luke’s care when taking into consideration the distance between them and the 2007 Custody Order in place. Even so, Grandmother argues that Father’s delay in seeking to modify custody, even after learning that she, not Defendant, was the one who was primarily caring for Luke, was a relinquishment of Father’s “constitutionally protected right to the control of his child[.]” *David N.*, 359 N.C. at 307, 608 S.E.2d at 753. Grandmother contends that

[b]etween May, 2009 and May, 2010 the Plaintiff never indicated that he was dissatisfied with the minor child remaining with the Intervenor or that he intended to remove this child from her residence. If a parent cedes paramount decision making authority, then so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his paramount parental status. *Boseman v. Jarrell*, 364 N.C. 537, 552, 704 S.E.2d 494, 504 (2010)[.] The trial court should look at the intentions and conduct of the parents towards the third person to determine whether there has been created a permanent parent like relationship with their child. *Estroff v. Chatterjee*, 190 N.C. App. 61, 70, 660 S.E.2d 73, 78-79 (2008)[.] This court has recognized that acts inconsistent with a parent’s constitutionally protected status may include failure to resume custody when able. *Price*, 346 N.C. at 84, 484 S.E.2d at 537[.]

Plaintiff allowed for the Intervenor to act as the parent of this minor child for most of his life without taking action to obtain custody himself.

4. Luke’s fifth birthday was May 1, 2009.

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Thus, Grandmother contends that Father knowingly relinquished his parental rights and allowed her to assume a parental role as he permitted Luke to remain in her home when Defendant was absent from Grandmother's home.

D. Law on Third Parties Acting as Parents

Price v. Howard addresses the circumstances under which a parent may lose his constitutionally protected right to custody by a voluntary relinquishment of those rights by allowing a third party to assume a parental role. *Price v. Howard*, 346 N.C. 68, 83-84, 484 S.E.2d 528, 537 (1997). In *Price*, the child's mother "represented to the child and to others that plaintiff was the child's natural Father. She chose to rear the child in a family unit with plaintiff being the child's *de facto* father." *Id.* at 83, 484 S.E.2d at 537. The Supreme Court ultimately remanded the case to the trial court as there was a dispute as to

whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite and whether she informed plaintiff and the child that the relinquishment of custody was temporary. This is an important factor to consider, for, if defendant had represented that plaintiff was the child's natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.

However, if defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status.

We wish to emphasize this point because we recognize that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment. However, to preserve the constitutional protection of parental interests in such

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a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include failure to maintain personal contact with the child or failure to resume custody when able.

Id. at 83-84, 484 S.E.2d at 537 (citation omitted).

In *Boseman v. Jarrell*, our Supreme Court discussed *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), a case which relied upon *Price*, where the parent intentionally created a family unit which included a nonparent:

In *Mason* the parties jointly decided to create a family and intentionally took steps to identify the nonparent as a parent of the child. These steps included using both parties' surnames to derive the child's name, allowing the nonparent to participate in the pregnancy and birth, and holding a baptismal ceremony at which the nonparent was announced as a parent. After the child's birth, the parties acted as a family unit. They shared caretaking and financial responsibilities for the child. As a result of the parties' creation, the nonparent became the only other adult whom the child considers a parent.

The parent in that case also relinquished custody of the minor child to the nonparent with no expectation that the nonparent's relationship with the child would be terminated. The parent chose to share her decision-making authority with the nonparent. The parent also executed a Parenting Agreement in which she agreed that the nonparent should participate in making all major decisions regarding their child.

364 N.C. 537, 551, 704 S.E.2d 494, 503 (2010) (citations, quotation marks, and brackets omitted). In *Boseman*, the Supreme Court went on to consider whether the child's parent had lost her constitutionally protected parental status by intentionally creating a family unit which included another:

The record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act-and acted-as a parent. The parties jointly decided to bring a child into their relationship, worked together to conceive a child, chose the child's first name to-

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gether, and gave the child a last name that is a hyphenated name composed of both parties' last names. The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. Defendant even agrees that plaintiff is and has been a good parent.

Moreover, the record indicates that defendant created no expectation that this family unit was only temporary. Most notably, defendant consented to the proceeding before the adoption court relating to her child. As defendant envisioned, the adoption would have resulted in her child having two legal parents, myself and plaintiff.

364 N.C. at 552, 704 S.E.2d at 504 (quotation marks and brackets omitted).

In *Rodriguez*, the paternal grandparents sought custody of their grandchildren after the death of the children's father and after the children were temporarily removed from the mother's custody by the Department of Social Services. ___ N.C. App. at ___, 710 S.E.2d at 237. In reversing the trial court's order granting visitation to the grandparents we noted,

Accordingly, relevant to the case-by-case determination to be made here are defendant's volitional acts involved in the placement of her children with DSS. In fact, the specific question to be answered in cases such as this one is: Did the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child? In answering this question, it is appropriate to consider the legal parent's intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.

Thus the court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. The parent's intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the

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legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.

However, our Supreme Court has recognized that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody.

Yet in this case, defendant did not voluntarily choose to cede any parental authority to another party; DSS filed a juvenile petition and removed the children from her custody.

Id. at ____, 710 S.E.2d at 242-44 (citations, quotation marks, ellipses, and brackets omitted).

E. Analysis

In this case also, we must consider “the legal parent’s intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.” *Id.* at ____, 710 S.E.2d at 242. The trial court here made findings of fact which demonstrate the intentions of the Father. The relationship with Grandmother, for purposes of this action, was formed when Father entered into the 2007 Custody Order which granted primary physical custody of Luke to Defendant, who “mainly resided” at Grandmother’s home since 2004. The 2007 Custody Order specifically set forth that “family members” would assist with exchanges of Luke due to the parent’s work schedules. The 2007 Custody Order very clearly granted custodial rights and decision-making authority to Father and Defendant only. Here, the primary family unit was clearly intended to be Father, Defendant, and Luke, with Grandmother as a part of the extended family, as any Grandmother would be a part of her grandchild’s life. Thus, this case is entirely different from *Price* and *Boseman*, where one parent intentionally created a family unit which included a person who was not a biological parent of the child. *See Boseman*, 364 N.C. at 552, 704 S.E.2d at 504; *Price*, 346 N.C. at 83, 484 S.E.2d at 537. As Father here was merely following the 2007 Custody Order, we cannot determine that Father chose to create parental relationship between Grandmother and Luke.

Furthermore, as to the time Luke lived with Grandmother while Defendant was away from the home, we note that Grandmother primarily cared for Luke not through any voluntary act by Father, but

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rather because, unbeknownst to Father, Defendant left Grandmother's home with the intent for Grandmother, not Father, to assume primary care of Luke. During this time, Father did not fail to maintain contact with Luke, but rather was involved in Luke's life to the full extent allowed by the 2007 Custody Order. As the trial court found, Father did not know that Defendant would be moving to Germany permanently until December 2009, and Defendant requested that Father allow Luke to remain with Grandmother, but Father "refused and informed the Defendant that if she was not going to be in Harnett County to care for the child he believed the child should be with him and not the Intervenor on a regular basis." Accordingly, Father did not voluntarily relinquish custody of Luke to Grandmother during the time that Defendant was gone. Instead, as soon as Father learned that Defendant would be permanently moving away from Grandmother's home, he stated his objection to having Luke remain with Grandmother.

In summary, this case falls squarely within the situation warned of by this Court in *Rodriguez*, which observed that "[b]y looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent." *Rodriguez*, ___ N.C. App. at ___, 710 S.E.2d at 242. The findings of fact demonstrate that Father never intentionally chose to create a parental role for Grandmother, nor did he voluntarily relinquish primary custody of Luke to her; instead, Grandmother "assumed a parent-like status on . . . her own without that being the goal of" Father. *Id.* In such a case, we cannot conclude that Father acted inconsistently with his constitutionally protected paramount parental status.

IV. Conclusion

As the trial court erroneously concluded that Father "acted inconsistently with [his] parental rights and responsibilities and [his] constitutionally protected status[,]" we reverse this conclusion of law and the trial court's order to the extent that it awards joint legal custody and primary physical custody to Grandmother. As Defendant did not appeal from this order, the trial court's conclusion that she "acted inconsistently with [her] parental rights and responsibilities and [her] constitutionally protected status[,]" is not affected by this opinion. Accordingly, we remand for entry of an order granting full legal and physical custody to Father and otherwise consistent with this opinion.

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REVERSED and REMANDED.

Judges CALABRIA and McCULLOUGH concur.

TINA SMITH, PLAINTIFF v. ARTHUR AXELBANK, M.D.; ORANGE FAMILY MEDICAL GROUP A/K/A ORANGE FAMILY MEDICAL GROUP, INC. A/K/A ORANGE FAMILY MEDICAL GROUP, P.A., AND ARTHUR AXELBANK D/B/A ORANGE FAMILY MEDICAL GROUP, P.A., DEFENDANTS

No. COA12-150

(Filed 21 August 2012)

1. Medical Malpractice—required certification—res ipsa loquitur—allegations not sufficient

The trial court did not err by dismissing a medical malpractice action pursuant to N.C.G.S. § 1A-1, Rule 9(j) for failure to include the required certification or to allege facts establishing negligence under *res ipsa loquitur*. The alleged negligence arose from the prescription of a drug and a layperson would not be able to determine whether plaintiff's injury was caused by the drug or whether the doctor was negligent in prescribing it. Statements by the doctor that plaintiff's symptoms were caused by the drug and that he felt responsible were not sufficient for a layperson to infer negligence.

2. Appeal and Error—constitutional issue—ruling not requested in trial court—dismissed

The issue of whether N.C.G.S. § 1A-1, Rule 9(j) is constitutional was not preserved for appellate review where it was raised in plaintiff's complaint but her counsel specifically stated at the dismissal hearing that he was not requesting a ruling on the issue.

3. Pleadings—Rule 11—medical malpractice—extension of time to find expert

Although the Court of Appeals expressly did not address the issue of whether the trial court erred by concluding that plaintiff's motion to extend the statute of limitations in a medical malpractice action violated N.C.G.S. § 1A-1, Rule 11(a), the Court noted that a plaintiff may in good faith seek an extension to obtain an expert and be unable to do so, should not be penalized, and should be able to then file a claim under *res ipsa loquitur*.

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Plaintiff's Judge James E. Hardin, Jr., in Orange County Superior Court. Heard in the Court of Appeals 6 June 2012.

Bourlon & Davis, P.A., by John M. Bourlon and Camilla J. Davis for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendants-appellees.

HUNTER, Robert C., Judge.

Tina Smith ("plaintiff") appeals from the dismissal of her medical malpractice claim against Arthur Axelbank, M.D. ("Dr. Axelbank"), Orange Family Medical Group a/k/a Orange Family Medical Group, Inc. a/k/a Orange Family Medical Group, P.A., and Arthur Axelbank d/b/a Orange Family Medical Group, P.A. (collectively "defendants"). Plaintiff argues the trial court erred in dismissing her complaint for failure to comply with the pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j) and the statute of limitations pursuant to N.C. Gen. Stat. §§ 1-15(c) and 1-52. Plaintiff also contends the trial court erred in concluding she failed to state a claim under the doctrine of *res ipsa loquitur* and by dismissing her argument that the certification requirement of Rule 9(j) is unconstitutional without making any findings of fact or conclusions of law to support the dismissal. Furthermore, plaintiff argues the trial court erred in concluding that her motion to extend the statute of limitations was not made in good faith or for a proper purpose and was in violation of N.C. Gen. Stat. § 1A-1, Rule 11(a). After careful review, we affirm the dismissal of plaintiff's complaint for failure to comply with the pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j).

Background

Plaintiff was treated by her primary caregiver, defendant Dr. Axelbank of Orange Family Medical Group, for a number of years until 2007. Dr. Axelbank prescribed to plaintiff the drug Seroquel beginning on 23 February 2005. In early 2005, plaintiff claims she began to suffer from urological problems and related health issues, which intensified in frequency and pain until September of 2007. During a visit with Dr. Axelbank on 24 August 2007, plaintiff told him that she suspected that Seroquel had caused her years of pain and suffering. Following this visit with Dr. Axelbank, the doctor allegedly sent plaintiff a letter in which plaintiff claims he stated: "[You] suffered with side effects from medication that you were on for so many

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months. I feel responsible for adding an extra problem to someone who certainly did not need one more.” Plaintiff also alleges that her medical records revealed that Dr. Axelbank admitted “ ‘she is right.’ ” On 11 September 2007, plaintiff visited a urologist to whom she had been referred by Dr. Axelbank. Plaintiff alleges the urologist concluded that the symptoms plaintiff complained of were a result of the Seroquel.

In September 2010, in preparation for filing a medical malpractice claim against defendants, plaintiff filed a motion in Orange County Superior Court seeking an extension of the statute of limitations for additional time to retain an expert witness in order to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j). The motion was granted by Judge Ronald L. Stephens, extending the statute of limitations until 10 January 2011.

Plaintiff filed her complaint on 10 January 2011 alleging defendants committed medical malpractice and, alternatively, negligence under the doctrine of *res ipsa loquitur*. The complaint did not allege plaintiff’s medical care had been reviewed by an expert prior to filing; however, plaintiff included a statement that she could not afford to retain an expert witness. On 9 March 2011, defendants moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 9(j).

On 15 April 2011, the Honorable James E. Hardin, Jr. dismissed plaintiff’s complaint concluding that the complaint was filed more than three years after the cause of action arose and without a valid extension of the statute of limitations; thus, plaintiff’s complaint was not timely filed pursuant to N.C. Gen. Stat. §§ 1-15(c) and 1-52. In the alternative, the trial court dismissed plaintiff’s complaint for failure to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j), concluding that plaintiff failed to include the expert witness certification required by Rule 9(j)(1) and (2); and did not comply with Rule 9(j)(3) as she failed to allege facts establishing negligence under the doctrine of *res ipsa loquitur*, necessitating dismissal of that claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The trial court further found that plaintiff’s motion to extend the statute of limitations violated N.C. Gen. Stat. § 1A-1, Rule 11(a), concluding that plaintiff did not request the extension in good faith or for a proper purpose. Plaintiff timely filed written notice of appeal.

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Discussion**I. Rule 9(j) Compliance**

[1] “[A] plaintiff’s compliance with [N.C. Gen. Stat. § 1A-1,] Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*.” *Phillips v. Triangle Women’s Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (internal citation omitted), *aff’d per curiam*, 357 N.C. 576, 597 S.E.2d 669 (2003).

A. Expert Witness Certification

Plaintiff argues the trial court erred in dismissing her complaint based on her failure to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j) because her complaint lacked a certification that her medical care had been reviewed by an expert witness prior to filing. We disagree.

Rule 9(j) states that a complaint alleging medical malpractice shall be dismissed unless a plaintiff asserts in her complaint that her medical care has been reviewed by a person who is willing to testify that the medical care did not comply with the applicable standard of care, and that this person must be reasonably expected to qualify as an expert witness under N.C. Gen. Stat. § 8C-1, Rule 702 or must be a person the plaintiff will seek to have qualified as an expert witness under N.C. Gen. Stat. § 8C-1, Rule 702(e). N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)-(2) (2011). Alternatively, a plaintiff must allege facts establishing negligence under the doctrine of *res ipsa loquitur*. N.C. Gen. Stat. § 1A-1, Rule 9(j)(3). In order to comply with these requirements, Rule 9(j) allows the trial court to grant a party’s motion to extend the statute of limitations by up to 120 days “upon a determination that good cause exists” and “that the ends of justice would be served by an extension.” N.C. Gen. Stat. § 1A-1, Rule 9(j).

Here, plaintiff failed to obtain the required certification that her medical care had been reviewed by a medical expert before filing her complaint. Therefore, plaintiff’s claim must be dismissed unless she alleged facts establishing negligence under the doctrine of *res ipsa loquitur*, which she failed to do, as discussed below. *See Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166 (2002) (affirming the trial court’s dismissal of the plaintiff’s medical malpractice complaint for failure to include any medical expert certification in her complaint despite receiving a 120-day extension of the statute of limitations).

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B. *Res Ipsa Loquitur*

Plaintiff further argues that the trial court erred in dismissing, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), her claim of negligence under the doctrine of *res ipsa loquitur* as she contends Dr. Axelbank's negligence can be inferred without the benefit of expert testimony. We disagree.

A motion to dismiss a complaint pursuant to Rule 12(b)(6) "tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (internal citation omitted). *Res ipsa loquitur* is a doctrine to be applied in those situations where

the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of [the] defendant. It is applicable when no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of [the] defendant, and the injury is of a type that would not normally occur in the absence of negligence.

Bowlin v. Duke Univ., 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992).

For the doctrine to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience. *Diehl v. Koffer*, 140 N.C. App. 375, 378-79, 536 S.E.2d 359, 362 (2000); see *Bowlin*, 108 N.C. App. at 149-50, 423 S.E.2d at 323 (concluding that the doctrine of *res ipsa loquitur* was inappropriate where a layperson, without the benefit of expert testimony, would have no basis for concluding the physician was negligent in extracting bone marrow merely because the plaintiff's nerve was injured during the procedure); *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991) (holding that the doctrine of *res ipsa loquitur* did not apply in a case involving a tear in the plaintiff's uterus during a caesarean section because a layperson would not be able to determine that the force exerted by the physician during the procedure was improper or excessive). Here, a layperson would not be able to determine that plaintiff's injury was caused by Seroquel or be able to determine that Dr. Axelbank was negligent in prescribing the medication to plaintiff without the benefit of expert witness testimony.

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Plaintiff argues that a jury could infer Dr. Axelbank's negligence based on the letter he allegedly sent to plaintiff following her last visit with him and based on his alleged statement that " 'she is right.' " Even though we treat plaintiff's allegations as true, Dr. Axelbank's statements to the effect that plaintiff's symptoms were caused by the drug and that he felt responsible do not give a layperson sufficient evidence to infer the doctor was negligent in prescribing Seroquel to plaintiff. It is unclear whether this type of injury ordinarily occurs without negligence by the physician, and this inquiry would require expert testimony. Furthermore, "no presumption can arise from the mere result of a treatment upon the theory that it was not satisfactory or less than could be desired, or different from what might be expected." *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941).

Because expert testimony is required for a jury to infer that Dr. Axelbank was negligent in prescribing the medication, plaintiff has not sufficiently alleged facts establishing negligence under the doctrine of *res ipsa loquitur*. Therefore, the trial court did not err by dismissing plaintiff's complaint.

II. Constitutionality of Rule 9(j)

[2] Plaintiff contends the trial court erred in dismissing her argument that the certification requirement of Rule 9(j) is unconstitutional without making any findings of fact or conclusions of law to support the dismissal. However, plaintiff did not properly preserve this issue for appeal. N.C. R. App. P. 10(a)(1) (2012).

Rule 10(a)(1) requires the complaining party to obtain a ruling upon the party's timely request, objection, or motion in order to preserve an issue for appellate review. *Id.*; see *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citing N.C. R. App. P. 10(b)(1) (now codified as N.C. R. App. P. 10(a)(1)) and declining to consider an argument that was not presented to or adjudicated by the trial court), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). " 'Even alleged errors arising under the Constitution of the United States are waived if [the complaining party] does not raise them in the trial court.' " *Haselden*, 357 N.C. at 10, 577 S.E.2d at 600 (quoting *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996)).

Although plaintiff alleged the certification requirements of Rule 9(j) were unconstitutional in her complaint, during the hearing on defendants' motion to dismiss, plaintiff's counsel specifically stated that he was not requesting a ruling on that issue:

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THE COURT: Let me make sure I'm clear. You are not asking me to declare whether it is Constitutional or not at this point given that—

[PLAINTIFF'S COUNSEL]: At this point, no, I am not, Your Honor. However, I believe that for purposes of this hearing I will have to hand you one case I do want the Court to be aware of with respect to that, even though I'm not asking the Court to make any determination at this point of 9(j).

Because plaintiff's counsel did not request a ruling on this issue at the hearing, this issue was not properly preserved for appellate review.

III. Remaining Issues

[3] Because we conclude the trial court did not err in dismissing plaintiff's complaint for failure to comply with the pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j), we need not address plaintiff's argument that the trial court erred by concluding her motion to extend the statute of limitations violated N.C. Gen. Stat. § 1A-1, Rule 11(a).¹ Similarly, we need not reach plaintiff's argument regarding whether she complied with the statute of limitations pursuant to N.C. Gen. Stat. §§ 1-15(c) and 1-52.

Conclusion

In summary, we conclude the trial court did not err in dismissing plaintiff's complaint for failure to comply with the pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j) by not including the required certification in her complaint and by failing to allege facts establishing negligence under the doctrine of *res ipsa loquitur*.

AFFIRMED.

Judges GEER and BEASLEY concur.

1. The trial court concluded plaintiff's motion for an extension of the statute of limitations was not made in good faith or for a proper purpose because her complaint did not allege that she made a good faith effort to obtain an expert witness certification. However, we note that if plaintiff had alleged facts that established negligence under the doctrine of *res ipsa loquitur*, the extension would not have been obtained for an improper purpose. A plaintiff may seek, in good faith, an extension of the statute of limitations in order to retain an expert and yet be unable to do so. Such plaintiff should not be penalized for failing to obtain an expert witness certification and should be able to then file a claim under the doctrine of *res ipsa loquitur*.

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[222 N.C. App. 562 (2012)]

STATE OF NORTH CAROLINA v. LARRY DAVID DAVIS, II, DEFENDANT

No. COA11-591

(Filed 21 August 2012)

1. Indecent Liberties—Bill of Particulars—supported by evidence

The trial court did not err by not dismissing indecent liberties charges where defendant contended that the Bill of Particulars indicated that the State was relying only on touching, about which there was no testimony. The Bill of Particulars referred to fellatio and anal intercourse and defendant did not dispute that there was sufficient evidence of those charges.

2. Evidence—composition book entry by defendant—dissimilar from crime

The trial court erred in a prosecution for first-degree sexual offense with a child and indecent liberties with a child by admitting evidence of a composition book entry by defendant regarding forcible anal sex. The circumstances described in the writing and in the charged crime were strikingly dissimilar in that they involved different genders, radically different ages, different relationships between the parties, and different types of force.

3. Evidence—inadmissible expert evidence—admitted through cross-examination

The trial court erred in a prosecution for first-degree sexual offense and indecent liberties with a child by admitting inadmissible expert evidence concerning an evaluation of defendant from a child custody case through cross-examination. Although the State contended that defendant opened the door, defendant did not do so by testifying on re-direct after the State's cross-examination on the subject or introducing visitation orders through the testimony of an assistant clerk of court which did not refer to an opinion of the expert in the custody case, and N.C.G.S. § 8C-1, Rule 608 was not applicable because none of the questions related to defendant's truthfulness.

4. Evidence—erroneous entry of writing and expert assessment of defendant—prejudicial

Given the other evidence, there was prejudice in a prosecution for first-degree sexual offense with a child and indecent lib-

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erties with a child in the erroneous admission into evidence of a composition book entry concerning non-consensual anal intercourse and an expert assessment of psychopathic deviancy.

Appeal by defendant from judgments entered 28 September 2010 by Judge Milton F. Fitch, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

M. Alexander Charns for defendant-appellant.

GEER, Judge.

Defendant Larry David Davis, II appeals from his conviction of two counts of first degree sexual offense with a child and two counts of indecent liberties with a child. On appeal, defendant raises numerous challenges to the trial court's admission and exclusion of evidence. Based on our review of the record, we hold that the trial court erred under Rule 404(b) of the Rules of Evidence in admitting evidence of defendant's writings about forcible, non-consensual anal sex with an adult female acquaintance and erred in allowing the State to ask defendant on cross-examination questions that summarized the results of a psychological evaluation not admitted into evidence that described defendant as a psychopathic deviant. Further, we believe that there is a reasonable possibility that in the absence of these errors, the jury would have reached a different verdict. We, therefore, grant defendant a new trial.

Facts

The State's evidence tended to show the following facts. Defendant and Ms. Rebecca Allen, who were married, had a son, Luke,¹ who was born on 4 March 2002. Since both parents worked, Luke was cared for during the day by Ms. Allen's aunt, Sherry Allen.

In March 2006, when Luke was four, he told Sherry that "my daddy stuck his pee-bug in my butt." Sherry called Ms. Allen at work and told her what Luke had said. Ms. Allen was unsure what to do, but got an appointment for Luke with his pediatrician for the next morning. The pediatrician called the Johnston County Department of Social Services ("DSS"), and, after meeting with DSS, Ms. Allen and

1. The pseudonym "Luke" is used throughout this opinion to protect the minor's privacy and for ease of reading.

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Luke stayed the night at Sherry's house to give defendant time to remove his belongings from the marital home. Luke then went to a medical evaluation in Raleigh. Nothing abnormal was found during his physical examination. Luke also denied, during the exam, any sexual contact or sexual touching.

About a week after the 2006 incident, Ms. Allen filed for divorce and sole custody. Defendant did not have any contact with Luke between March and December 2006. He was then allowed supervised visits. In the middle of 2007, defendant was allowed unsupervised visitation during the day.

In June 2008, Luke came home from an unsupervised visit and told his mother that "his father had put his pee-bug in his butt and his mouth again." Ms. Allen took Luke to the emergency room that night. The medical personnel took Luke's clothes and obtained a rape kit. The emergency room physician did not see any physical evidence of trauma, and no semen or sperm were found on "the rectal smears and swabs" taken from Luke. Sperm was found, however, on Luke's underpants in an area consistent with a sex offense involving penetration of a child's anus. The DNA profile matched that of defendant.

Defendant was indicted for two counts of indecent liberties with a child and two counts of first degree sexual offense with a child. He was also indicted for two counts of sexual offense in a parental role and two counts of felony child abuse involving a sexual act, but those charges were dismissed prior to trial.

Luke testified at trial that defendant put his pee-bug into Luke's butt and mouth and that it hurt. The State also introduced evidence by Luke's mother, Luke's great aunt and great uncle, several nurses and doctors who examined Luke, two DSS employees, and a sheriff's detective who testified, in corroboration, about what Luke had told them.

Defendant's sister and his mother testified that defendant and Luke had a good relationship and would play outside a lot. Defendant's sister testified that Luke once asked her why she did not "believe what [his] mom says." Luke also told defendant's sister that his mother told him that the reason he was not allowed to see his father was because he "tells lies all the time and said that he tells lies to the Judge."

Defendant's mother testified that on one visit, Luke had questioned her as to why defendant could not live with him anymore. When told it was because of things Luke was saying about defendant, Luke told her that he "said that because my mommy told me to."

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Defendant's mother also testified that on another occasion when she was speaking on the phone with Luke, Ms. Allen told Luke to tell "what your daddy did, go ahead, you can tell her, tell her, and he said, no. And she said, you can tell her, go ahead and tell her what he did."

Defendant also testified in his own defense, denying all allegations that he had sexually assaulted his son or had other inappropriate contact with his son. Defendant testified that Ms. Allen mentioned divorce starting in the summer of 2005 and again mentioned divorce the week before the 2006 allegations that he had sexual contact with his son. According to defendant, the couple's disagreements during their marriage came from defendant not wanting Ms. Allen's family drinking and "smoking dope" around Luke. Defendant did not like Sherry, Ms. Allen's aunt, taking care of Luke because Sherry exposed Luke to inappropriate behaviors.

Defendant testified that after they separated, Ms. Allen fought every request for additional visitation. He was not able to see his son at all from March to December 2006 and, subsequently, visitation was supervised, one hour every other week. By the time of the allegations in 2008, defendant was having unsupervised visitation with his son every other weekend, Saturday 9:00 a.m. to 5:00 p.m., Sunday from 9:00 a.m. to 5:00 p.m., and every Wednesday evening from 5:00 p.m. to 7:00 p.m. Less than a month before the allegations were made, defendant had a conversation with Luke about staying over on Saturday nights.

On cross-examination, the State questioned defendant about writings in a composition book that belonged to defendant but that had an inscription indicating it belonged to "Kevin Connolly." While the State contended that the composition book contained defendant's journal entries, defendant testified that the writing was fictional and included short stories he had written set in 1868 and 1948. The book included a description of anal intercourse being forced on an adult woman.

The jury convicted defendant of all the charges on 28 September 2010. The trial court sentenced defendant (1) to a term of 240 to 297 months imprisonment for one count of first degree sexual offense, (2) to a consecutive sentence of 240 to 297 months imprisonment for the second count of first degree sexual offense, (3) to a consecutive sentence of 16 to 20 months imprisonment for one count of indecent liberties with a child, and (4) to a sentence of 16 to 20 months imprisonment for the second count of indecent liberties with a child that was to run concurrently with the first sexual offense sentence. Defendant timely appealed to this Court.

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I

[1] We first address defendant's contention that the trial court erred in denying his motion to dismiss the indecent liberties charges. The question for the Court is " 'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 913, 918-19 (1993)).

Defendant argues that the State's Bill of Particulars indicated that with respect to those charges, the State was only relying on touching and not anal sex and that Luke did not testify about any touching. The State "is limited to the items set out in the bill of particulars." N.C. Gen. Stat. § 15A-925(e) (2011).

In this case, the Bill of Particulars states that "the conduct alleged in 09crs 55971 [sic] and 09crs 5811 [sic] (date of offense June 15, 2008) is anal intercourse. And the conduct alleged in 09crs 55972 [sic] and 09crs 5812 [sic] (date of offense June 14, 2007 through June 14, 2008) is fellatio." The indecent liberties charges were 09 CRS 5811 and 09 CRS 5812, with one count based on anal intercourse and one on fellatio. Defendant does not dispute that the State presented sufficient evidence of anal intercourse and fellatio. The trial court, therefore, properly denied the motion to dismiss.

II

[2] Defendant next contends that the trial court erred, under Rule 404(b), in admitting defendant's writings regarding forcible anal sex. The entry in the composition book, which was in the form of a letter to a woman defendant had known, read: "[Y]ou thought I was going to kiss your neck until you felt my penis on your back, you said, no, don't, please, that's when I put you on the bed, held you down with one hand and used my other to put my penis in your butt." He continued: "I wanted to say I'm sorry when I raped you . . ." Defendant was cross-examined and the composition book was admitted over defendant's objection. The specific pages referenced by the State were published to the jury. While defendant contended the composition book was fiction, the State argued that the described events actually occurred.

Our Supreme Court recently clarified the standard of review applicable to evidentiary rulings under Rules 403 and 404(b):

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[W]e now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, ___ N.C. ___, ___, 726 S.E.2d 156, 159 (2012).

Here, the trial court admitted the composition book entry on the grounds that “it shows a pattern,” apparently assuming that the entry described an actual event. On appeal, the State argues in addition that the written material was relevant to prove intent and sexual gratification, an element of the indecent liberties offense. *See* N.C. Gen. Stat. § 14-202.1 (2011).

We assume that by referencing “a pattern,” the trial court meant that the composition book showed a common plan or scheme. We have found no authority—and the State has cited none—suggesting that “a pattern,” without more, is a proper purpose. Instead, evidence of a pattern may be relevant to the purpose of showing a common plan or scheme. *See, e.g., State v. Williams*, 355 N.C. 501, 563, 565 S.E.2d 609, 645 (2002) (“[The witness’] testimony concerning the choking incidents between herself and defendant were admissible under Rule 404(b) in order to show motive, plan, common scheme, and intent, as the trial court found, since defendant had shown a pattern of choking his victims.”).

The Supreme Court in *Beckelheimer* emphasized that although “it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity.” ___ N.C. at ___, 726 S.E.2d at 159 (internal quotation marks omitted). Although similarities need not be unique and bizarre, “[p]rior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them.” *Id.* at ___, 726 S.E.2d at 159 (internal quotation marks omitted).

Here, the State sought to introduce evidence that defendant wrote about having non-consensual anal intercourse with an adult woman whom he knew. The charges in this case, however, involved anal penetration of defendant’s six-year-old son. The only overlapping fact is anal intercourse.

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In *State v. Dunston*, 161 N.C. App. 468, 469, 588 S.E.2d 540, 542 (2003), the defendant was found guilty of first degree sex offense with a child and taking indecent liberties with a child. On appeal, defendant argued that the trial court erred in admitting his wife's testimony that she and defendant engaged in anal sex. *Id.* This Court found that "the fact defendant engaged in and liked consensual anal sex with an adult, whom he married, is not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both, i.e., they both involve anal sex, to be admissible under Rule 404(b)." *Id.* at 473, 588 S.E.2d at 545. Finding the evidence "was not relevant for any purpose other than to prove defendant's propensity to engage in anal sex," this Court rejected the State's contentions regarding purpose and held the trial court erred in admitting the testimony. *Id.*

The only distinction between *Dunston* and this case is that the anal sex with an adult reported in the composition book was non-consensual. Yet, the actual force used with the adult in the composition book is not analogous to the constructive force theory that applies with sexual conduct between a parent and a child. *See State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987) ("The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.").

While "the Court has been markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b), . . . [n]evertheless, the Court has insisted the prior offenses be similar and not too remote in time." *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419-20 (1986). Here, apart from the fact that anal intercourse was involved, the acts bore no resemblance to each other, involving different genders, radically different ages, different relationships between the parties, and different types of force.

The State has cited no case, and we have found none, in which our appellate courts have upheld the admission of evidence so lacking in similarities. By way of comparison, in *State v. Brown*, ___ N.C. App. ___, ___, 710 S.E.2d 265, 269-70 (2011), *aff'd per curiam*, ___ N.C. ___, 722 S.E.2d 508 (2012), this Court considered the admissibility of pornography showing incestuous sexual acts ("Family Letters") in a prosecution for sexual offenses committed by a father on his daughter. While the Court noted that prior decisions had concluded that a defendant's possession of general pornography

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was inadmissible, the Court pointed out that the Family Letters material “was of an uncommon and specific type of pornography; the objects of sexual desire aroused by the pornography in evidence were few; and the victim was the clear object of the sexual desire implied by the possession.” *Id.* at ____, 710 S.E.2d at 269. The Court concluded: “Where the pornography possessed consists solely of incestuous encounters, there arises a strong inference that the possessor is sexually excited by at least the idea of, if not the act of, incestuous sexual relations. Accordingly, in this case, the fact of [the defendant’s] possession of incestuous pornography reasonably supports the inference that [the defendant] was sexually desirous of an incestuous relationship.” *Id.* at ____, 710 S.E.2d at 271.

More recently, in *Beckelheimer*, the Supreme Court upheld a trial court’s admission of evidence under Rule 404(b) based on “key similarities” between the sex offense for which the defendant was being tried and a prior sex offense. ____, N.C. at ____, 726 S.E.2d at 159. The Court first pointed to the trial court’s finding that the victim in the charged crime was an 11-year-old cousin of the defendant, while the 404(b) witness was also a cousin and had been around 12 years old at the time of the prior acts. *Id.* at ____, 726 S.E.2d at 159. The Court “conclude[d] . . . that the similar ages of the victims is more pertinent in this case than the age difference between victim and perpetrator.” *Id.* at ____, 726 S.E.2d at 160. Next, the Court upheld the trial court’s finding that the location of the occurrence was similar in that the crime and the 404(b) offense both occurred after the defendant had played video games with his victims in his bedroom. *Id.* at ____, 726 S.E.2d at 160. Finally, the Court emphasized that the crime and the 404(b) offenses had both been “brought about” in the same manner with a similar progression of sexual acts. *Id.* at ____, 726 S.E.2d at 160. The Court then concluded that the similarities of the victims (age and relationship to the defendant), the similarities of the locations, and the similarities in how the sexual offenses came to occur were sufficient to render the evidence admissible under Rule 404(b). *Id.* at ____, 726 S.E.2d at 160.

Here, the charged crime involves defendant’s very young son, while the 404(b) evidence involved a grown woman friend. There was no evidence that the locations of the crimes were similar. Further, there was no similarity in how the crime came to occur other than that it involved anal intercourse. Even though the State argues that both crimes involved force, the State has not shown that defendant’s writings about physically forcible, non-consensual anal sex with an

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adult woman friend give rise to any inference that defendant would be desirous of or obtain sexual gratification from anal intercourse with his four-year-old or six-year-old son. The 404(b) evidence simply does not “share ‘some unusual facts’ that go to a purpose other than propensity” *Id.* at ____, 726 S.E.2d at 160.

The State has pointed to no decisions in which our courts have upheld the admission under Rule 404(b) of evidence involving such strikingly dissimilar circumstances. In the absence of any such authority, we hold that the composition book entry was not relevant to any proper purpose. It was, therefore, inadmissible under Rule 404(b).

III

[3] Defendant next contends the trial court committed reversible error by allowing the State to ask defendant, during cross-examination, questions that assumed facts not in evidence. The prosecutor cross-examined defendant regarding a report prepared by Milton Kraft who did not testify at trial. The trial transcript does not specifically identify Milton Kraft other than indicating that he was an expert who evaluated defendant in connection with the 2006 investigation and the custody case relating to Luke.

After marking for identification purposes the evaluation conducted by Milton Kraft, the State asked defendant the following questions:

Q. You saw Milton Kraft?

A. Yes, sir.

Q. Isn't it true that when you were with Milton Kraft, the MMPI results were marginally valid because you attempted to place yourself in an overly positive light by minimizing faults and denying psychological problems?

MR. PLEASANT: Objection.

THE COURT: Overruled.

. . . .

Q. Does it indicate that it says, a prominent elevation on the psychopathic deviant scale?

MR. PLEASANT: Objection.

THE COURT: If that's what it says.

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BY MR. JACKSON:

Q. Does it say that?

MR. PLEASANT: Objection to what the document says, Your Honor.

THE COURT: Overruled.

THE WITNESS: Read that again. I'm sorry. Prominent—yes, that's what it says in a third of the sentence, yes.

Q. The whole sentence says, the clinical scale prototype used in the development of this narrative included a prominent elevation on the psychopathic deviant scale. That's the whole sentence, is it not?

A. That is.

MR. PLEASANT: Objection.

THE COURT: Overruled.

BY MR. JACKSON:

Q. These individuals may be risk takers who may do things others do not approve of simply for the personal enjoyment of doing so. Does it not say that?

MR. PLEASANT: Objection.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. JACKSON:

Q. He tends to be generally oriented towards thrill seeking and self gratification. Does it not say that?

MR. PLEASANT: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, it does.

BY MR. JACKSON:

Q. May occasionally show bad judgment and tends to be somewhat self-centered, pleasure oriented, narcissistic [sic] and manipulative.

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MR. PLEASANT: Objection.

THE COURT: Overruled.

BY MR. JACKSON:

Q. Does it not say that?

A. Yes, it does.

Mr. Kraft did not testify, and the report was never admitted into evidence for any purpose.

North Carolina has long adopted “the rule of law which forbids a prosecuting attorney to inject into the trial of a cause to the prejudice of the accused by argument or by insinuating questions supposed facts of which there is no evidence.” *State v. Phillips*, 240 N.C. 516, 524, 82 S.E.2d 762, 767 (1954). In *Phillips*, our Supreme Court held that “where a prosecuting attorney persists in asking witnesses improper questions for the purpose of getting before the jurors prejudicial matters which the law does not permit them to hear, the questions produce a highly prejudicial effect on the minds of the jurors,” *id.* at 528, 82 S.E.2d at 770, and ordered a new trial. *Id.* at 529, 82 S.E.2d at 771.

Here, the State does not argue that the report was admissible on any basis. Rather, it contends that defendant opened the door to the questions when defendant testified that he was ordered to undergo the evaluation with Mr. Kraft as part of the custody battle and that as a result of the evaluation performed by Mr. Kraft and Mr. Kraft’s recommendation, the custody court granted defendant immediate rights to visitation with his son. The State further argues that the questions regarding “the evaluation were admissible through cross-examination but not through extrinsic evidence as evidence relating to his credibility.”

The State cites no authority at all in support of its claim that defendant opened the door. Generally, the rule is that “evidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant. . . . Therefore, where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State’s rebuttal or explanatory evidence about the matter.” *State v. O’Hanlan*, 153 N.C. App. 546, 561, 570 S.E.2d 751, 761 (2002).

In contending that defendant opened the door by testifying that as a result of Mr. Kraft’s evaluation, the trial court granted him visita-

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tion, the State points to defendant's testimony *on redirect*—only after the challenged cross-examination questions. If anything, the State opened the door to the redirect testimony.

Apart from the redirect, the State also points to defendant's introduction of the district court's visitation orders during the testimony of an assistant clerk of court, indicating only that defendant was ordered to undergo an evaluation and, subsequently, the district court granted defendant visitation. As the trial court noted, and the State conceded, the order allowing visitation after the evaluation did not include any reference to an opinion by Mr. Kraft. Accordingly, the State has failed to show factually or legally that defendant opened the door to the questions summarizing the contents of Mr. Kraft's evaluation.

With respect to defendant's credibility, the State cites no authority other than Rule 608 of the Rules of Evidence as justifying the questions. Rule 608(a) allows the credibility of a witness to be attacked by opinion and reputation evidence of character, although "the evidence may refer only to character for truthfulness or untruthfulness." Rule 608(b) provides that specific instances of the conduct of a witness may "if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness," although the acts may not be proven by extrinsic evidence.

The only question that the State attempts to defend on this basis is the one asking defendant to acknowledge that Mr. Kraft wrote that "the MMPI results were marginally valid because [defendant] attempted to place [himself] in an overly positive light by minimizing faults and denying psychological problems[.]" Even assuming without deciding that this question fell within the scope of Rule 608, the State has not explained how Rule 608 authorizes the questions suggesting that the test indicated that defendant was a "psychopathic deviant," that he was a "risk taker[] who may do things others do not approve of simply for the personal enjoyment of doing so," and that he is "oriented towards thrill seeking and self gratification." Since none of these questions relate to defendant's truthfulness, Rule 608 is inapplicable.

In sum, the State, through cross-examination questions, placed before the jury expert evidence that was not otherwise admissible. As our Supreme Court stated in *Phillips*, 240 N.C. at 524, 82 S.E.2d at 768 (quoting *Thurpin v. Commonwealth*, 147 Va. 709, 714, 137 S.E. 528, 529 (1927)), "[t]he form of these questions was highly improper. They were more in the nature of testimony and an argument by the [prosecutor] before the taking of the testimony had been completed

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and contained statements of facts not supported by the evidence.’ ” The trial court erred in overruling defendant’s objections to the State’s reading Mr. Kraft’s evaluation to the jury in the form of cross-examination questions.

IV

[4] Although we have agreed with defendant that the trial court erred in admitting the evidence of the composition book and in overruling defendant’s objections to the State’s cross-examination questions summarizing a non-testifying expert’s report, the question remains whether the errors were sufficiently prejudicial to warrant a new trial. Under N.C. Gen. Stat. § 15A-1443(a) (2011), defendant bears the burden of showing “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.”

This Court in *Dunston* ordered a new trial after finding it “highly probable,” in light of the State’s “inconsistent and unclear” evidence, that the testimony regarding the defendant’s anal intercourse with his wife was prejudicial to the defendant “given the sensitive and potentially inflammatory nature” of the evidence. 161 N.C. App. at 473-74, 588 S.E.2d at 545. The evidence in this case was not, however, as equivocal as that in *Dunston*.

Here, the State presented evidence that Luke’s underwear, included in the 2008 rape kit, was stained with sperm that closely matched defendant’s DNA profile. In addition, Luke, who was in the third grade at the time of trial, testified specifically and unequivocally that his father put “his private part in [his] mouth and [his] butt.” The State also put on substantial corroborative evidence.

On the other hand, no semen was found on the rectal smears and swabs taken from Luke. Defendant presented evidence that two weeks before the 2008 allegation, his ex-wife had masturbated him with her hand, and he had ejaculated into her hand. The State’s experts acknowledged that someone other than defendant could have placed the sperm on the underwear, and a secondary transfer from one item of clothing to another was possible, particularly if the body fluid was wet. In addition, defendant, through cross-examination of Luke and the testimony of other witnesses, presented evidence that would have allowed the jury to conclude that defendant’s ex-wife had coached Luke regarding the allegations.

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While the jury could have reasonably found this evidence self-serving and not entitled to much weight, the improperly admitted evidence of the composition book entry and the expert report essentially guaranteed that the jury would find defendant guilty. The jury had before it, in defendant's own handwriting, a document that the State credibly argued was a confession that defendant had raped a female friend and had forcible, non-consensual anal intercourse with her. In addition, the jury was told—through the State's improper cross-examination questions—that an expert had determined that defendant had “a prominent elevation on the psychopathic deviant scale,” as well as being a risk taker willing to do things others do not approve of for the personal enjoyment of doing so.

We cannot conclude that the combined effect of an admission of rape and non-consensual anal intercourse together with an expert assessment of psychopathic deviancy was non-prejudicial. *See State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002) (holding that although neither “of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial”); *State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992) (holding that cumulative evidence of prior sexual assaults allegedly committed by defendant were prejudicial entitling defendant to new trial).

In light of defendant's evidence regarding the presence of the DNA, the ex-wife's possible coaching of the young son, and the conflict between defendant and his ex-wife, there is a reasonable possibility that in the absence of the composition book and the cross-examination questions, the jury would have reached a different verdict than guilty of both first degree sexual offense with a child and indecent liberties with a child. Although we are mindful of and troubled by the effect on the child, the errors committed at the first trial require that defendant be granted a new trial. Because we believe it unlikely that the other issues raised on appeal will recur, we do not address them.

New trial.

Judges STEELMAN and BEASLEY concur.

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STATE OF NORTH CAROLINA v. TORREY JERMAINE FREDERICK

No. COA12-76

(Filed 21 August 2012)

1. Constitutional Law—right to counsel—critical stage of proceeding—pretrial suppression hearing

In a prosecution for drug-related charges that arose from a traffic stop, defendant's pretrial hearing on a motion to suppress evidence was a critical stage in the proceedings against defendant and his Sixth Amendment right to counsel attached no later than the time of the hearing.

2. Constitutional Law—right to counsel—pro se representation—possible maximum punishment

The trial court erred by allowing defendant to proceed *pro se* at a critical stage (a pretrial suppression hearing) after telling him only that he could go to prison for a long, long time and that the law required an active prison sentence if defendant was convicted. This was not the specificity required by N.C.G.S. § 15A-1242(3).

Appeal by defendant from judgments entered 7 September 2011 by Judge Paul L. Jones in Sampson County Superior Court. Heard in the Court of Appeals 23 May 2012.

Roy Cooper, Attorney General, by Joseph E. Elder, Assistant Attorney General, for the State.

Marilyn G. Ozer for the defendant.

THIGPEN, Judge.

Defendant appeals from judgments entered convicting him of trafficking in cocaine, intentionally keeping or maintaining a vehicle for the purpose of keeping a controlled substance, and possession of a firearm by a felon. Defendant presents five issues on appeal: (I) whether the trial court erred by denying Defendant's motion to dismiss the charge of trafficking in cocaine; (II) whether the trial court erred by denying Defendant's motion to dismiss the charge of maintaining a vehicle; (III) whether the trial court erred by denying Defendant's request for discovery of SBI drug testing protocol and procedures; (IV) whether the trial court erred by summarily dismissing Defendant's *pro se* motion to suppress after Defendant had been improperly allowed to waive counsel; and (V) whether appointed

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counsel provided ineffective assistance of counsel due to a conflict of interest in her representation of Defendant, for which she withdrew as counsel of record.

The evidence of record tends to show the following: Around midnight on 29 August 2010, Michael Wallace (“Wallace”), the driver of a GMC Sierra Z-71 pickup truck, and passengers Torrey Jermaine Frederick (“Defendant”) and Natasha Smith (“Smith”), were stopped by police officers at a driver’s license checkpoint in Clinton, North Carolina. The vehicle was registered to Alicia Washington, Defendant’s fiancée. Defendant was in the front passenger seat, and Smith was in the middle of the back seat.

Sergeant Robbie King (“Sergeant King”) discovered that Wallace had an expired license and instructed him to pull over to the shoulder of the road in front of the patrol cars. Wallace complied, got out of the vehicle, and proceeded to walk towards the officers, who then instructed him to return to the vehicle. Wallace again complied, returning to the vehicle, after which he backed the vehicle closer to the patrol cars. However, the officers observed that Wallace drove the truck in reverse in a manner that may have been calculated to obscure the officers’ view of the passenger side of the vehicle. Sergeant King then walked to the passenger side of the vehicle and had a conversation with Defendant, who explained that he and Wallace were on their way to drop Smith off at home. Wallace, however, told Corporal Edgar Carter (“Corporal Carter”) a different story.

The officers conferred with one another about Wallace and Defendant’s conflicting stories and became suspicious. The officers then asked Wallace for consent to search the vehicle. Wallace refused, insisting that the vehicle belonged to his boss. Corporal Carter went to his patrol car to get his K-9 dog. As soon as the K-9 dog got out of the patrol car, it signaled that drugs were near. Corporal Carter walked the K-9 dog from the front of the truck to the back, first on the driver side and then on the passenger side. As Corporal Carter came to the passenger door, the K-9 dog alerted and began to bark and scratch at the ground under the passenger side door. The officers ordered Wallace, Smith and Defendant out of the vehicle, searched the vehicle, and discovered drugs and paraphernalia near the driver’s seat and in the back seat. A cigarette package containing a white rock substance was found under the driver’s seat in the vehicle. The officers also found bullets in the glove box, and a measuring cup with powder residue, baking soda, butter knives with powder residue, a digital scale, a marijuana cigarette and Ziploc bags in the vehicle.

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Corporal Carter, while walking the K-9 dog around the front of the vehicle, noticed a white brick lying on the side of the road which appeared to be cocaine. In the grass next to the white brick, Corporal Carter also found a handgun, a bag with residue, and a bag containing crack cocaine and marijuana. The bullets in the glove box of the truck matched the bullets in the handgun found in the grass. The officers also searched Defendant's person and found \$1335.00 in cash in his pocket. Defendant was questioned by Detective Alpha Clowney. Defendant admitted to possession of the blunt and marijuana found in the grass near the brick of cocaine, but Defendant recanted these admissions during the same interview.

Prior to trial, the substance contained in the white brick found at the scene was tested by Nicole Manley, a forensic scientist specializing in drug chemistry with the North Carolina State Crime Lab. Ms. Manley conducted preliminary and confirmatory tests on the substance and determined that it was cocaine hydrochloride. The brick was also marked with a "Z." Corporal Carter testified that in his experience, the marking indicated that the brick came from the Mexican drug cartel, Zeta. Corporal Carter also testified that a brick of cocaine that size had an estimated street value of "a minimum of \$40,000."

On 12 January 2011, Defendant was indicted on the following seven charges in three indictments: the first indictment, 10 CRS 52051, included one count of trafficking in cocaine, one count of possession with the intent to manufacture, sell and deliver a schedule II controlled substance, and one count of maintaining a vehicle to keep controlled substances; the second indictment, 10 CRS 52053, included one count of possession with the intent to sell and deliver a schedule VI controlled substance, one count of possession of a stolen firearm, and one count of possession of drug paraphernalia; and the third indictment, 10 CRS 52054, was for one count of possession of a firearm by a convicted felon. Defendant was also indicted on the charge of having attained the status of an habitual felon.

Defendant signed two waivers of appointed counsel. On 21 June 2011, Defendant filed a *pro se* motion to suppress the evidence arising out of the driver's license checkpoint stop. This motion was heard, along with a number of additional *pro se* motions, at a 25 July 2011 hearing, where Defendant argued his motions without the representation of counsel. Defendant's motion to suppress was denied.

The trial was held during the 6 September 2011 session of the Sampson County Superior Court, the Honorable Paul L. Jones presid-

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ing. Defendant proceeded at trial *pro se*. Wallace was a witness for the State, after having entered into a plea agreement pursuant to which the charges against him—possession of cocaine and no operator's license—were reduced; Wallace pled to misdemeanor possession of drug paraphernalia and no operator's license. At trial, Wallace testified that he did carpentry work for Defendant, that he frequently drove Defendant in the GMC pickup truck because Defendant did not have a driver's license, and finally, that earlier that evening, he dropped Defendant and Smith off at a local motel, went to Wal-Mart and smoked drugs in the vehicle while he waited for them. Defendant re-called Wallace after the State rested. During the defense's case, Wallace testified that he had not seen Defendant use drugs and had never known Defendant to sell drugs.

On 7 September 2011, after the presentation of the State's evidence, the court dismissed one count from the indictment, 10 CRS 52053—possession of a schedule VI controlled substance. After closing arguments, the court dismissed the remaining two counts of 10 CRS 52053, possession of a stolen firearm and possession of drug paraphernalia. Later that same day, the jury found Defendant guilty on all remaining counts.

The trial court entered judgments convicting Defendant of trafficking cocaine, keeping or maintaining a vehicle for the purpose of keeping a controlled substance, and possession of a firearm by a felon. After concluding Defendant was a record level IV offender, the trial court sentenced Defendant to 175 to 219 months incarceration and a fine of \$250,000.00 on the trafficking conviction; on the maintaining a vehicle for controlled substances conviction, the trial court sentenced Defendant to a term of 8 to 10 months incarceration to be served concurrently with the trafficking sentence; the court sentenced Defendant to a consecutive term of 15 to 18 months incarceration on the possession of a firearm by a felon conviction. The court arrested judgment on the second count of 10 CRS 52051: possession with intent to sell and deliver a schedule II controlled substance. Defendant gave notice of appeal in open court on 7 September 2011.

I: Critical Stage—N.C. Gen. Stat. § 15A-1242 (2011)

[1] Defendant contends the trial court failed to adequately advise him of the range of permissible punishments as required by N.C. Gen. Stat. § 15A-1242(3) before allowing him to waive his right to appointed counsel and proceed *pro se* during a critical stage of the criminal process—the hearing on Defendant's motion to suppress. We

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believe the hearing on Defendant's motion to suppress was a "critical stage[.]" prior to which the trial court allowed Defendant to waive his right to appointed counsel without making a proper inquiry as mandated by N.C. Gen. Stat. § 15A-1242.

"It is well settled that an accused is entitled to the assistance of counsel at every critical stage of the criminal process as constitutionally required under the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Taylor*, 354 N.C. 28, 35, 550 S.E.2d 141, 147 (2001), *cert. denied*, 535 U.S. 934, 122 S. Ct. 1312, 152 L. Ed. 2d 221 (2002). "[A] defendant's right to counsel under the Sixth and Fourteenth Amendments attaches only at such time as adversary judicial proceedings have been instituted whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Id.* (citation and quotation omitted); *see State v. Detter*, 298 N.C. 604, 619, 260 S.E.2d 567, 579 (1979) (stating, "the right to counsel attaches and applies not only at trial but also at and after any pretrial proceeding that is determined to constitute a critical stage in the proceedings against the defendant"). "Whether a critical stage has been reached depends upon an analysis of whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Detter*, 298 N.C. at 620, 260 S.E.2d at 579 (citation omitted). A hearing on a motion to suppress has been deemed a critical stage. *See State v. Gordon*, 79 N.C. App. 623, 626, 339 S.E.2d 836, 838 (1986) (stating "[t]he suppression hearing was the critical stage for developing any weaknesses in the State's evidence").

Defendant made his first appearance in this case on 30 August 2010, at which time Defendant was informed that he was to remain in custody pending the posting of an appearance bond in the amount of \$207,000.00. A preliminary hearing was set for 3 September 2010. The record shows that on 10 December 2010, Defendant signed a waiver of counsel, and on 15 December 2010, the trial court granted appointed counsel's motion to withdraw. Defendant was indicted on the charges in this case on 12 January 2011. The record also shows Defendant signed a second waiver of counsel on 24 January 2011.

On 21 June 2011, Defendant filed a *pro se* motion to suppress the evidence arising out of the driver's license checkpoint stop, which was titled, "MOTION TO SUPPRESS CALENDAR & DOCKET FOR HEARING[.]" The words, "evidence as fruits of unconstitutional seizure," were scribbled next to "MOTION TO SUPPRESS." This motion was heard, along with a number of additional *pro se* motions, at a 25

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July 2011 hearing—almost seven months after Defendant was indicted. At the hearing, Defendant’s motion to suppress was summarily denied:

THE COURT: Okay. Motion to suppress calendar document for hearing is denied.

THE DEFENDANT: I want to appeal that.

THE COURT: Okay. You’re getting your day in court and you ain’t doing very well.

Defendant asserts on appeal that the “pre-trial judicial review of the Motion to Suppress was the single most critical stage of [Defendant’s] case.” We agree that the hearing on the motion to suppress was a critical stage in the criminal proceedings against Defendant, and that Defendant’s Sixth Amendment right to counsel had attached no later than the time of the hearing. *See State v. Gibbs*, 335 N.C. 1, 44, 436 S.E.2d 321, 345 (1993), *cert. denied*, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994) (stating, “[the] defendant’s Sixth Amendment right to counsel attached during his first appearance on 4 June, when the State’s position against him solidified as to the murder charges and counsel was appointed”); *see also Gordon*, 79 N.C. App. at 626, 339 S.E.2d at 838 (1986) (stating “[t]he suppression hearing was the critical stage for developing any weaknesses in the State’s evidence, and without the assistance of counsel defendant was ill-equipped to perform that task[,]” holding that “the court erred in requiring defendant to proceed *pro se* at the suppression hearing without a clear indication that he desired to do so and without making the inquiries required by N.C. Gen. Stat. 15A-1242[,]” and granting the defendant a new trial).

We must now determine whether the trial court made a proper N.C. Gen. Stat. § 15A-1242 inquiry prior to the 25 July 2011 hearing on Defendant’s motion to suppress.

[2] We review the question of whether the trial court complied with N.C. Gen. Stat. § 15A-1242 *de novo*. *See State v. Watlington*, ___ N.C. App. ___, ___, 716 S.E.2d 671, 675 (2011). “This Court has long recognized the state constitutional right of a criminal defendant to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.” *State v. Moore*, 362 N.C. 319, 321, 661 S.E.2d 722, 724 (2008) (citations and quotation omitted). “However, before allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied.” *Id.* at 322, 661 S.E.2d at 724 (cita-

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tion and quotation omitted). “In order to determine whether the waiver meets this constitutional standard, the trial court must conduct a thorough inquiry[,] [and] [t]his Court has held that N.C.G.S. § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries.” *State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002) (citations and quotation omitted).

N.C. Gen. Stat. § 15A-1242(3), provides the following:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant . . . [c]omprehends the nature of the charges and proceedings and the range of permissible punishments.

Id. “The record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will.” *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). In cases where “the record is silent as to what questions were asked of defendant and what his responses were,” this Court has held, “[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel[.]” *Id.* at 324-25, 350 S.E.2d at 129. A trial court’s failure to conduct the inquiry entitles defendant to a new trial. *See State v. Seymore*, ___ N.C. App. ___, ___, 714 S.E.2d 499, 502 (2011).

In this case, Defendant contends that the trial court did not advise him of his possible maximum punishment, as required by N.C. Gen. Stat. § 15A-1242(3), prior to the hearing on Defendant’s *pro se* motion to suppress. The transcripts filed with this Court show only two such discussions between Defendant and the trial court with regard to Defendant’s range of permissible punishments prior to, or on the date of, the hearing.¹ First, at a hearing on 24 January 2011, the

1. The record also contains two waivers of counsel signed by Defendant on 10 December 2010 and 24 January 2011. However, “[t]he execution of a written waiver is no substitute for compliance by the trial court with the statute[;] [a] written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it.” *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). (citations and quotation omitted). Moreover, it is possible that other hearings were held before the trial court, in which the trial court conducted an adequate N.C. Gen. Stat. § 15A-1242 inquiry; however, those proceedings were either not transcribed or the parties failed to file the transcripts with this Court as part of Defendant’s appeal. *See Callahan*, 83 N.C. App. at 324-25, 350 S.E.2d at 129 (stating that in cases where “the record is silent as to what questions were asked of defendant and what his responses were,” this Court has held, “[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel”).

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trial court informed Defendant of the range of permissible punishments in the following way:

Now I'm satisfied that you have graduated from high school, that you are—or you think you are very familiar with the elements of the crimes charged, and you understand it's a Class C felony, and that you can go to prison for a long, long time. And you just need to be aware of all of that.

Second, at the hearing on Defendant's motion to suppress on 25 July 2011, the trial court informed Defendant of the range of permissible punishments by stating the following: "Now do you understand if you're convicted of these offenses, the law requires you get a mandatory active prison sentence? Do you understand that?" Later at the 25 July 2011 hearing, the trial court stated the following, generally, about the sentencing of "a lot of people[.]" without particular reference to any sentence Defendant may have actually faced, were he convicted of the crimes for which he was charged:

Okay. Well, sir, I'm required to tell you these things because a lot of people, after the fact, say well the judge shouldn't have let me represent myself and that's how I ended up getting life in prison, or the death penalty, or 20 or 30 years.

The question presented, therefore, is whether the trial court adequately advised Defendant of the range of permissible punishments as required by N.C. Gen. Stat. § 15A-1242(3), by telling Defendant either (1) "you can go to prison for a long, long time[.]" or (2) "if you're convicted of these offenses, the law requires you get a mandatory active prison sentence[.]"² We believe the foregoing is inadequate to constitute the "thorough inquiry" envisioned by N.C. Gen. Stat. § 15A-1242(3), meant to "satisf[y]" the trial court "that the defendant . . . [c]omprehends . . . the range of permissible punishments." Quite simply, both "a long, long time" in prison and "[an] active prison sentence" lack the appropriate specificity we believe is required by N.C. Gen. Stat. § 15A-1242(3). *See Watlington*, ___ N.C. App. at ___, 716 S.E.2d at 675 (stating, "the trial court must make a *thorough inquiry* into whether the defendant's waiver was knowingly, intelligently and voluntarily made") (citation omitted) (emphasis added); *see also State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (holding, "the trial court failed to properly inform defendant

2. The trial court's third statement, regarding the sentences of "a lot of people[.]" has no bearing on the question in this case, as the sentences referenced did not reflect the "range of permissible punishments" Defendant faced.

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regarding ‘the range of permissible punishments’ that he faced[,]” because “[w]hile the trial court correctly informed defendant of the maximum 60-day imprisonment penalty for a Class 2 misdemeanor, . . . it failed to inform defendant that he also faced a maximum \$1,000.00 fine for each of the charges”) (citing N.C. Gen. Stat. § 15A-1242(3)); compare *State v. Whitfield*, 170 N.C. App. 618, 621, 613 S.E.2d 289, 291 (holding the trial court made an appropriate inquiry pursuant to N.C. Gen. Stat. § 15A-1242(3) as to the defendant’s comprehension of the possible sentence she faced by “ma[king] sure that [the] defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve eleven to fifteen months in prison”).

We reiterate, in part, the advice our Supreme Court gave to judges in *Moore*, 362 N.C. at 327-28, 661 S.E.2d at 727:

Although not determinative in our decision, we take this opportunity to provide additional guidance to the trial courts of this State in their efforts to comply with the “thorough inquiry” mandated by N.C.G.S. § 15A-1242. . . .

12. Do you understand that you are charged with ____, and that if you are convicted of this (these) charge(s), you could be imprisoned for a maximum of ____ and that the minimum sentence is ____? (Add fine or restitution if necessary.) . . .

See 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judge’s Bench Book* § II, ch. 6, at 12-13 (Inst. of Gov’t, Chapel Hill, N.C., 3d ed. 1999) (italics omitted). While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of “thorough inquiry” envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242.

Id.

It is prejudicial error³ to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceedings without making the inquiry required by N.C. Gen. Stat. § 15A-1242, *See Seymore*, _____

3. “[S]ome constitutional rights, like the right to counsel, are so basic to a fair trial that their infraction can never be treated as harmless error.” *State v. Colson*, 186 N.C. App. 281, 650 S.E.2d 656 (citation and quotation omitted), *disc. review denied*, 362 N.C. 89, 656 S.E.2d 280 (2007).

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N.C. App. at ____, 714 S.E.2d at 502, and because neither “a long, long time” in prison nor “a mandatory active prison sentence” satisfy the requirements of N.C. Gen. Stat. § 15A-1242(3), we grant Defendant a new trial.⁴

NEW TRIAL.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA v. TRENDELL LIMONT HARRIS AND SHERROD LA
DONTAE WHITAKER, DEFENDANTS

No. COA11-1449

(Filed 21 August 2012)

1. Appeal and Error—Rule 2—not applied—evidence of identity sufficient

The Court of Appeals did not suspend the Rules of Appellate Procedure pursuant to Rule 2 in order to address defendant’s argument that there was insufficient evidence that defendants were the perpetrators of a robbery with a dangerous weapon and felonious conspiracy to commit robbery with a firearm where there was nothing to indicate that a manifest injustice would result from not suspending the Rules.

2. Criminal Law—instructions—identity—separate instruction not given—no plain error

There was no plain error in the trial court’s failure to instruct the jury on identity in a prosecution for armed robbery and conspiracy to commit robbery with a firearm where defendants contended that the trial court’s instruction on acting in concert left the jury with the impression that the State did not have to prove that defendants were among the perpetrators. In connection with the entire instruction, the trial court’s jury instruction substantively included an instruction regarding identity and defendants could not show that the failure to give a separate instruction on identity caused the jury to reach a verdict that it probably would not have reached otherwise.

4. Because Defendant will receive a new trial due to the trial court’s failure to comply with N.C. Gen. Stat. § 15A-1242, we do not reach Defendant’s remaining arguments on appeal.

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3. Robbery—armed robbery—failure to instruct common law aggravated robbery—no such offense

The trial court did not err in an armed robbery prosecution by not giving an “aggravated common law robbery” instruction. Defendants admitted that a firearm was used in the robbery but argued that the victim’s life was not threatened or endangered. However, the evidence fully supported armed robbery, did not support a lesser included offense, and there is no such offense as aggravated common law robbery in North Carolina.

Appeal by defendants from judgments entered 29 July 2011 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 23 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State v. Trendell Limont Harris, and by Assistant Attorney General Tammy A. Bouchelle, for the State v. Sherrod La Dontae Whitaker.

Richard Croutharmel for defendant-appellant Trendell Limont Harris.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., and Amanda S. Zimmer, for defendant-appellant Sherrod La Dontae Whitaker.

BRYANT, Judge.

Where exceptional circumstances do not exist to justify suspending our Rules of Appellate Procedure and reaching an issue pursuant to Rule 2, we will not address defendants’ argument. Where the trial court’s jury instructions clearly required that the State prove defendants were the perpetrators of the crimes charged, we find no plain error by the trial court’s failure to give a specific instruction regarding identity. Where there is no such offense as “aggravated common law robbery” in North Carolina, we find no plain error in the trial court’s failure to give such an instruction as a lesser included offense.

On 29 July 2011, a jury in Halifax County Superior Court found co-defendants Terrell Harris and Sherrod Whitaker guilty of robbery with a dangerous weapon and felonious conspiracy to commit robbery with a firearm. The trial court entered judgments in accordance with the jury verdicts and sentenced defendant Harris to a term of 77 to 102 months for the charge of robbery with a firearm and a concur-

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rent sentence of 29 to 44 months for conspiracy to commit robbery with a firearm. Defendant Whitaker was sentenced to a term of 64 to 86 months for the charge of robbery with a firearm and a concurrent sentence of 25 to 39 months for conspiracy to commit robbery with a firearm.

The evidence at trial indicated that defendants entered Bell's Country Store in Hobgood on 18 August 2008. Carolyn Brady ("Brady"), an employee, testified that two men came in and yelled at her to give them money. Each man's face was covered by a bandana and a baseball cap. After taking money from the register, the men left. Police later found items of clothing and two bandanas that matched Brady's description of the assailants' clothing in a field near the crime scene. Law enforcement received tips that Harris and Whitaker may have been involved. DNA found on the clothing discarded near the crime scene matched DNA samples taken from each defendant. Following the trial court's entry of judgment, both defendants gave notice of appeal in open court.

Defendants raise three issues submitted in identical briefs on appeal¹: whether the trial court erred by (I) submitting charges against them to the jury as there was insufficient evidence to support their convictions; (II) failing to instruct the jury on the issue of identity; and (III) by failing to submit to the jury the lesser included offense of aggravated common law robbery.

I

[1] Defendants argue that the trial court erred in submitting to the jury the charges of robbery with a dangerous weapon and felonious conspiracy to commit robbery with a firearm arguing there was insufficient evidence that defendants were the perpetrators. Specifically, defendants argue that the State failed to present substantial evidence of circumstances from which the jury could conclude that the DNA evidence implicating them could only have been left at the time the crime was committed.

1. Initially, counsel for both defendants submitted *Anders* briefs indicating they were unable to identify any issues with sufficient merit to support relief on appeal. However, on 28 February 2012, pursuant to a motion, this Court allowed Whitaker to substitute a brief raising substantive issues for review on appeal. In accordance with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), counsel notified Harris of his right to file written arguments with this Court. Harris, in his name, filed a brief duplicating the brief submitted by Whitaker.

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Defendants acknowledge that they failed to make a motion to dismiss the charges at the close of all of the evidence; therefore, this argument was not presented to the trial court. Accordingly, this argument was not preserved for our review. *See* N.C. R. App. P. 3 (2012) (“In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial.”).

Defendants ask this Court to review the matter pursuant to Rule 2 of our Rules of Appellate Procedure.

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2012). “Rule 2, however, must be invoked ‘cautiously,’ and [as our Supreme Court has stated,] we reaffirm our prior cases as to the ‘exceptional circumstances’ which allow the appellate courts to take this ‘extraordinary step.’” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citations omitted).

This case does not appear to present exceptional circumstances that would justify suspending our rules and reviewing this issue on appeal.

Defendants were each convicted of robbery with a dangerous weapon and conspiracy to commit robbery with a firearm. The store clerk, Brady, who faced the robbers stated that the robber who pointed a gun at her and demanded money wore a bandana with money symbols printed on it and a black baseball cap with a red brim; the second robber who collected the money in a plastic bag wore a plain dark bandana and a baseball cap and a black t-shirt. The store clerk testified that she had worked in Hobgood at various stores for forty-six years and had watched Harris grow up from the time he was eight or nine years old. She further testified that the body shape and mannerisms of the second robber—who collected the money—reminded her of Harris. Brady testified that the robbers ran out of the store and ran to the left in the direction of a fire department located adjacent to the country store.

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In the area behind the fire department adjacent to the country store, a bandana scarf with dollar signs printed on it was discovered lying on the ground. In the field behind the fire department, law enforcement found a dark colored baseball cap with a red bill, a blue baseball cap, and a black t-shirt with a knot tied in the back of it. Tips from members of the community led law enforcement to defendants. After a DNA specimen was taken from defendants and examined, it was determined that defendant Whitaker's DNA matched the DNA from the bandana with dollar signs. Defendant Harris's DNA matched the DNA from the black t-shirt tied with a knot.

We reject defendants' argument that the evidence was insufficient to show that defendants were the perpetrators. Further, we see nothing to indicate a manifest injustice would result by failing to suspend the rules. Accordingly, we will not suspend the Rules of Appellate Procedure pursuant to Rule 2 in order to address defendants' argument.

II

[2] Defendants next argue that the trial court committed plain error by failing to instruct the jury on identity as provided in N.C.P.I. Crim. 104.90. Specifically, defendants contend that because the trial court gave an instruction on acting in concert “[w]ithout the specific instruction relating to identity, the jury [was] left with the impression that the State did not have to prove that [defendants] [were] one of the perpetrators.” We disagree.

Because defendants made no objection before the trial court regarding jury instructions, we review this matter only for plain error.

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 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. Vincent, 195 N.C. App. 761, 763-64, 673 S.E.2d 874, 876 (2009) (citation omitted). “[A] [d]efendant has the burden of showing. . . (i)

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that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.” *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 60-61 (2000) (citation omitted).

In the instant case, the trial court began by instructing the jury that each defendant was presumed innocent and that the State must prove that he is guilty beyond a reasonable doubt. Then, the trial court gave the following instruction on acting in concert:

For a person to be guilty of a crime, it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit robbery with a firearm, *each of them, if actually or constructively present*, is guilty of that crime if the other person commits the crime and also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a firearm, or as a natural or probable consequence thereof.

(Emphasis added). The trial court subsequently gave the following instruction regarding robbery with a firearm:

For you to find *the defendant* guilty of this offense, the State must prove seven things beyond a reasonable doubt. First, that *the defendant* took property from the person of another or in her presence. Second, that *the defendant* carried away the property. Third, that the person did not voluntarily consent to the taking and carrying away of the property. Fourth, that *the defendant* knew he was not entitled to take the property. Fifth, that at the time of the taking *the defendant* intended to deprive that person of its use permanently. Sixth, that *the defendant* had a firearm in his possession at the time he obtained the property or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what *the defendant's* conduct represented it to be. And, seventh, that *the defendant* obtained the property by endangering or threatening the life of that person with the firearm. If you find from the evidence beyond a reasonable doubt that on or about the alleged date *the defendant* either by himself or acting together with other persons had in his possession a firearm and took and carried away property from the person or presence of a person without her voluntary consent by endangering or threatening her life with the use or threatened use of a firearm, *the defendant* knowing that he was not

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entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added).

Both instructions reiterated multiple times that the State must prove that *defendant* was the perpetrator of each of the crimes. Given in connection with the entire jury instruction, the trial court's jury instruction substantively included an instruction regarding identity. Defendants cannot show that the trial court's failure to give a separate instruction on identity beyond that included in the armed robbery instruction caused the jury to reach a verdict convicting defendants that it probably would not have reached had a separate instruction been given. Defendants' argument is overruled.

III

[3] Defendants next argue that the trial court committed plain error by not including an instruction to the jury on the lesser included offense of "aggravated common law robbery." We disagree.

Because defendants did not request the submission of aggravated common law robbery or object to the jury instruction given, we review this matter for plain error.

It is well-settled that "the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Rhinehart*, 322 N.C. 53, 59, 366 S.E.2d 429, 432 (1988) (quotation omitted). But when the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, the submission of a lesser included offense is not required. *Id.* at 59, 366 S.E.2d at 432-33. "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Black*, 21 N.C. App. 640, 643-644, 205 S.E.2d 154, 156, *aff'd*, 286 N.C. 191, 209 S.E.2d 458 (1974) (citation omitted).

State v. Porter, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009).

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As set forth in N.C. Gen. Stat § 14-87(a), the offense of armed robbery is as follows:

(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87 (2011). “The primary distinction between armed robbery and common law robbery is that ‘the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.’” *State v. Williams*, 201 N.C. App. 103, 110, 685 S.E.2d 534, 539 (2009) (citation omitted).

Defendants rely heavily on *State v. McFadden*, 181 N.C. App. 131, 638 S.E.2d 633 (2007), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), for the claim that the trial court erred by not instructing the jury on the lesser included offense of “aggravated common law robbery,” which defendants claim was created in North Carolina subsequent to the decisions in *Apprendi* and *Blakely*. Currently, there is no such offense as “aggravated common law robbery” in North Carolina.

In *McFadden*, the defendant posed a similar argument, claiming that the trial court committed plain error by convicting him of armed robbery rather than aggravated common law robbery as the two have identical elements and “under the United States Supreme Court’s holding in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), regarding the use of aggravating factors, [the] defendant must be sentenced to the offense with the least possible sentence.” *McFadden*, 181 N.C. App. at 135, 638 S.E.2d at 635. This Court found no merit to the defendant’s argument, instead finding that armed robbery and common law robbery did not contain identical elements. *Id.* at 136, 638 S.E.2d at 636. “[T]he crime of robbery with a dangerous weapon contains an additional element: That the life of a person is endangered or threatened by the use of the dangerous weapon.” *Id.*

Defendants in the present case admit to the use of a firearm during the robbery, but claim that, while Brady was afraid, her life was never threatened or endangered where “no shots were fired, no threats were made, no injuries were suffered, no medical attention

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was required and no other crimes of kidnapping and assault were charged.” “But ‘[t]he question in an armed robbery case is whether a person’s life was in fact endangered or threatened by [the robber’s] possession, use or threatened use of a dangerous weapon, *not whether the victim was scared or in fear of his life.*’” *State v. Hill*, 365 N.C. 273, 279, 715 S.E.2d 841, 845 (2011) (citation omitted).

Notwithstanding defendants’ request that we review a potential sentencing factor—aggravated common law robbery—as a substantive offense, we decline that invitation. Where, as here, the evidence fully supports armed robbery and no lesser included offense, there could be no plain error for failure to submit a lesser included offense. Further, since there is no such offense as “aggravated common law robbery” in North Carolina, we find no merit to defendants’ argument.

No error.

Judges STEPHENS and THIGPEN concur.

STATE OF NORTH CAROLINA v. KEITH DONNELL MILES

No. COA11-1383

(Filed 21 August 2012)

1. Homicide—first-degree murder—defendant as perpetrator—sufficiency of evidence

The trial court did not err in a first-degree murder prosecution by denying defendant’s motion to dismiss where defendant contended that there was insufficient evidence that he was the perpetrator. The evidence that defendant murdered the victim was circumstantial, but constituted substantial evidence from which the jury could have concluded that defendant was the perpetrator and that defendant possessed the motive, means, and opportunity to murder the victim. No singular combination of evidence, nor any finite, quantifiable amount constitutes substantial evidence. Once the court has determined that the evidence of motive and opportunity as a whole surmounts the initial benchmark of sufficiency, the task of assessing the value and weight of the evidence is for the jury.

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2. Appeal and Error—preservation of issues—issue not pursued

Defendant abandoned for appellate review the issue of whether two of the victim's acquaintances could have been the perpetrators of the crime where the State's motion *in limine* was not definitively ruled upon during trial, defendant did not make an offer of proof or explanation of evidence that would have supported the conjecture offered in his brief, and defendant never again raised the issue.

3. Appeal and Error—preservation of issues—discretionary review

An argument concerning the guilt of another was not properly preserved for appellate review but was reviewed under Appellate Rule 2.

4. Evidence—guilt of another—evidence excluded—no error

Evidence implicating someone else and exonerating defendant was properly disallowed where defendant offered only conjecture as to the other person's actions and the State refuted this claim with positive and uncontradicted evidence exculpating the other person. Defendant did not meet his burden of showing a reasonable possibility of a different result without the evidence by simply enumerating possible factual scenarios.

5. Homicide—first-degree murder prosecution—second-degree murder instruction refused—no error

The trial court did not err in a first-degree murder prosecution by refusing defendant's request for a charge on second-degree murder where all of the evidence supported the jury's conclusion that defendant murdered the victim with malice and after premeditation and deliberation, and defendant proffered no evidence supporting the submission of second-degree murder.

Judge CALABRIA dissenting.

Appeal by defendant from judgment entered 16 March 2011 by Judge Ronald E. Spivey in Wilkes County Superior Court. Heard in the Court of Appeals 24 May 2012.

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Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

M. Gordon Widenhouse, Jr., for defendant appellant.

McCULLOUGH, Judge.

On 16 March 2011, Keith Donnell Miles (“defendant”), was convicted of the first-degree murder of Jonathan Wayne Whitmore (“victim”) by a Wilkes County jury. The trial court sentenced defendant to life imprisonment without parole. Defendant now appeals. After a complete and careful review of the record, we find the trial court committed no error.

I. Facts and Procedural Background

On 14 September 2009, a Wilkes County grand jury returned an indictment charging defendant with the first-degree murder of the victim. This matter came to trial before a jury at the 7 March 2011 Special Session of the Superior Court for Wilkes County.

The relevant evidence produced at trial tended to show the following: The victim owned a business, Foothills Environmental (“Foothills”), which performed demolition and asbestos abatement. Around July 2007, Foothills hired defendant as its subcontractor to perform demolition work on a number of projects for North Carolina Central University (“NCCU”). At the time of the murder, Foothills had not yet completed the necessary paperwork for OSHA and NCCU had not yet remitted payment to Foothills for the work performed. As a result, the victim owed defendant approximately \$41,000.00—\$42,000.00 for his subcontracting work on these projects.

Defendant began contacting NCCU representatives demanding his payment around September October 2007. In summer 2007, defendant began calling the victim’s cellular and home phones demanding payment. Defendant visited the victim’s home in late September 2007 and, two weeks before the victim’s murder, a neighbor witnessed defendant again visit the victim. Between 20 September 2007 and 18 October 2007, defendant called the victim’s home or cellular phone numbers at least 94 separate times, including 7 separate times on 16 October 2007, 11 separate times on 17 October 2007, and 7 separate times on 18 October 2007. After 18 October 2007, defendant never again contacted the victim or either of the NCCU agents demanding payment.

On 18 October 2007, the evening of the murder, the victim returned home from a job in Greensboro around 6:30 p.m. and picked

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up his daughters for dinner. Ms. Whitmore was not expecting her husband that night, but greeted her family at the door around 7:30 p.m. and retired to the living room with her daughters. The victim went outside and told his family that he would “be right back.” The victim had his work gear with him at his truck.

At some time after 7:30 p.m., Ms. Whitmore and her daughters heard a loud “roaring sound” outside the window, which they described as a “roaring” of an engine. One of the victim’s daughters looked out the window and witnessed “what looked like a big tour bus” with orange lights at the top and the bottom. She also described the vehicle as big and box-like, similar to a bus, U-Haul, or R.V. Defendant’s wife owned an R.V. matching this description with similar amber lights, which defendant later sold in December 2007. When the R.V. was recovered in Georgia two years later, a section of carpet had been removed and replaced, a bleach stain was found near the driver’s side couch, and a bloodstain not matching the victim’s DNA was found.

After the vehicle drove by, Ms. Whitmore and her daughters noticed that the victim was not home. Ms. Whitmore noticed that the door was unlocked, the victim’s work vehicle was still outside, and the victim’s keys were on the picnic table outside. Around 8:00 p.m., Ms. Whitmore and her daughters began calling the victim, the victim’s son, and family friends inquiring as to the victim’s whereabouts. Ms. Whitmore also called defendant and left him voicemails. Defendant’s cellular records indicated that he did not pick up Ms. Whitmore’s calls, but listened to her voicemails almost immediately after she recorded them. While on the phone with her sister around 4:30 a.m., Ms. Whitmore received a call from defendant’s number and an unidentified voice asked why she had been calling. Ms. Whitmore pleaded for defendant to return her husband, but the voice stated that defendant had been in the hospital all night.

The victim’s neighbor, Dorothy Adams, discovered the body the morning of 19 October 2007, at approximately 7:15 a.m. The body was discovered approximately 100 feet from the rear of the Whitmores’ home and 77 feet from the nearest light pole, positioned down a slope from the roadside and in an area of low shrubs near a dogwood tree. Mrs. Adams slept outside in her gazebo, about 150 feet away from where the body was found, from 10:00 p.m. to 4:00 a.m. and had not heard any loud or unusual sounds during that time.

The autopsy showed that the victim died of a single gunshot wound to the back of his head. The wound was located towards the

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middle of the victim's skull. Gunshot residue analysis revealed that the gun was not pressed against the victim's head, but was no more than one inch from it. The bullet that killed the victim could have been from a 9 millimeter, 10 millimeter, .38 millimeter, or possibly a .40 millimeter firearm, but not a .22 millimeter, .32 millimeter, or a .45 millimeter gun. The victim also had a scrape on his face and on the back of his right arm and a blood alcohol content of .11.

At trial, the medical examiner who performed the autopsy testified that based on the varying development of rigor mortis in each individual, the victim's actual time of death was difficult to pinpoint. A local medical examiner who filled out a written request for autopsy form but who did not perform the autopsy or testify at trial recorded the estimated time of death as somewhere between 8:00 p.m. and 9:00 p.m. The police discovered a .40 caliber shell casing at the scene. Detectives later searched the victim's truck and defendant's vehicles, but found no physical evidence connected to the crime. Police did not search the Whitmore home.

Detectives interviewed defendant on 19 October 2007, at approximately 3:00 p.m. and discovered that defendant had admitted himself to Duke Hospital at 4:26 a.m. on 19 October and again about ten hours later. Defendant first told detectives that he had worked in Raleigh until about 5:00 p.m. the day before, but later changed his statement and said that he was in Rocky Mount all evening and did not return home to Durham until 8:00 p.m. On the morning of the murder, defendant left the following voicemail on the victim's machine:

Jonathan, Jonathan this is Keith. I have been calling you. You know I have been calling. Now, I am going to get me a lawyer, but it ain't going to be to collect my money. And you will see me. You need to call me. You done pissed me the f-k off. And g--d--nit, you need to f----g call me. Now, I am going to tell you, I don't give a f-k about living. If you want to [live], you need to g--d--n pay me my m----f----g money. And this is Keith m----f----g Miles. And I swear to God, when I see you, you're going to know it. I mean that s--t. M----f----r, you'd better call me. Do you hear me? You know, you had better check the g--d--n message. Ain't a d--n thing you can do in this world to stop me from getting a hold of you. I done told you this s--t, and I tried to g--d--n keep my patience with you but you want to play with me. M----f----r, they going to pay you, you going to pay me. I don't give a f-k. You're going to pay me.

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On the afternoon of the murder at 3:23 p.m., defendant called Ms. Whitmore looking for the victim, and told her “that when [the victim] doesn’t communicate we are going to have problems,” that defendant needed “to come up there” to “straighten this mess out,” that defendant was owed \$42,000.00, and again that defendant was going to “come up there and get [the victim].”

At trial, the State called an FBI Special Agent who testified as to defendant’s whereabouts on 18 October 2007, which were pinpointed by over 100 cellular phone calls. Defendant consistently utilized cellular phone towers in the Raleigh-Durham area in the morning and early afternoon, towers in the Durham area in the late afternoon, and between 4:00 p.m. and 7:00 p.m., towers indicating a progression westbound. Beginning at 7:23 p.m., defendant utilized one of the three cellular towers in the Wilkesboro area, thus placing him in the vicinity of the victim’s home and scene of the murder. Defendant made a four-second call to the victim’s work phone at 7:23 p.m. through a Wilkesboro tower. Following that call was a 12-minute gap. Beginning again at 7:35 p.m. and through 7:46 p.m. defendant made a series of calls to his wife, family members, and a friend, first utilizing towers in the Wilkesboro area, then towers indicating a progression east. Beginning at 7:46 p.m. and through 7:55 p.m., defendant used towers crossing the Wilkes County line. Defendant made 22 subsequent calls from 8:00 p.m. to 11:00 p.m. which indicated defendant was progressing eastward through Winston-Salem, Greensboro, and finally to Durham.

The State presented the testimony of Alfreddie Roberson, a friend of defendant’s since 2000. In 2009, Roberson entered into a plea agreement with federal prosecutors to provide truthful information regarding this case in return for immunity and a sentence reduction. Roberson testified he knew that the victim owed defendant and that defendant had called and visited the victim. Additionally, Roberson testified defendant explicitly stated he was going to drive to the victim’s house in his R.V. and kill the victim if he did not receive his money. Roberson stated that defendant kept a handgun, the size of a 9 millimeter or a .45 caliber, in the door of his truck. The State offered additional evidence corroborating Roberson’s testimony.

At the close of the State’s evidence, defendant moved to dismiss the case for insufficient evidence. Defendant renewed his motion at the close of all the evidence. The trial court instructed the jury on only first-degree murder, and on 16 March 2011, the jury returned a unanimous guilty verdict. Thereafter, defendant moved for a dismissal notwithstanding the verdict and gave oral notice of appeal. As

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required by statute, defendant was sentenced to life imprisonment without the possibility of parole. On 16 March 2011, defendant filed written notice of appeal pursuant to our Rules of Appellate Procedure. After a complete and careful review of the record, the transcript, and the arguments presented by the parties, we find the trial court committed no error.

II. Analysis

A. Substantial Evidence of Defendant as the Murderer

[1] Defendant first contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. Specifically, defendant argues the State failed to present sufficient evidence from which the jury could conclude that defendant was the perpetrator of the offense. Additionally, defendant contends the State presented insufficient evidence of his motive, opportunity, and means to commit the murder. We disagree.

This Court reviews the trial court's denial of a motion to dismiss *de novo* and views the evidence in the light most favorable to the State, giving the State every reasonable inference therefrom, and resolving any contradictions or discrepancies in the State's favor. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007); *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). When reviewing a defendant's motion to dismiss, this Court determines only whether there is substantial evidence of (1) each essential element of the offense charged and of (2) the defendant's identity as the perpetrator of the offense. *See State v. Lowry*, 198 N.C. App. 457, 465, 679 S.E.2d 865, 870 (2009). Whether the evidence presented at trial is substantial evidence is a question of law for the court. *See State v. Earnhardt*, 307 N.C. 62, 65 66, 296 S.E.2d 649, 651 (1982). "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); *see State v. Smith*, 300 N.C. 71, 78 79, 265 S.E.2d 164, 169 (1980). Substantial evidence simply means that "the evidence must be existing and real, not just seemingly or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Whether the evidence presented is direct or circumstantial, the test for sufficiency of the evidence is the same. *See State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). Then, it

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is for the jury to resolve any contradictions or discrepancies in the evidence and “decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.” *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994) (internal quotation marks and citation omitted).

Where, as here, defendant does not dispute that the victim died by virtue of a criminal act, asserting only that the evidence presented was insufficient to support a reasonable finding that defendant was the perpetrator of the offense, we review the evidence for “proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime.” *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983), *aff’d*, 311 N.C. 299, 316 S.E.2d 72 (1984). Where the evidence raises only a suspicion or conjecture as to the defendant’s identification as the perpetrator, no matter how strong, the motion to dismiss should be allowed. *State v. Hayden*, ___ N.C. App. ___, ___, 711 S.E.2d 492, 494, *disc. review denied*, 365 N.C. 349, 717 S.E.2d 737 (2011). “[E]vidence of *either* motive or opportunity alone is insufficient to carry a case to the jury.” *Bell*, 65 N.C. App. at 238 39, 309 S.E.2d at 467. However, this Court must assess the quality and strength of the evidence as a whole. *See id.* Whether the State has presented sufficient evidence to identify defendant as the perpetrator of the offense is not subject to “an easily quantifiable ‘bright line’ test.” *See id.* at 239, 309 S.E.2d at 468.

In the instant case, the only evidence adduced at trial tending to show defendant murdered the victim was circumstantial. Nevertheless, under the standards set out above, we hold the State produced substantial evidence from which the jury could conclude that defendant was the perpetrator of the offense and that defendant possessed the motive, means, and opportunity to murder the victim. The victim owed defendant approximately \$41,000.00—\$42,000.00 for a subcontracting job performed several months before the murder. Defendant persistently contacted the victim over the summer demanding his money and between 20 September 2007 through 18 October 2007, defendant called the victim at least 94 separate times. Additionally, Alfreddie Roberson testified that defendant, defendant’s business, and defendant’s family were experiencing financial troubles due to the stagnant nature of the current economy. Thus, a rational juror could reasonably conclude that defendant’s strong financial interest in receiving payment from the victim constituted a financial motive.

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Further, on the morning of the murder, defendant left the victim an angry voicemail stating that he would be retaining a lawyer, but not for the purposes of collecting his money, and threatening that the defendant would ultimately get “a hold of” the victim. A rational juror could reasonably infer that defendant was intentionally threatening the victim’s life. Similarly, Roberson stated that on the morning of the murder, defendant confided that if he did not obtain his money soon, he would kill the victim. Roberson testified that later that same day, defendant told him that he was going to Wilkesboro to either collect his money from the victim or kill the victim. Roberson also testified that he had previously seen defendant with a handgun, the size of a 9 millimeter or .45 caliber firearm, which defendant stowed in the door of his truck. Roberson’s testimony constituted positive evidence of defendant’s motive and intention to murder the victim, but also established a question of fact as to whether defendant possessed a firearm equivalent to the .40 caliber murder weapon, which would establish the means by which defendant perpetrated the crime.

Lastly, the State presented the testimony of the victim’s wife and the victim’s neighbor who witnessed defendant visit the victim’s house on two separate occasions, in September 2007 and two weeks before the murder. The victim’s wife and daughter also observed a vehicle similar to an R.V. owned by defendant’s wife in front of their home, an observation which was corroborated by cellular phone records. Notably, defendant’s phone records showed that between the times of 7:23 p.m. and 7:46 p.m. defendant utilized one of three cell phone towers in Wilkesboro, thereby pinpointing his location to Wilkesboro, in the vicinity of the victim’s home and site of the crime. Taking the State’s evidence as a whole and resolving all contradictions in favor of the State, a reasonable juror could conclude that defendant was in the vicinity of the victim’s home and the scene of the crime at the time of death, thereby establishing defendant’s opportunity to commit the murder. Additionally, when first interviewed by the police defendant denied being in Wilkesboro.

Defendant cites a number of cases to support his contention. Defendant first argues that *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978), and *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977) are instructive. In *Lee*, the victim was discovered in a wooded area a few miles from the defendant’s home with two small bullet holes in the left side of her neck. *See Lee*, 294 N.C. at 300, 240 S.E.2d at 449. The evidence tended to show that the defendant was seen on numerous occasions in possession of a .25 caliber pistol that was never linked

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to the crime; shots were heard in the vicinity of the scene of the crime; and defendant told a witness he was planning on killing the victim. *See id.* at 301 02, 240 S.E.2d at 450. Our Supreme Court determined that, although the State's evidence tended to show defendant's malice and motive to commit the murder, and created a "strong suspicion" of defendant's guilt because the State could not conclusively place the defendant at the murder scene, the evidence was not substantial to the point of excluding the "rational conclusion that some other unknown person may be the guilty party." *Id.* at 303, 240 S.E.2d at 451 (internal quotation marks and citation omitted).

In *Furr*, the State presented ample evidence that the defendant harbored ill will towards his wife, the victim, and that the defendant actively sought his wife's death. *Furr*, 292 N.C. at 718 19, 235 S.E.2d at 198. One witness testified that he may have seen the defendant with the victim on the day of the murder, but little further evidence established the events that transpired on that day. *See id.* at 717, 235 S.E.2d at 197. Several guns were found in the defendant's and victim's homes, but none were linked to the murder. *See id.* No physical evidence was presented. *See id.* Our Supreme Court held the State proved the defendant's motive to murder his wife, but failed to prove opportunity or the remaining elements that would positively identify him as the perpetrator. *See id.* at 717, 235 S.E.2d at 198. Instead, the Court resolved the case based on the law of principals and accessories to first-degree murder. *See id.* at 719, 235 S.E.2d at 198.

Both *Lee* and *Furr* are easily distinguishable from the present case. In *Lee*, the Court could not hold "that the State failed to offer substantial evidence that" the defendant was the murderer where no evidence placed him at the scene of the crime. *See Lee*, 294 N.C. at 303, 240 S.E.2d at 451. As we concluded above, in the present case, the State presented substantial evidence of defendant's motive and his exact whereabouts around the time of the murder. In *Furr*, the Court decided the defendant's guilt by an entirely different body of law. *See Furr*, 292 N.C. at 719, 235 S.E.2d at 198. Further, in *State v. Lowry*, 198 N.C. App. 457, 679 S.E.2d 865 (2009), this Court recently reviewed both *Lee* and *Furr* and recounted that in both cases, the State produced evidence of motive, but not opportunity. *See id.* at 467, 679 S.E.2d at 872. Thus, defendant's attempts to analogize this case to *Lee* and *Furr* in order to overturn his conviction fall short.

Defendant next contends that *State v. Hayden*, ___ N.C. App. ___, 711 S.E.2d 492 (2011), is indistinguishable. In *Hayden*, the vic-

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tim was discovered lying beside his still-running vehicle on the side of the road in a wooded area. The victim died from a gunshot wound to the head, but the handgun found on the front seat of his car was not the murder weapon. *See id.* at ____, 711 S.E.2d at 493. The defendant had a history of threatening the victim, which indicated the defendant's ill will towards the victim and his intention and motivation to murder. *See id.* at ____, 711 S.E.2d at 494 95. The Court held that while the defendant's history of threats or physical abuse constituted evidence of motive, by not conclusively placing the defendant at the scene of the crime at the time of the murder, the State failed to propound substantial evidence of the defendant's means or opportunity to commit the crime. *See id.* at ____, 711 S.E.2d at 496 97.

Hayden is distinguishable from this case. Here, defendant was placed in the immediate vicinity of the scene of the crime by real-time cellular phone tracking. Additionally, the victim's family testified to observing a vehicle in their neighborhood shortly after the time of the victim's disappearance, and within the time range the defendant was placed in Wilkesboro, similar to defendant's wife's R.V. Therefore, defendant's attempts to analogize this case to *Hayden* are unsuccessful.

Defendant broadly contends that should this Court hold the trial court committed no error, we would run afoul of the general rule espoused in *State v. Powell*, *State v. Bell*, and *State v. Lee*, that where evidence merely arouses a suspicion or conjecture of defendant's guilt, another party may reasonably be identified as the murderer and thus defendant's motion to dismiss must be granted. *See Lee*, 294 N.C. at 303, 240 S.E.2d at 451. However, as to his remaining arguments, defendant himself freely engages in speculation. Defendant argues that, because the State failed to establish a connection between defendant and the murder weapon, failed to present DNA evidence or other physical evidence, such as blood in defendant's R.V., failed to explain the victim's elevated blood alcohol content, and failed to show that defendant possessed any of the victim's property or had any of the victim's blood on his person, the record lacks substantial evidence identifying defendant as the perpetrator of the crime. Defendant contends that because solely circumstantial evidence links him to the crime, circumstances may exist that exonerate defendant.

The case law clearly shows that no singular combination of evidence, nor any finite, quantifiable amount of evidence constitutes substantial evidence. *See Bell*, 65 N.C. App. at 239, 309 S.E.2d at 468. Once the court has determined that the evidence of motive and opportunity as a whole surmounts the initial benchmark of suffi-

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ciency, the task of assessing the value and weight of that evidence is for the jury. Factually, this Court does not interpret a lack of certain types of evidence as somehow negating defendant's guilt.

Finally, defendant strains to convince this Court that *State v. Pastuer*, 205 N.C. App. 566, 697 S.E.2d 381 (2010), *aff'd by an equally divided court*, 365 N.C. 287, 715 S.E.2d 850 (2011), is instructive. Because we distinguish *Pastuer*, we need not address the issue of *Pastuer's* lack of precedential value. In *Pastuer*, defendant's wife's body was discovered wrapped in a blue tarp in the trunk of her car approximately 100 yards from a highway. *See Pastuer*, 205 N.C. App. at 268, 697 S.E.2d at 383. At trial, the State presented abundant evidence tending to show defendant's history of hostility towards his estranged wife sufficient to prove motive. *See id.* at 572, 697 S.E.2d at 385-86. However, the State introduced little physical evidence linking the defendant to the crime scene and little circumstantial evidence as to the defendant's whereabouts around the time of the victim's disappearance and death. *See id.* Contrasted to the instant case, defendant's whereabouts at the time of the murder were proved by positive evidence of his cellular phone records and were confirmed by eyewitness testimony. Thus, *Pastuer* is inapposite.

While the State persuasively argues that this case is similar to *State v. Barnett*, 141 N.C. App. 378, 540 S.E.2d 423 (2000), *aff'd*, 354 N.C. 350, 554 S.E.2d 644 (2001); *State v. Bostic*, 121 N.C. App. 90, 465 S.E.2d 20 (1995); *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309; *State v. Parker*, 113 N.C. App. 216, 438 S.E.2d 745 (1994); *State v. Patel*, ___ N.C. App. ___, 719 S.E.2d 101 (2011), *disc. review denied*, ___ N.C. ___, 720 S.E.2d 395 (2012), as well as *State v. Stone*, 323 N.C. 447, 373 S.E.2d 430 (1988), ultimately, we find *State v. Carver*, ___ N.C. App. ___, 725 S.E.2d 902 (2012), controlling. In *Carver*, defendant and his cousin were fishing at a spot a short distance from the crime scene around the time of the murder. *See Carver*, ___ N.C. App. at ___, 725 S.E.2d at 904. The defendant denied his presence at the scene, but his alibi was refuted by positive DNA analysis linking him to the victim's vehicle. *See id.* This Court held the trial court committed no error in denying defendant's motion to dismiss and that, while the State failed to show the defendant's motive to murder the victim, defendant's presence near the scene of the crime during the time in which the murder was committed, as well as the positive evidence linking him to the scene of the crime, taken in the light most favorable to the State was sufficient to establish his identity as the murderer. *See id.*

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In the instant case, as in *Carver*, defendant's false alibi was contradicted by positive evidence placing him in the vicinity of the murder around the victim's time of death. *See id.* As we found above, defendant's cellular phone records and the testimony of the victim's family that they observed what appeared to be an R.V. similar to defendant's wife's, taken in the light most favorable to the State, constitute substantial opportunity evidence placing defendant near the scene of the crime around the time of the victim's murder. Therefore, we hold defendant's arguments are without merit and the trial court committed no error in denying defendant's motion to dismiss.

B. Excluded Evidence of Alternate Perpetrators

[2] We initially note that, although in his brief defendant mentions the argument that the "Leach brothers," referring to two of the victim's acquaintances, could have been the perpetrators of the crime, the State filed a motion *in limine* on this matter, which the court took under advisement and did not definitively rule on during trial. Defendant did not pursue this issue, never again raised this issue, nor did he at the time of the trial court's initial ruling make any offer of proof or explication of evidence that would support the conjecture offered in his brief. Therefore, we hold defendant abandoned this issue for appellate review. *See State v. Ryals*, 179 N.C. App. 733, 740 41, 635 S.E.2d 470, 475 (2006) ("In order to preserve an argument on appeal which relates to the exclusion of evidence, . . . the defendant must make an offer of proof so that the substance and significance of the excluded evidence is in the record.") (internal quotation marks and citation omitted).

[3] Next, we address the preliminary issue of whether defendant properly preserved his constitutional claims for appellate review. Defendant claims the trial court erred by excluding evidence that Rachael Whitmore, the victim's wife, possessed the motive and opportunity to murder her husband, thereby casting a reasonable doubt on the guilt of defendant. Defendant claims the ruling violated his constitutional rights to present a defense, to confront and examine witnesses called against him, and to offer for the jury evidence tending to support his version of the facts.

Prior to trial, the State filed a motion *in limine* that effectively prohibited defendant from questioning Ms. Whitmore on her husband's alleged extramarital affair and from presenting an argument and eliciting testimony from Ms. Whitmore that would imply her guilt and cast doubt on the guilt of defendant. The trial court took the

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motion under advisement awaiting Ms. Whitmore's *voir dire* and further proffer from defendant. After a complete interview with Ms. Whitmore, defendant proffered the evidence that Ms. Whitmore may have murdered her husband based on anger for her husband's infidelity, jealousy of his mistress(es), and the financial motive of receiving the benefits of his life insurance policy. Thereafter, the trial court made a definitive ruling granting the State's motion. Defendant did not raise his constitutional objections at that point, nor did he object to the alleged constitutional violations at any time during the remainder of the trial.

After a careful review of the record and the applicable case law, we hold defendant has failed to preserve his constitutional claim for appellate review. Further, in his brief, defendant did not "specifically and distinctly" allege plain error nor did he request plain error review in accordance with the case law and our Rules of Appellate Procedure. N.C. R. App. P. 10(a)(4). *See State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (holding that "the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error," but may be applied where there is danger of prejudice amounting to a "miscarriage of justice" and "'cautiously and only in the exceptional case'") (citation omitted); *see also State v. Towe*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (No. 121PA11, 14 June 2012 at 10 11). We fail to see the possibility of prejudice amounting to a miscarriage of justice and decline to review defendant's constitutional claims.

The standards for the admissibility of evidence are governed by the evidentiary rules of relevance, not the strictures of the Constitution. Defendant's theory of the case is that the trial court erred in excluding evidence to be adduced at trial from Ms. Whitmore that was relevant under Rule 401 of the North Carolina Rules of Evidence. Defendant claims the excluded evidence passes the test of Rule 401 in that it has the tendency to make the existence of a fact that is of consequence to the determination of the action—whether defendant was the perpetrator of the offense—less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Defendant argues the evidence implicating Ms. Whitmore and exonerating himself is relevant beyond the point of mere speculation and conjecture.

Defendant proffered an argument on this issue at the time the trial court took the motion *in limine* under advisement and again at the time the trial court made its definitive ruling. Despite defendant's

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failure to enunciate the proper standard of review governing evidentiary errors, we exercise our power under Rule 2 of our Appellate Rules of Procedure and review the trial court's exclusion of alternate perpetrator evidence under our state evidence code for prejudicial error.

[4] When the trial court excludes evidence based on its relevancy, a defendant is entitled to a new trial only where the erroneous exclusion was prejudicial. *See State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 734 (2010). A defendant is prejudiced by the trial court's evidentiary error where there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011). Defendant bears the burden of showing prejudice. *See Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 194. Here, defendant has not shown a reasonable possibility the jury would have reached a different result had further evidence implicating Ms. Whitmore been admitted.

Evidence casting doubt on the guilt of the accused and insinuating the guilt of another must be relevant in order to be considered by the jury. *See State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987). Because the relevancy standard in criminal cases is "relatively lax," "[a]ny evidence calculated to throw light upon the crime charged should be admitted by the trial court." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988) (internal quotation marks and citation omitted). However, the general rule remains that the trial court has great discretion on the admission of evidence. *State v. Lassiter*, 160 N.C. App. 443, 450, 586 S.E.2d 488, 494 (2003). "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard." *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279. Rather, it "must point directly to the guilt of the other party." *Id.* The evidence must simultaneously implicate another and exculpate the defendant. *See State v. Floyd*, 143 N.C. App. 128, 132, 545 S.E.2d 238, 241 (2001).

Defendant cites numerous cases supporting his contention, which we now distinguish in turn. In *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (2000), the defendant proffered evidence that a specific person had both the opportunity to kill the victim—the third party was identified on video surveillance entering and exiting the victim's apartment—and the motive to murder the victim. *See id.* The Court held that not only was the evidence of defendant's guilt "equivocal," but that because of the substantial evidence incriminating the third

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party, there was a reasonable possibility that had the jury considered the alternate perpetrator evidence, a different result would have been reached. *See id.* In both *Cotton* and *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990), the exclusion of conflicting eyewitness testimony exonerating the defendants was deemed prejudicial error. *See Cotton*, 318 N.C. at 667, 351 S.E.2d at 280; *Sneed*, 327 N.C. at 268, 274, 393 S.E.2d at 532 33, 535. In *McElrath*, a murder case based solely on circumstantial evidence, the trial court excluded a map that arguably indicated an alternate murder plan inconsistent with the murder plan the defendant could have been involved in. *See McElrath*, 322 N.C. at 12 14, 366 S.E.2d at 448 49. A jury could have concluded from viewing the alternate plan that a different group of assailants had the motive and opportunity to commit the murder. *See id.*

We believe the facts of the instant case are distinguishable from this line of cases. Unlike in *Israel*, *Cotton*, and *Sneed*, where alternate perpetrators were positively identified and both direct and circumstantial evidence demonstrated the third parties' opportunity and means to murder, this defendant proffers merely conjecture as to Ms. Whitmore's possible actions—she need only step outside her home to murder her husband—whereas the State contradicts these speculations with the explicit testimony of Ms. Whitmore's daughters that they had been with their mother all night. Further, the State notes that no direct, physical evidence indicates Ms. Whitmore's guilt.

Defendant claims the jury could infer that Ms. Whitmore possessed the motive to murder her husband from the following facts: knowledge of her husband's infidelity or infidelities, their pending divorce, and the promise of a \$75,000.00 life insurance policy payout. Defendant claims the jury could infer that Ms. Whitmore possessed the opportunity and means to murder her husband from the following facts: Ms. Whitmore need only step outside to accomplish the task, the family did not hear a gunshot, the local medical examiner's estimated time of death did not coincide with the passing of the R.V. and the victim's blood alcohol content, and no physical or DNA evidence linked Ms. Whitmore to any murder weapon. Defendant argues this evidence casts doubt on his guilt by offering only negative evidence and conjecture, whereas the State refutes this claim with positive and uncontradicted evidence exculpating Ms. Whitmore. Moreover, in simply enumerating possible factual scenarios in his briefs, defendant has not met his burden of showing a reasonable possibility that a different result would have been reached had the purported inculpatory evidence been admitted. Accordingly, we hold defendant's argument

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has no merit and the trial court committed no error in disallowing further evidence or argument implicating Ms. Whitmore in the murder of her husband.

C. Lesser Included Offense of Second-Degree Murder

[5] Defendant argues the trial court erred by not instructing the jury on the lesser included offense of second-degree murder. Defendant contends that the State failed to present substantial evidence from which a juror could conclude that after premeditation and deliberation defendant formed the specific intent to murder the victim. Defendant specifically argues that, because the victim had an elevated blood alcohol reading and a wound on his face, the evidence tended to show that a fight occurred immediately before the murder. We disagree and hold the trial court committed no error in refusing defendant's request for a charge on second-degree murder.

A defendant properly preserves error under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure warranting this Court's full review of the record on appeal by requesting a specific instruction at the charge conference, notwithstanding defendant's failure to formally object to the charge when given. *See State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). When reviewing the record to determine whether the denial of defendant's request was error, we ask whether, viewing the evidence in the light most favorable to the State, a reasonable juror could conclude that after premeditation and deliberation defendant formed the specific intent to murder the victim. *Patel*, ___ N.C. App. at ___, 719 S.E.2d at 109 10. Defendant is entitled to an instruction on a lesser included offense only where the evidence adduced at trial supports the reasonable inference that the jury could find the defendant guilty of the lesser offense and acquit him of the greater. *See State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000).

First-degree murder is "the unlawful killing of a human being with malice, premeditation and deliberation." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62 (internal quotation marks and citation omitted). "Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation" and is a lesser included offense of first-degree murder. *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997). "[M]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997). Premeditation and deliberation are processes

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of the mind and are not easily amenable to proof by direct evidence. See *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. Rather, premeditation and deliberation are usually established by circumstantial evidence. See *id.* However, “mere speculation is not sufficient to negate evidence of premeditation and deliberation.” *Gary*, 348 N.C. at 524, 501 S.E.2d at 67.

Premeditation means the act was “thought out beforehand for some length of time, however short.” *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991). “[D]eliberation means an intention to kill, executed by defendant in a ‘cool state of blood’ in furtherance of a fixed design or to accomplish some unlawful purpose.” *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981). However, “cool state of blood” does not mean “an absence of passion and emotion.” *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773 (1961).

Premeditation and deliberation may be inferred by: lack of provocation on the part of the victim, the defendant’s conduct, statements, and threats before the murder, and past ill will between the parties, *State v. Gladden*, 315 N.C. 398, 430 31, 340 S.E.2d 673, 693 (1986); bringing a weapon to the scene of the crime or anticipating a confrontation in which the defendant was prepared to use deadly force, *State v. Larry*, 345 N.C. 497, 514, 481 S.E.2d 907, 917 (1997); the nature of the wounds, especially a fatal gunshot wound to the back of the head, *Keel*, 337 N.C. at 476, 447 S.E.2d at 751, *Hunt*, 330 N.C. at 428, 410 S.E.2d at 481; flight from the scene, leaving the victim to die, *State v. Sierra*, 335 N.C. 753, 759, 440 S.E.2d 791, 795 (1994); and fabricating an alibi, discarding a weapon or other evidence suggesting guilt, or attempting to cover up any involvement in a crime, *State v. Chapman*, 359 N.C. 328, 376 77, 611 S.E.2d 794, 828 29 (2005), *State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 178, 191 92 (1998).

In the present case, the record supports the inference that defendant murdered the victim after premeditation and deliberation. Defendant harassed the victim over the telephone at least 94 times and visited the victim’s home at least twice; defendant threatened the victim’s life in a voicemail message on the afternoon of the murder; defendant declared his intention to murder the victim to a confidant; defendant and the victim were known to have a heated relationship and to have argued over payment in the past; defendant anticipated a confrontation whereby he would use deadly force while driving from Durham to Wilkesboro; defendant crafted a false alibi when questioned by the police; defendant fled the scene leaving the victim to

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die; and defendant sold his wife's R.V., which the jury could infer was the vehicle defendant drove on the night of the murder, less than two months after the murder. Most notably, the victim died as a result of a gunshot wound to the center back of the head, discharged at close range, indicating that defendant not only inflicted a brutal, fatal wound on the victim with a deadly weapon, but that even if defendant and the victim were fighting at the time the shot was fired, the victim's back was to defendant and the victim was fleeing from him or turning away from a fight at the time of his death. Defendant argues the scratch on the victim and the victim's elevated blood alcohol content indicate that a fight ensued, which precipitated the murder. Even if defendant's argument had merit, "evidence that the defendant and the victim argued, without more, is insufficient to show that defendant's anger was strong enough to disturb his ability to reason" and hinder his ability to premeditate and deliberate the killing. *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (1995). In sum, defendant has proffered no evidence supporting the submission of second-degree murder; all the evidence in this case supports the jury's conclusion that defendant murdered the victim with malice and after premeditation and deliberation. Accordingly, we hold the trial court committed no error in failing to instruct the jury on second-degree murder.

III. Conclusion

In conclusion, the State presented sufficient evidence from which a reasonable juror could rationally conclude that defendant possessed the motive, opportunity, and means to murder the victim and that defendant was ultimately the perpetrator of the offense. Defendant abandoned the argument that the "Leach Brothers" were possible perpetrators of the victim's murder for appellate review. Defendant did not meet his burden of showing a reasonable possibility that had the trial court allowed defendant to introduce and argue evidence implicating Ms. Whitmore as the assailant in her husband's murder, the jury would have reached a different verdict. Further, defendant did not properly preserve error in accordance with our Rules of Appellate Procedure and is barred from presenting the argument that defendant's constitutional rights were violated by the exclusion of this evidence. Finally, defendant proffered no positive uncontradicted evidence showing that defendant did not intentionally murder the victim after premeditation and deliberation. Accordingly, defendant did not show that the trial court erred by failing to instruct the jury on second-degree murder. Therefore, we hold

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defendant's arguments are without merit and the trial court committed no error.

No error.

Judge STROUD concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

I concur with the majority that the trial court properly excluded evidence that prohibited Keith Donnell Miles ("defendant") from questioning Rachel Whitmore ("the victim's wife") on certain issues by granting the State's motion *in limine*. I also concur with the majority that the court did not err by denying defendant's requested jury instruction on the lesser included offense of second-degree murder. However, I find that the trial court erred by denying defendant's motion to dismiss the first-degree murder charge. Therefore, I respectfully dissent.

At the close of the State's evidence, and again at the close of all the evidence, the trial court denied defendant's motion to dismiss. When the defendant makes a 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 [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

The majority correctly states that the only evidence adduced at trial tending to show defendant murdered Jonathan Whitmore ("the victim") was circumstantial. While "[c]ircumstantial evidence may withstand a motion to dismiss[.]" *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988), "[i]f the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted). "The law will not allow a conviction on evidence that merely gives rise to suspicion or conjecture that the defendant committed the crime." *State v. Lambert*, 341 N.C. 36, 42, 460 S.E.2d 123, 127 (1995).

"[E]vidence of *either* motive or opportunity alone is insufficient to carry a case to the jury." *State v. Bell*, 65 N.C. App. 234, 238-39, 309

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S.E.2d 464, 467 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72, 73 (1984). “When the question is whether evidence of *both* motive and opportunity will be sufficient to survive a motion to dismiss, the answer . . . [depends on] the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable ‘bright line’ test.” *Id.* at 239, 309 S.E.2d at 468.

I agree with the majority that there was sufficient evidence of motive to overcome defendant’s motion to dismiss. Defendant had a financial motive and repeatedly made threatening phone calls to the victim, visited his home, and indicated to Alfreddie Roberson (“Roberson”) that he would kill the victim if he did not receive the money that the victim owed him. However, evidence of motive alone is insufficient to carry a case to the jury. *Id.* at 238-39, 309 S.E.2d at 467. I find that the State produced evidence of motive, suspicion and conjecture but failed to produce sufficient evidence of opportunity to identify defendant as the perpetrator.

The State and the majority rely on cases where some physical evidence or eyewitness testimony linked the defendant to the crime scene and therefore created a reasonable inference that defendant was the perpetrator. In *State v. Carver*, which the majority finds controlling, the victim was found dead on the shore of a river beside her car. ___ N.C. App. ___, ___, 725 S.E.2d 902, 903 (2012). The only evidence that showed the defendant committed the murder was circumstantial. *Id.* at ___, 725 S.E.2d at 904. The Court held that there was sufficient evidence to deny the defendant’s motion to dismiss where there was evidence that the defendant was fishing near the victim’s car, close to the time of the victim’s murder and despite the defendant’s claims that he had not seen or touched the victim or the victim’s car, positive DNA analysis found on the victim’s vehicle was “sufficient to establish that the DNA could only have been left at the time the offense was committed.” *Id.* at ___, 725 S.E.2d at 904-05.¹; see also *State v. Barnett*, 141 N.C. App. 378, 384, 540 S.E.2d 423, 428 (2000) (finding sufficient evidence to survive a motion to dismiss where the defendant admitted to being at the scene and touching various items and the State also presented evidence that *shoe prints* on the floor and the victim’s shirt were consistent with the shoes defendant admitted to wearing on the day of the murder); *State v. Ledford*, 315 N.C. 599, 613-14, 340 S.E.2d 309, 318-19 (1986) (finding sufficient

1. We note that *Carver* has been appealed to the Supreme Court of North Carolina based on a dissenting opinion.

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evidence to survive a motion to dismiss where there was evidence of *defendant's boot print* in the victim's home, *a cigarette butt consistent with the defendant's blood type and brand in the home*, eyewitness testimony placing the defendant outside the victim's home at 2:00 a.m. the night of the murder and evidence defendant had in his possession approximately the same amount of money that was taken from the victim); *State v. Parker*, 113 N.C. App. 216, 223, 438 S.E.2d 745, 750 (1994) (finding sufficient evidence to survive a motion to dismiss where the State presented eyewitness testimony that the defendant was in the area on the morning of the victim's death and where the "*defendant's brand of cigarette package*" was found at the scene) (emphasis added); *State v. Patel*, ___ N.C. App. ___, ___, 719 S.E.2d 101, 107 (2011), *disc. review denied*, ___ N.C. ___, 720 S.E.2d 395, 396 (2012)(finding evidence of opportunity where the State's evidence showed that the victim called the defendant twice the day of the murder and told others she was going to his apartment, the defendant avoided other activities and his alibi was unsupported, the victim's car was located at the defendant's apartment complex, and a *fiber found in defendant's truck was consistent with fibers found under the victim's body*); *Stone*, 323 N.C. at 452-53, 373 S.E.2d at 434 (finding sufficient evidence of opportunity where the defendant "had access to a weapon and bullets which could have caused the death of the victim, had the time and opportunity to commit the murder, and *drove a car which could have made the tire tracks found at the dump site.*")(emphasis added). In *State v. Bostic*, also relied on by the State, there was no physical evidence linking the defendant to the crime scene, but there was eyewitness testimony that confirmed that the defendant assaulted the victim at the scene on the morning of the victim's death and a subsequent statement by the defendant that he killed the victim. 121 N.C. App. 90, 99, 465 S.E.2d 20, 24 (1995).

In the instant case, the State failed to produce any physical evidence or eyewitness testimony linking defendant to the murder scene. When law enforcement arrived, they found the victim's body at a distance of approximately three feet from the side of the road, and approximately one hundred feet from the victim's residence. According to Dr. Patrick Eugene Lantz, a forensic pathologist who performed the victim's autopsy, the victim died as a result of a gunshot wound to the back of the head. The gunshot residue on the victim's head indicated "that the wound was near contact or close range, not quite pressed up hard against the skin's surface, but off of it just a little bit, but definitely not more than an inch away." The State's theory at trial was that defendant was waiting at the victim's home, the

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victim approached defendant's R.V. and when the victim failed to pay defendant, defendant shot him. However, there was no evidence that anyone heard a gunshot fired near the victim's home. The State claimed that the roar of defendant's R.V. masked the sound of the gunshot. However, the State's evidence also indicated that the victim's wife and daughter only heard the vehicle one time and that it was moving fast enough that the victim's wife was unable to reach the window in time to see the vehicle. Therefore, the State's theory suggests that defendant shot the victim one inch from his skull as he was driving the R.V. by the victim's house. This seems highly improbable to create a reasonable inference that defendant was the perpetrator.

A .40 caliber shell casing was also found, but there was no evidence that defendant's DNA and fingerprints were found on the shell casing recovered near the victim's body. No weapons were recovered at the scene, but the victim's wallet containing identification and cash and the victim's two cell phones were recovered. The State produced no evidence that defendant's DNA and fingerprints were found on the victim's wallet or cell phones either.

The majority contends that *Carver* controls the instant case because in both cases the defendants denied their presence at the scene, but later evidence placed them in the vicinity of the murder. However, *Carver* is distinguishable because in *Carver*, DNA was discovered linking the defendant to the victim's car. *Carver*, ___ N.C. App. at ___, 725 S.E.2d at 904. In the instant case, unlike *Carver*, there was no DNA or any other physical evidence linking defendant to the crime scene. In contrast to the cases the State relied on, in the instant case there was absolutely no physical evidence of defendant's presence at the murder scene: no DNA, no fingerprints, no footprints, no cigarette butts, no fibers and no tire tracks.

Furthermore, there were no traces of the victim found in defendant's possession or in his residence. When detectives searched defendant's residence, they did not find a murder weapon or a gun registered to defendant or anything of evidentiary value pertaining to the case. Although blood was later discovered in defendant's wife's R.V., it was confirmed that the blood did not match the victim's blood.

The majority concludes that the cases defendant cites, *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978), and *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977), are inapplicable because in those cases "the State presented evidence of motive, but not opportunity." *State v. Lowry*, 198 N.C. App. 457, 467, 679 S.E.2d 865, 871 (2009). However,

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Lowry's interpretation of *Lee* conflicts with the actual language of *Lee*. The Court in *Lee* specifically found that "[t]he State's evidence in this case establishes a murder; and considered in the light most favorable to the State, shows that *the defendant had the opportunity, means and perhaps the mental state to have committed this murder.*" *Lee*, 294 N.C. at 303, 240 S.E.2d at 451 (emphasis added). Therefore, we will follow the language set out in *Lee* in examining its applicability to the instant case. See *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (holding that the Court of Appeals lacked the authority to overrule decisions of the Supreme Court of North Carolina and has, instead, a "responsibility to follow those decisions, until otherwise ordered by the Supreme Court").

In addition, the majority determines that the Court in *Furr* "decided the defendant's guilt by an entirely different body of law." However, in both the instant case and in *Furr*, the issue was whether there was sufficient evidence to convict the defendant of murder. *Furr*, 292 N.C. at 719, 235 S.E.2d at 198.

In *Lee*, the Court held that the evidence showed "a brutal murder and raise[d] a strong suspicion of [the] defendant's guilt, but" that "the State failed to offer substantial evidence that the defendant was the one who shot [the victim]." *Lee*, 294 N.C. at 303, 240 S.E.2d at 451. *Lee* has been recently examined by this Court in *Patel*, where the Court recognized that in *Lee* the State was unable "to present any evidence placing the defendant with the murdered victim at the time of the murder...[and] there was no evidence linking either [the] defendant to the murder scene or tying him to the means by which the victim was killed." *Patel*, ___ N.C. App. at ___, 719 S.E.2d at 108. Similarly, in *Furr*, the Court found that there was insufficient evidence that the defendant killed his wife where there was no murder weapon in the defendant's or victim's home, none of the fingerprints from the scene matched the defendant, and the defendant was only seen in the vicinity of the victim's home for a short window of time on the morning of the victim's death. *Furr*, 292 N.C. at 717-18, 235 S.E.2d at 197-98. Just as the evidence in *Lee* and *Furr* was insufficient, the State's evidence in the instant case was also insufficient because the State presented no physical evidence linking defendant to the murder scene.

The majority contends the instant case is distinguishable from *Lee* because here there is evidence of defendant's "exact whereabouts around the time of the murder" based on Raven Whitmore's ("the victim's daughter") report that she saw vehicle similar to defendant's

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wife's R.V. around the time of the victim's death and defendant's phone records placing him in Wilkesboro around the time of the murder. I disagree.

Initially, I note that the majority contends that "[t]he victim's wife and daughter...observed a vehicle similar to an R.V. owned by defendant's wife in front of their home..." However, the majority is mistaken. The victim's wife never testified that she saw an R.V. She testified that she heard a loud noise, but not that she actually saw the vehicle. Furthermore, the victim's daughter did not initially describe the vehicle as an R.V., but rather she saw what she described as a box-like vehicle that looked like a U-haul. At trial she testified about what she saw

[State]: And what did you see?

[The victim's daughter]: I seen [sic] what looked like a big tour bus. It was big, with lights around it.

[State]: And how would you describe the lights?

[The victim's daughter]: They were orange. They were at the top and the bottom.

[State]: And where on the vehicle did you see these orange lights?

[The victim's daughter]: I seen [sic] the back part of it.

[State]: Pardon?

[The victim's daughter]: I seen [sic] the back part of it, like a side view.

[State]: So the side of the vehicle you saw?

[The victim's daughter]: Yes, sir.

[State]: And you said it looked like a tour bus?

[The victim's daughter]: Yes, sir.

[State]: How big was it?

[The victim's daughter]: Like width and diameter or something?

[State]: How long was it?

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[The victim's daughter]: I only seen [sic] the back part.

[State]: What was it doing when you saw it?

[The victim's daughter]: It was driving past our mailbox.

...

[State]: Did you see anything else outside?

[The victim's daughter]: No, sir.

All she saw was a side view of the back part of the vehicle as it drove down the street. When asked if the vehicle the victim's daughter described matched defendant's wife's R.V., the investigating detective testified during *voir dire* that "she said a large vehicle with lights down the side, and the R.V. does have that." While the majority claims that the victim's daughter's testimony establishes "eyewitness testimony" that proves defendant's whereabouts on the night of the murder, there is no "eyewitness" who actually saw defendant or even a vehicle that was positively identified as belonging to defendant. *Contrast Patel*, ___ N.C. App. at ___, 719 S.E.2d at 107 (where the victim's vehicle was parked at the defendant's apartment complex). The fact that the victim's daughter briefly glimpsed the back of an unknown vehicle is insufficient to establish that defendant had the opportunity to murder the victim.

The majority determines that, according to phone records, defendant's presence in Wilkesboro on the night of the murder from 7:23 p.m. to 7:46 p.m. gave him the opportunity to commit the murder. Defendant's cell phone records indicate he left Wilkes County prior to 8:00 p.m. and the only evidence of the time of the victim's death was an estimate that the victim died between 8:00 p.m. and 9:00 p.m.

However, there was no evidence presented that defendant and the victim had any plans to meet on the night of the murder. When detectives found the victim's phone, there were two voicemail messages from defendant, however neither message indicated defendant was going to the victim's home on 18 October 2007. While defendant told the victim's wife he would come to the victim's home to resolve the payment issue, the victim's wife told defendant that the victim was not at home, but on a job. In fact, the victim's wife testified that the victim said he was not coming home that night and that she only knew he had come home when he arrived at her gym with their daughters at approximately 7:00 p.m. The State produced no evidence

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indicating that defendant knew the victim would be home on 18 October 2007.

Moreover, the amount of time that defendant had access to the victim is less than the amount recognized by the majority. The majority suggests that defendant had approximately twenty-three minutes to meet and murder the victim. However, additional evidence indicated the victim was not at his home at 7:23 p.m. On the night of his death, the victim drove his two daughters to two different places to pick up fast food. A receipt indicated that the victim left a Wendy's restaurant at 7:24 p.m. The victim's daughter testified that the restaurant was approximately ten minutes from their home. She also testified that after arriving home, the victim went inside the house, placed his food on the counter and was inside for a minute. Subsequently, the victim left the house. At the earliest, the victim could not have been outside his home until around 7:35 p.m. The State's evidence showed that defendant made a series of calls, eight in total, from 7:35 p.m. to 7:46 p.m. Therefore, that amount of time indicates that defendant's phone was in use almost the entire time defendant was near the victim's house and the victim was outside.

Furthermore, the victim's blood alcohol content ("BAC") was .11 at the time of death. Both the victim's daughter and his wife testified that the victim had not been drinking prior to returning home. The victim's daughter also testified that she did not see him consume any alcohol and the victim's wife stated that he had not been drinking alcohol. Investigators found a 12 pack of beer in the victim's car. The victim's BAC of .11 indicated that to register that level he had to consume several beers or a fairly large mixed drink prior to his death.

The scenario proposed by the State, and accepted by the majority, suggests that the victim left his home after 7:30 p.m. and consumed enough alcohol to raise his BAC to .11. Defendant was then waiting on the victim's street at precisely the time the victim stepped outside. Then the victim walked to defendant's vehicle, defendant shot the victim one inch from the back of his head, then drove off in his R.V. and all of this happened while defendant was using his cell phone. This scenario, along with several other pieces of evidence including defendant's phone records, merely raise a suspicion of defendant's guilt and make it improbable that defendant murdered the victim. *See Lee*, 294 N.C. at 302, 240 S.E.2d at 451.

Ultimately, there is not "a reasonable inference of defendant's guilt [which] may be drawn from the circumstances." *Fritsch*, 351

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N.C. at 379, 526 S.E.2d at 455 (citation omitted). The State failed to prove that defendant had sufficient opportunity to commit the crime to identify him as the perpetrator and therefore the trial court should have granted defendant's motion to dismiss.

STATE OF NORTH CAROLINA v. DONALD OSTERHOUDT, DEFENDANT

No. COA11-1428

(Filed 21 August 2012)

1. Appeal and Error—DWI pretrial indication—appeal directly from superior to appellate court

The State correctly conceded that it did not have a statutory right of appeal to the Court of Appeals from a superior court order entered pursuant to N.C.G.S. § 20-38.7 (after a district court's pretrial indication that granted defendant's motion to suppress in a DWI prosecution). Although the State argued that the superior court order was final because it included language "suppressing" the evidence, the order specifically stated that the basis for the hearing was the State's appeal of the district court indication, which meant that a remand to district court for final action was required. The order was therefore interlocutory; however, the State's petition for *certiorari* was granted.

2. Motor Vehicles—crossing halfway point in street—turn lane

There was competent evidence in a DWI suppression hearing to support the superior court's finding of fact that defendant's car did not cross the halfway point on a street in a DWI prosecution that involved a street with a turn lane (a total of three lanes). A Highway Patrol Trooper testified on direct examination that half of defendant's car went over the double-yellow line, which corresponded with the superior court's finding. Additionally, it would have been reasonable for the superior court to assume that the double-yellow line on a three-lane street would not be close enough to the middle of the street that the two lanes on one side and the one on the other would have the same total width.

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3. Motor Vehicles—cross double-yellow line—statutory violations

The trial court erred by concluding that a DWI defendant did not violate any traffic laws in crossing a double-yellow line where defendant made a wide turn and went over the double-yellow line on a street with three lanes (two regular lanes and a turn lane). Defendant did not violate N.C.G.S. § 20-146(a) because that statute does not apply to highways divided into three marked lanes; however, defendant violated N.C.G.S. § 20-146(d)(3-4) by not obeying a traffic control device (the double-yellow line) and N.C.G.S. § 20-146(d)(1) by not staying in his lane.

4. Search and Seizure—traffic stop—normal driving—articulable suspicion

The trial court erred when considering a DWI stop by not looking beyond whether defendant's driving was normal in order to determine whether the trooper had reasonable, articulable suspicion for stopping defendant. The relevant inquiry is whether the officer had specific and articulable facts, as well as rational inferences from those facts, that a person was involved in criminal activity.

5. Search and Seizure—traffic stop—reasonable articulable suspicion—mistaken statute

The trial court erred by finding that a Trooper did not have a reasonable, articulable suspicion for stopping a DWI defendant where the Trooper saw defendant cross a double-yellow line but was mistaken about the statute violated. Defendant's driving violated other statutes and the Trooper's testimony established objective criteria justifying the stop.

Appeal by the State from order entered 14 March 2011 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 23 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

Matthew J. Davenport for defendant-appellant.

The Avery, P.C., by Isaac T. Avery, III, Raleigh, on behalf of the North Carolina Conference of District Attorneys, amicus curiae.

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Tiffanie W. Sneed, Chapel Hill, on behalf of the North Carolina Association of Police Attorneys, amicus curiae.

Edmond W. Caldwell, Jr. and Julie B. Smith, Raleigh, on behalf of the North Carolina Sheriffs' Association, amicus curiae.

HUNTER, Robert C., Judge.

The State appeals from a 14 March 2011 order entered by Judge W. Russell Duke, Jr. in Pitt County Superior Court affirming the district court's pretrial indication that granted defendant Donald Osterhoudt's ("defendant's") motion to suppress the stop of defendant ("motion to suppress").¹ The State asserts the following errors on appeal: (1) the superior court's finding of fact that defendant's car "never crossed over the middle halfway point of Fifth Street[]" was not supported by the evidence; (2) the superior court's conclusion of law that it is permissible for a vehicle to cross the double yellow line as long as it does not cross the "centerpoint of the roadway" is erroneous as a matter of law; (3) the superior court applied an incorrect test to determine whether defendant's traffic stop was permissible under the Fourth Amendment and, thus, erred in its conclusion of law that the police officer's observations did not constitute reasonable articulable suspicion; and (4) the superior court's conclusion of law that the stop of defendant was unreasonable was erroneous. After careful review, we reverse and remand.

Background

The evidence tended to establish the following: On 14 January 2010 at approximately 1:10 a.m., North Carolina State Highway Patrol Trooper Nathaniel Monroe ("Trooper Monroe") was on-duty and stopped at a stoplight on Fifth Street in Greenville, N.C. Trooper Monroe was traveling east on Fifth Street and observed defendant make a "wide right turn" onto Fifth Street whereby half of defendant's car went over the double yellow line into the turning lane for traffic coming in the opposite direction. Fifth Street is a three-lane road with two lanes for westbound traffic (consisting of a regular lane and a left hand turn lane) and one lane for eastbound traffic. Trooper Monroe turned on his blue lights and stopped defendant. Defendant pulled

1. We note that the phrase "motion to suppress the stop" was used by defendant, and the record shows that the actual name of defendant's motion was "Motion to Suppress Stop Pursuant to N.C.G.S. § 20-38.6." However, for clarity, we refer to it as a motion to suppress the evidence obtained as a result of the stop.

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over on Fifth Street but only pulled his car halfway into a parking spot. Trooper Monroe charged defendant with and arrested defendant for driving while impaired (“DWI”) pursuant to N.C. Gen. Stat. § 20-138.1 (2009).²

On 12 November 2010, defendant filed a motion to suppress in district court pursuant to N.C. Gen. Stat. § 20-38.6 (2010). After a pretrial hearing on 17 November 2010, the district court issued its pretrial indication and included the following pertinent conclusions of law:

3. That it is not a violation of the N.C. General Statutes for a vehicle to cross a double yellow line separating a turn lane from a straight travel lane at an intersection while making a right turn so long as such movement is made in safety and no traffic is affected;
4. That [Trooper Monroe’s] observations do not constitute a reasonable articulable suspicion that any crime has occurred or is occurring;
5. The stop of the vehicle which the [d]efendant was operating was unreasonable.

The district court ordered all evidence obtained as a result of the stop suppressed. The State gave oral notice of its appeal to superior court pursuant to N.C. Gen. Stat. § 20-38.7 (2010) and filed its notice of appeal on 30 November 2010.

On 3 December 2010, the superior court held a hearing on the State’s appeal of the district court’s pretrial indication. After taking the matter under advisement, the superior court made the following findings of fact in its 14 March 2011 order, *nunc pro tunc* to 3 December 2010:

8. That [defendant’s car], during the turn, veered over the double yellow line to the extent that approximately half of the car was over the line before coming back into its eastbound lane of travel;
9. That, although the car cross [sic] the yellow lines . . . the car never crossed over the middle halfway point of Fifth Street[.]

Based on its findings of fact, the superior court issued the following pertinent conclusions of law:

2. Defendant was also charged with violating N.C. Gen. Stat. § 20-146(a) for failing to stay within the right half of the road.

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3. That it is not a violation of the General Statutes for a vehicle to cross the double yellow line separating the turn lane from the straight lane at this particular intersection while making a right turn so long as the vehicle does not cross the centerpoint of the roadway, and such turn is made in safety and no traffic is affected;
4. That this driving falls within a normal pattern of driving behavior, and the Trooper's observations do not constitute a reasonable articulable suspicion that any crime has occurred or is occurring;
5. The stop of the vehicle which the [d]efendant was operating was unreasonable.

The superior court affirmed the district court's pretrial indication and ordered "all evidence obtained as a result of the stop and detention of [d]efendant" suppressed.

On 21 March 2011, the State filed its notice of appeal to this Court.

Discussion

I. Grounds for Appellate Review

[1] Initially, the Court must determine whether this appeal is properly before it. The State "concedes that, ordinarily, it has no statutory right of appeal from a superior court order entered pursuant to N.C.G.S. § 20-38.7(a)." However, because the superior court failed to remand the matter back to the district court to enter a final order and it included language specifically ordering a suppression of all the evidence obtained as a result of the stop, the State asserts it is, in effect, a final order that gives the State a statutory right of appeal pursuant to N.C. Gen. Stat. §§ 15A-979(c) and 15A-1445(b). However, if we find the State has no statutory right of appeal, the State requests this Court grant its petition for writ of *certiorari* and review the merits of its appeal.

We note that the State is correct in its concession that it has no statutory right of appeal from a superior court order entered pursuant to N.C. Gen. Stat. § 20-38.7. *See State v. Fowler*, 197 N.C. App. 1, 7, 676 S.E.2d 523, 532 (2009), *disc. review denied and appeal dismissed*, 364 N.C. 129, 696 S.E.2d 695 (2010); *State v. Palmer*, 197 N.C. App. 201, 203, 676 S.E.2d 559, 561 (2009), *disc. review denied*, 363 N.C. 810, 692 S.E.2d 394 (2010). Pursuant to N.C. Gen. Stat. § 20-38.6 (2011), after a defendant moves to suppress evidence in district court prior to trial, the district court "shall set forth in writing the findings

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of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied.” If the district court indicates that a defendant’s motion to suppress should be granted, “the judge shall not enter a final judgment on the motion until after the State has appealed to superior court [pursuant to N.C. Gen. Stat. § 20-38.7] or has indicated it does not intend to appeal.” N.C. Gen. Stat. § 20-38.6(f). This Court has held that a superior court order issued pursuant to N.C. Gen. Stat. § 20-38.7 is interlocutory even though it “may have the same ‘effect’ of a final order but requires further action for finality.” *Fowler*, 197 N.C. App. at 6, 676 S.E.2d at 531. Pursuant to N.C. Gen. Stat. § 20-38.7, once the superior court reviews the district court’s pretrial indication *de novo*, the superior court must “enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant’s pretrial motion[.]” *Id.* at 11, 676 S.E.2d at 535.

Here, while acknowledging the fact that it may not appeal a superior court order issued pursuant to N.C. Gen. Stat. § 20-38.7, the State attempts to side step this procedural bar by arguing that the superior court order is no longer interlocutory, as designated in *Fowler*, 197 N.C. App. at 6, 676 S.E.2d at 531, but constitutes a final order giving the State a right of appeal through N.C. Gen. Stat. §§ 15A-1445 and 15A-979. We are not persuaded.

Pursuant to N.C. Gen. Stat. §§ 15A-1445 and 15A-979 (2011), the State has a right of appeal to this Court if the superior court grants a defendant’s motion to suppress. *See State v. Barnhill*, 166 N.C. App. 228, 230, 601 S.E.2d 215, 217, *appeal dismissed*, 359 N.C. 191, 607 S.E.2d 646 (2004) (noting that pursuant to N.C. Gen. Stat. § 15A-979(c), “[t]he State has the right to appeal [to this Court] an order by the superior court granting a motion to suppress prior to trial”). Thus, the State is arguing that since the superior court order included language in it specifically “suppressing” the evidence, the superior court was granting defendant’s motion to suppress; therefore, the State has a statutory right of appeal pursuant to N.C. Gen. Stat. §§ 15A-1445 and 15A-979. However, in the present case, the superior court order specifically states that the basis for the 3 December 2010 hearing is the State’s appeal of the district court’s pretrial indication granting defendant’s motion to suppress. Therefore, although the superior court order does not fully comply with *Fowler* and *Palmer*, this does not change the nature of the order from interlocutory to final. Accordingly, because the State has no statutory right of appeal, we must grant defendant’s motion to dismiss.

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However, as the State requests, this Court may grant a writ of *certiorari* “when no right of appeal from an interlocutory order exists.” N.C.R. App. P. 21(a)(1) (2012). The State argues this Court should grant *certiorari* for two reasons. First, the State contends that the superior court exceeded its jurisdiction by: (1) failing to remand the matter back to the district court with instructions to enter a final order granting or denying the motion to suppress in violation of N.C. Gen. Stat. § 20-38.7(a), and (2) failing to “give[] effect” to *Fowler* and *Palmer*. Second, the State alleges that review is “vitally important because of the manifest errors of law committed by the superior court and the very real potential for those errors to be repeated in Pitt County and elsewhere.” In support of its petition for *certiorari*, the State cites *Fowler* and *Palmer* where we granted *certiorari* to address issues pertaining to the appeal of a district court’s pretrial indication. *Fowler*, 197 N.C. App. at 8, 676 S.E.2d at 533 (granting the State’s petition for *certiorari* after the superior court found N.C. Gen. Stat. §§ 20-38.6 and 38.7 unconstitutional); *Palmer*, 197 N.C. App. at 204, 676 S.E.2d at 561 (allowing *certiorari* based on the superior court’s finding that the State lacked jurisdiction in appealing the district court’s pretrial indication).

Having determined that the State has no right of appeal from the superior court’s interlocutory order and recognizing that this Court has granted *certiorari* in similar circumstances, we exercise our discretion to grant the State’s petition for writ of *certiorari*.

II. Standard of Review

On appeal, we will apply the same standard of review we would use as if the superior court order was a final order even though it was entered pursuant to N.C. Gen. Stat. § 20-38.7. Our review of a superior court’s order granting a motion to suppress is limited to “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). Any unchallenged findings of fact are “deemed to be supported by competent evidence and are binding on appeal.” *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735–36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). “[T]he trial court’s conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting

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State v. Golphin, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001)).

III. Finding of Fact No. 9

[2] First, we address the State’s argument that the superior court’s finding of fact that defendant’s car “never crossed over the middle halfway point of Fifth Street” was not supported by competent evidence. In support of its argument, the State claims that although Trooper Monroe testified that defendant’s vehicle was “about halfway into the turning lane[.]” he did not definitively establish that defendant’s car was “no more than halfway” into the turning lane. Furthermore, the State contends that because there was no testimony establishing the total width of Fifth Street nor the width of the individual traffic lanes, “there was no way of determining by competent evidence that crossing the double yellow lines did not constitute crossing the ‘middle halfway point of Fifth Street.’ ” In other words, the State seems to argue that there is a possibility that the double yellow line was located near enough to the center of Fifth Street that a portion of defendant’s car may have crossed the “middle halfway point” of the road. We disagree.

While the State is correct that on cross-examination, Trooper Monroe did testify that defendant’s car was “about halfway” into the turning lane, he stated in direct examination that “[h]alf of [defendant’s] vehicle went over the double yellow line[.]” Since Trooper Monroe’s initial statement is unequivocal and corresponds with the superior court’s finding of fact, the State’s argument is without merit.

Additionally, although the State is correct in its assertion that no testimony was offered to conclusively establish where the double yellow line was in relation to the middle point of the road, it was reasonable for the superior court to assume that the double yellow line on a three-lane road, as Fifth Street is, would not be close enough to the middle of the road whereby the two lanes on one side and the one lane on the other side would essentially have the same total width. Thus, the superior court’s finding of fact that “[defendant’s] car did not cross over the middle halfway point of Fifth Street” was supported by the court’s rational assumption. Therefore, because we find that there was competent evidence to support the superior court’s finding of fact, the State’s argument is overruled. Since the State did not challenge any other findings of fact, the remaining findings are deemed competent and are binding on appeal. *See Roberson*, 163 N.C. App. at 132, 592 S.E.2d at 735–36.

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IV. Conclusion of Law No. 3

[3] Next, the State argues that the superior court erred in its conclusion of law that crossing a double yellow line separating the turning lane from a motorist's lane of traffic at this particular intersection is not a violation of law if: (1) the motorist "does not cross the centerpoint of the roadway"; (2) the turn is "made in safety"; and (3) "no traffic is affected[.]" Specifically, the State contends that the superior court's conclusion is not supported by law or evidence and that defendant's act of driving over the "centerpoint" of the road violates N.C. Gen. Stat. §§ 20-146 and 20-153. We agree that defendant violated N.C. Gen. Stat. §§ 20-146(d) and 20-153, but we do not find a violation of N.C. Gen. Stat. § 20-146(a).

The State argues on appeal, as it did at the superior court hearing, that defendant violated N.C. Gen. Stat. § 20-146(a) which requires drivers to drive on the "right half of the highway[.]" In fact, defendant was charged with violating this statute. However, N.C. Gen. Stat. § 20-146(a) contains several exceptions. Specifically, the statute does not apply to "highway[s] divided into three marked lanes for traffic[.]" N.C. Gen. Stat. § 20-146(a)(3). Here, Fifth Street is a three-lane road; therefore, N.C. Gen. Stat. § 20-146(a) and its requirement that drivers stay on the right half of the road would not apply. Therefore, we find the State's assertion that defendant violated this statute is without merit.³

In contrast, we do find defendant violated N.C. Gen. Stat. §§ 20-146(d) and 20-153. Pursuant to N.C. Gen. Stat. § 20-146(d), on streets that are two or more lanes and clearly marked:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

...

(3) Official traffic-control devices may be erected directing specified traffic to use a designated lane or designating those lanes to

3. We note that the superior court seems to base its conclusion of law that defendant did not violate any traffic law because he did not cross the "centerpoint" of the road on a misapplication of this statute to the facts of this case. Since we have found that N.C. Gen. Stat. § 20-146(a) does not apply to the facts here, whether defendant crossed the "centerpoint" of Fifth Street is irrelevant, and we do not address the State's assertions on this point.

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be used by traffic moving in a particular direction regardless of the center of the street and drivers of vehicles shall obey the direction of every such device.

(4) Official traffic-control devices may be installed prohibiting the changing of lanes on sections of streets, and drivers of vehicles shall obey the directions of every such device.

As for a definition for “traffic-control devices,” N.C. Gen. Stat. § 136-30 (2011) requires any traffic-control devices to comply with the Manual on Uniform Traffic-Control Devices for Streets and Highways (“the Manual”) published by the United States Department of Transportation; therefore, we look to the Manual to find a definition of a traffic-control device. According to the Manual, a traffic control device is “a sign, signal, marking, or other device used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, private road open to public travel, pedestrian facility, or shared-use path by authority of a public agency or official having jurisdiction[.]” Manual on Uniform Traffic-Control Devices for Streets and Highways § 1A.13 (2009 ed.). Therefore, the double yellow line at issue in this case is a “marking” used to guide traffic and, thus, a traffic-control device.

When defendant crossed the double yellow line on Fifth Street, he failed to stay in his lane and violated N.C. Gen. Stat. § 20-146(d)(1). Additionally, defendant failed to obey the double yellow line marker and, therefore, violated N.C. Gen. Stat. § 20-146(d)(3-4). Thus, we find that defendant violated § 20-146(d)(1), (3-4).

Pursuant to N.C. Gen. Stat. § 20-153(a) (2011), “a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.” At the superior court hearing, Trooper Monroe testified that there was nothing in the roadway that would cause defendant to make a wide turn to avoid hitting something. Thus, as the State asserts and we agree, there was no practical reason why defendant would need to veer over the double yellow line. Therefore, we find defendant also violated N.C. Gen. Stat. § 20-153 by failing to stay close to the right-hand curb when making the turn onto Fifth Street.

Because we find that defendant violated N.C. Gen. Stat. §§ 20-146(d) and 20-153, we hold that the superior court’s conclusion of law no. 3 does not reflect a correct interpretation of applicable legal principles. Furthermore, we note that the superior court’s conclusion that defendant did not violate the law because he did not cross the “centerpoint” of the road, he made the turn safely, and no traffic was

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affected is not an accurate reflection of our traffic laws. Therefore, we hold that the superior court erred in concluding defendant did not violate any traffic laws in crossing the double yellow line.

V. Test to Determine Whether the Traffic Stop was Valid Under the Fourth Amendment

[4] Next, the State argues that the superior court erred by considering in its analysis whether defendant's driving fell within a normal driving pattern when determining if the stop was valid under the Fourth Amendment. Specifically, the State alleges that the superior court's analysis has the potential to make our traffic laws unenforceable since it is normal for people to violate them and warns that a formal adoption of this analysis would necessitate the need for expert witness testimony in all traffic cases. Finally, the State contends that the superior court erred by "overlook[ing] or discount[ing]" other objective factors that established reasonable articulable suspicion because it only focused on whether defendant's driving was normal. We agree.

While we acknowledge that this Court has classified a defendant's driving as normal when looking at the totality of the circumstances, that classification has never been the only objective factor we have examined to determine whether a police officer has reasonable articulable suspicion. See *State v. Peele*, 196 N.C. App. 668, 674, 675 S.E.2d 682, 687 (2009) (noting that "a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior" was not enough to establish reasonable articulable suspicion to stop the defendant (internal quotations omitted)). The relevant inquiry for determining the constitutionality of an investigatory stop under the Fourth Amendment is whether the police officer had "specific and articulable facts, as well as the rational inferences from those facts" that a person is involved in criminal activity but not, as the superior court seems to indicate, how "normal" his or her driving is. *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994). Here, since the superior court fails to look beyond whether defendant's driving was normal in order to determine whether Trooper Monroe had reasonable articulable suspicion, the court erred.

VI. Conclusions of Law Nos. 4 and 5

[5] Finally, the State argues that the superior court erred in its conclusions of law that Trooper Monroe did not have reasonable articulable suspicion to stop defendant and that the stop was unreasonable.

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Specifically, the State asserts that because Trooper Monroe observed defendant violate several traffic statutes when defendant crossed the double yellow line, he was justified in stopping defendant. We agree that Trooper Monroe had reasonable articulable suspicion to stop defendant based on the observed traffic violations notwithstanding his mistaken belief that defendant had violated N.C. Gen. Stat. § 20-146(a) and that the stop was reasonable under the Fourth Amendment.

The Fourth Amendment protects “[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]” U.S. Const. amend. IV. “An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (internal quotation marks omitted). The stop must be based on a “minimal level of objective justification, something more than an unparticularized suspicion or hunch.” *Id.* at 442, 446 S.E.2d at 70 (internal quotation marks and citation omitted). Our Supreme Court has held that “reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected.” *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). However, “an officer’s determination regarding potential criminal activity must be objectively reasonable, and an officer’s mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop.” *State v. Heien*, ___ N.C. App. ___, ___, 714 S.E.2d 827, 828-29 (2011), *writ of supersedeas allowed and disc. review granted*, ___ N.C. ___, 720 S.E.2d 389 (2012). This Court has held that “an officer’s subjective motivation for stopping a vehicle is irrelevant as to whether there are other objective criteria justifying the stop.” *State v. Baublitz*, 172 N.C. App. 801, 807, 616 S.E.2d 615, 620 (2005) (internal quotation marks omitted); *see also State v. McLamb*, 186 N.C. App. 124, 127, 649 S.E.2d 902, 904 (2007) (holding that “[w]hether the legal justification for [a police officer’s] traffic stop was subjectively reasonable is irrelevant”).

Here, Trooper Monroe testified that he initiated the stop of defendant after he observed “half of [defendant’s] vehicle” go over the double yellow line when defendant turned right onto Fifth Street. Even though he charged defendant with “driving left of center” and issued defendant a ticket for violating N.C. Gen. Stat. § 20-146(a) for failing to keep his “vehicle on the right half of the highway,” Trooper Monroe did not testify that he stopped defendant for violating N.C. Gen. Stat. § 20-146(a) but based for defendant’s crossing the double yellow line.

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Since we have held that defendant did not violate N.C. Gen. Stat. § 20-146(a) because Fifth Street is a three-lane road, the issue becomes whether there is objective criteria to justify stopping defendant other than Trooper Monroe's mistaken belief that defendant violated N.C. Gen. Stat. § 20-146(a) when he crossed the double yellow line. To decide this issue, we must determine whether Trooper Monroe's proffered justification for stopping defendant is sufficient to establish an objectively reasonable basis for the stop.

Trooper Monroe's testimony that he initiated the stop of defendant after observing defendant drive over the double yellow line is sufficient to establish a violation of: (1) N.C. Gen. Stat. § 20-146(d)(3-4) since we concluded that crossing the double yellow line constitutes a failure to obey traffic-control devices; (2) N.C. Gen. Stat. § 20-146(d)(1) because by crossing the double yellow line, defendant failed to stay in his lane; and (3) N.C. Gen. Stat. § 20-153 as defendant failed to stay close to the right-hand curb of Fifth Street when he veered over the double yellow line. Therefore, regardless of his subjective belief that defendant violated N.C. Gen. Stat. § 20-146(a), Trooper Monroe's testimony establishes objective criteria justifying the stop. Consequently, the stop of defendant was reasonable, and the superior court erred in holding otherwise.

We note that because Trooper Monroe's reason for stopping defendant was not based solely on his mistaken belief that defendant violated N.C. Gen. Stat. § 20-146(a) but because defendant crossed the double yellow line, we find the present case distinguishable from other cases where our Court has held that an officer's mistaken belief a defendant has committed a traffic violation is not objectively reasonable and, thus, violates a defendant's Fourth Amendment rights. *See Heien*, ___ N.C. App. at ___, 714 S.E.2d at 831; *McLamb*, 186 N.C. App. at 127, 649 S.E.2d at 904; *State v. Burke*, ___ N.C. App. ___, ___, 712 S.E.2d 704, 707 (2011), *aff'd per curiam*, ___ N.C. ___, 720 S.E.2d 388 (2012).

Accordingly, we remand and reverse the superior court's order affirming the district court's pretrial indication. On remand, the superior court must remand the matter back down to the district court with instructions to enter a final order denying defendant's motion to suppress in accordance with this opinion.

Conclusion

Based on our holding that defendant's driving violated N.C. Gen. Stat. §§ 20-146(d) and 20-153 and Trooper Monroe's reason for initiat-

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ing the stop was objectively reasonable, we find that the superior court erred in affirming the district court's pretrial indication. We, therefore, reverse and remand the superior court's order affirming the district court's pretrial indication. On remand, the superior court must remand the matter back down to the district court with instructions to enter a final order denying defendant's motion to suppress in accordance with this opinion.

Reversed and Remanded.

Judges GEER and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 AUGUST 2012)

ALBRIGHT v. NASH COUNTY No. 11-1530	Nash (10CVS2141)	DISMISSED as to the 1 July 2011 order. REMANDED as to the 30 April 2012 advisory opinion for entry of an order consistent with this decision. VACATED as to the 30 April 2012 order awarding attorneys' fees and expenses.
BINDER v. BINDER No. 11-1502	Guilford (04CVD4810)	Affirmed in part; vacated and remanded in part
CULLEN v. EMANUEL & DUNN, PLLC No. 11-921	Columbus (11CVS20)	Affirmed
DUNN v. DART No. 11-1264	Craven (09CVS2600)	Affirmed
HANKINS v. BARTLETT No. 11-1394	Guilford (11CVS3663)	Affirmed
HARMON v. LEEUWENBURG No. 11-1498	Onslow (11CVD3105)	Affirmed
IN RE C.A. No. 12-123	Wake (09JT857)	Dismissed
IN RE GEORGE MURROW No. 12-148	Wake (11SPC580)	Reversed
IN RE I.E.R. No. 12-204	Guilford (04JT70)	Affirmed
IN RE M.G.C. No. 12-296	Gaston (11JT112)	Affirmed
KINNEY v. KINNEY No. 11-1517	Pitt (04CVD2166)	Affirmed

McCALL v. NORMAN No. 12-244	Transylvania (09CVD22)	Affirmed
NEWBRIDGE BANK v. KOTIS HOLDINGS, LLC No. 11-1016	Guilford (09CVS11379)	Reversed and Remanded
PUTNAM v. SWEEP RITE, INC. No. 12-73	Indus. Comm. (893717) (PH-2076)	Remanded
REBER v. N.C. DEP'T OF CORR. No. 11-1294	Indus. Comm. (TA-18483)	Affirmed
SARTORI v. CNTY OF JACKSON No. 11-1398	Jackson (10CVS266)	Dismissed
STATE v. BARKER No. 12-126	Gaston (11CRS54610)	No Error
STATE v. BENHAM No. 11-1321	Mecklenburg (10CRS207651)	New trial in part, no error in part
STATE v. CARVER No. 11-1575	Burke (09CRS3513)	No Error
STATE v. CHAVIS No. 12-193	Richmond (10CRS50894)	No Error
STATE v. COSTA No. 12-206	Macon (11CRS50104) (11CRS50105)	No Error
STATE v. DAVIS No. 11-1464	Mecklenburg (07CRS231922-23) (08CRS14351)	No prejudicial error
STATE v. FRANCE No. 12-50	Cabarrus (09CRS52770-71) (09CRS9072)	No error in part; Vacated in part
STATE v. FULTON No. 12-33	Forsyth (10CRS56211)	No Error
STATE v. GUTIERREZ-GONZALEZ No. 11-1497	Mecklenburg (10CRS231075)	No error in part, no plain error in part, dismissed in part.

STATE v. HENSLEY No. 11-1576	Buncombe (09CRS61578-83)	Affirmed
STATE v. HOWELL No. 11-1489	Johnston (10CRS52025)	Affirmed
STATE v. HUFFMAN No. 12-59	Rowan (09CRS52855)	No Error
STATE v. IRELAND No. 11-1240	Buncombe (10CRS53637)	Affirmed
STATE v. LEWIS No. 11-1390	Durham (10CRS57915) (10CRS57938)	No Error
STATE v. LOGAN No. 12-279	Henderson (09CRS1894)	Affirmed; remanded for correction of clerical error
STATE v. McALLISTER No. 11-1515	Robeson (09CRS58516)	No Error
STATE v. McNEIL No. 11-1319	McDowell (03CRS54024) (04CRS53930) (04CRS54298-99) (04CRS54348) (04CRS54398) (05CRS50036) (10CRS1270-73)	Affirmed in part; remanded in part
STATE v. MILLSAPS No. 12-32	Iredell (11CRS1571) (11CRS50623)	No Error
STATE v. MINCEY No. 12-223	Cleveland (06CRS58033) (07CRS2291)	No Error
STATE v. MOBLEY No. 12-54	Mecklenburg (09CRS225504-06) (11CRS3138)	No prejudicial error.
STATE v. MORVAY No. 12-118	Mecklenburg (09CRS80001) (09IFS26709)	No Error
STATE v. PHAIR No. 12-46	Guilford (10CRS90989-90)	No Error

STATE v. PICKLESIMER No. 11-1245	Jackson (07CRS51506)	No Error
STATE v. RICHARDSON No. 11-1581	Mecklenburg (09CRS224326) (09CRS224327) (09CRS79460)	No Error
STATE v. SMITH No. 11-1277	Pitt (07CRS51701-06)	Vacated in part and remanded for resentencing; No error as to the remaining convictions
STATE v. SUTTON No. 11-1518	Mecklenburg (10CRS209046)	No Error
STATE v. SYLER No. 11-1534	Cumberland (09CRS50442) (09CRS50446)	Affirmed
STATE v. TAYLOR No. 11-1535	Guilford (11CRS66308-09) (11CRS66858) (11CRS66860)	No Error
STATE v. WATERS No. 11-1557	Buncombe (07CRS262-266)	Affirmed
STATE v. WILLIAMS No. 11-1344	Franklin (10CRS50348) (10CRS50364)	No Error
VALU-LODGE OF GREENVILLE, INC. v. BRANCH BANKING & TRUST No. 11-1241	Buncombe (10CV5701)	Affirmed

AM. TOWERS, INC. v. TOWN OF MORRISVILLE

[222 N.C. App. 638 (2012)]

AMERICAN TOWERS, INC., PETITIONER v. TOWN OF MORRISVILLE, RESPONDENT

No. COA11-1455

(Filed 4 September 2012)

Zoning—special use permit—telecommunications tower—failure to make prima facie showing—substantial injury to value of adjoining properties

Respondent Town did not err in a case involving petitioner's application for a special use permit to erect a telecommunications tower by concluding that petitioner did not offer competent, material, and substantial evidence supporting required findings. Although petitioner met its burden to make out a *prima facie* case of two of the three general findings at issue in this case, the Court of Appeals was bound by its decision in *SBA v. City of Asheville City Council*, 141 N.C. App. 19, and held that petitioner failed to make a *prima facie* showing that the proposed use would not substantially injure the value of adjoining properties.

Appeal by petitioner from order entered 19 August 2011 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 April 2012.

Nexsen Pruet, PLLC, by David S. Poleka and Brian T. Pearce, attorneys for petitioner-appellant.

Jordan Price Wall Gray Jones & Carlton, PLLC, by R. Frank Gray and Lori P. Jones, attorneys for respondent-appellee.

STEELMAN, Judge.

In applying for a special use permit to erect a telecommunications tower, petitioner made a *prima facie* showing that the proposed use was in harmony with the neighborhood and that it was in conformity with the comprehensive plan of the town. However, petitioner failed to make a *prima facie* case that the proposed use would not substantially injure the value of adjoining property. The decision of the trial court, which upheld the denial of the special use permit, is affirmed.

I. Factual and Procedural Background

The Kathrine R. Everett Trust owns 12.47 acres of land located at 2399 Weaver Forest Way, in Morrisville. This property is forested and undeveloped land, crossed by various easements, including those for

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telephone and power lines. It is bounded on the north by North Carolina Highway 540, a six-to-eight lane divided highway, and on the south and east by single family residential homes. To the west of the property is vacant land. The Trust agreed to lease 0.147 acres of the property to American Towers, Inc. (petitioner), for construction of a telecommunications tower. The parcel adjoins residentially zoned properties. The tower site is about 280 feet from the rear lot line of the closest neighboring residential lot, and about 300 feet from the nearest home.

The Morrisville Zoning Ordinance establishes an industrial management zoning district, described using code IM. Morrisville, N.C., Zoning Ordinance, part B, art. I, § 11 (2012). The tower site is zoned IM. Under the ordinance, IM is the only zoning district in which a telecommunications tower can be constructed, and a special use permit is required before a tower may be built. Morrisville, N.C., Zoning Ordinance, part C, art. IV. Before it may grant a special use permit, the Town of Morrisville (respondent) must make six general findings, and also twenty additional findings particular to telecommunications towers. *Id.* part C, art. VII, §§ 1, 2.10.

On 10 February 2010, petitioner submitted an application for a special use permit. The application contained materials in support of the required findings. Petitioner included an analysis prepared by Craig D. Smith, a real estate appraiser, to address the requirement that the “proposed development or use will not substantially injure the value of adjoining property.” Morrisville, N.C., Zoning Ordinance, part C, art. VII, § 1. Smith opined that the tower would not injure adjoining property values. On 9 September 2010, the Morrisville Planning and Zoning Board held a hearing on the application, and thereafter forwarded the permit application to the Town Council, with a recommendation that the permit be approved.

From October to December 2010, the Town Council held a series of four public hearings on the application. The hearings were quasi-judicial in nature. During the course of these hearings, petitioner agreed to reduce the overall height of the tower from 199 feet to 175 feet. Petitioner also indicated a willingness to disguise the tower as another object, such as a fire tower or tree. Petitioner’s expert Smith testified at these hearings. Lay witnesses spoke in opposition to the application. No expert testimony was offered as to the impact of the tower upon the values of adjoining properties in opposition to the application, although lay witnesses at the third hearing presented property tax listings as evidence of the value of properties.

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On 14 December 2010, the Board denied petitioner's application for a special use permit. It found "[t]hat the applicant did not carry its burden to demonstrate" three of the six general findings required by the Morrisville Zoning Ordinance: (1) that the tower would not substantially injure the value of adjoining property; (2) that the tower would be in harmony with the character of the neighborhood; and (3) that the tower would conform to the town's comprehensive plan. The Town Council found that petitioner had demonstrated the other three requirements. It declined to address nineteen of the twenty additional findings required for a telecommunications tower. However, it concluded that petitioner failed to satisfy additional finding (Q), which states that the Town Council

may consider the aesthetic effects of the tower as well as mitigating factors concerning aesthetics, and may disapprove a tower on the grounds that such aesthetic effects are unacceptable. Factors relevant to aesthetic effects are the protection of the view in sensitive or particularly scenic areas and areas specially designated as unique natural features, scenic roadways and historic sites; the concentration of towers in the proposed area; and whether the height, design, placement or other characteristics of the proposed tower could be modified to have a less intrusive visual impact.

Morrisville, N.C., Zoning Ordinance, part C, art. VII, § 2.10(Q).

On 16 February 2011, petitioner filed a petition for writ of *certiorari*, seeking review of respondent's decision, in the Wake County Superior Court. The Court issued its writ, bringing the record of the proceedings before the Court. On 19 August 2011, the trial court entered an order affirming respondent's decision to deny the permit.

Petitioner appeals.

II. Prima Facie Case

Petitioner contends that respondent erred by concluding that petitioner did not offer competent, material, and substantial evidence supporting three of the required findings. We disagree.

A. Standard of Review

"When deciding special use permits . . . the city council or planning board shall follow quasi-judicial procedures." N.C. Gen. Stat. § 160A-381(c) (2011). The deciding body

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must follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. If a *prima facie* case is established, [a] denial of the permit [then] should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 12, 565 S.E.2d 9, 16 (2002) (citations and quotation marks omitted).

There are two standards of review that may apply to special use permit decisions. Whole record review, a deferential standard, applies where we must determine if a decision was supported by the evidence or if it was arbitrary or capricious. *Id.* at 13, 565 S.E.2d at 17. However, errors of law are reviewed *de novo*. *Id.* Further, “[w]hen the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue *de novo*.” N.C. Gen. Stat. § 160A-393(k)(2) (emphasis added).

“[W]hether competent, material and substantial evidence is present in the record is a conclusion of law.” *Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (2009) (quotation marks omitted). Thus, we review *de novo* the initial issue of whether the evidence presented by petitioner met the requirement of being competent, material, and substantial. The town’s ultimate decision about how to weigh that evidence is subject to whole record review. *See SBA, Inc., v. City of Asheville City Council*, 141 N.C. App. 19, 23–29, 539 S.E.2d 18, 20–24 (2000) (determining, in part I, that petitioner did not present sufficient evidence under *de novo* review; and holding, in part II, that respondent properly weighed the evidence under whole record review).

We must determine whether petitioner presented competent, material, and substantial evidence. If so, then petitioner has made out a *prima facie* case, and the permit must issue unless there was competent, material, and substantial evidence to rebut petitioner’s showing. Because “whether competent, material and substantial evidence is present in the record is a conclusion of law,” we address both of these issues under *de novo* review. *Clark*, 136 N.C. App. at 119, 524 S.E.2d at 50 (quotation marks omitted).

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B. Analysis

Municipalities derive their zoning power from a grant of authority by the General Assembly. N.C. Gen. Stat. § 160A-381(a). Municipalities may require a special use permit, with “reasonable and appropriate conditions and safeguards,” for certain uses. *Id.* § 160A-381(c). “A special permit . . . is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.” *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974).

An applicant for a special use permit must make out a *prima facie* case, by competent, material, and substantial evidence, meeting all the conditions in the zoning ordinance. *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136. Material evidence is “[e]vidence having some logical connection with the consequential facts or the issues.” *Black’s Law Dictionary* 578 (7th ed. 1999). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SBA*, 141 N.C. App. at 26, 539 S.E.2d at 22 (2000) (citation and quotation marks omitted).

It must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Humble Oil, 284 N.C. at 471, 202 S.E.2d at 137 (citations and quotation marks omitted). An applicant who has made a *prima facie* case is entitled to a special use permit, unless there is also competent, material, and substantial evidence in the record to support denial. *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16.

We must first determine whether petitioner made out a *prima facie* case, and will address each applicable criterion under the ordinance.

1. Three Uncontroverted Criteria

A petitioner seeking a special use permit under the Morrisville zoning ordinance must show

- A. That the proposed development or use will not materially endanger the public health or safety;
- B. That the proposed development or use will not substantially injure the value of adjoining property;

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C. That the proposed development or use will be in harmony with the scale, bulk, coverage, density, and character of the neighborhood in which it is located;

D. That the proposed development or use will generally conform with the Comprehensive plan and other official plans adopted by the Town;

E. That the proposed development or use is appropriately located with respect to transportation facilities, water and sewer supply, fire and police protection, and similar facilities; and

F. That the proposed use will not cause undue traffic congestion or create a traffic hazard.

Morrisville, N.C., Zoning Ordinance, part C, art. VII, § 1. A petitioner seeking a special use permit for a telecommunications tower must also meet twenty additional requirements. *Id.* § 2.10(A)-(T).

There is no dispute, in the instant case, that petitioner's evidence satisfied items A, E, and F under the ordinance, so we do not specifically address these criteria.

2. Harmony with the Neighborhood

"The inclusion of a use as a conditional use in a particular zoning district establishes a *prima facie* case that the permitted use is in harmony with the general zoning plan. Competent evidence is required to prove that the permitted use is not in harmony with the surrounding area." *MCC Outdoor, LLC v. Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 814, 610 S.E.2d 794, 797 (2005) (citations omitted).

In the instant case, the land in question is zoned IM. The ordinance provides that, if an applicant obtains a special use permit, a telecommunications tower may be constructed in an IM zoning district. Morrisville, N.C., Zoning Ordinance, part C, art. IV. The ordinance itself established a *prima facie* case of harmony with the surrounding neighborhood. *MCC Outdoor*, 169 N.C. App. at 814, 610 S.E.2d at 797.

3. Conformity with the Comprehensive Plan

The inclusion of a use in a zoning district, even where a special use permit is required, establishes a *prima facie* case that the use conforms with the comprehensive plan. *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980); *see also Vulcan*

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Materials Co. v. Guilford Cty. Bd. of Cty. Comm'rs, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994) (holding that the inclusion of a use as a conditional use established a *prima facie* case of "harmony with the general zoning plan," but further holding that there was sufficient evidence to rebut the *prima facie* case).

In the instant case, the ordinance requires that an applicant show that the proposed use will conform with the comprehensive plan. Morrisville, N.C., Zoning Ordinance, part C, art. VII, § 1(D). Respondent contends that the proposed use does not conform with its Land Use Plan, adopted in 2009, because that plan suggests that the subject property may be rezoned to residential in the future. *See* Town of Morrisville, N.C., Land Use Plan 2009-2035 at 24 fig. 5.1 (2009).

However, "[a] comprehensive plan is a policy statement to be implemented by zoning regulations, and it is the latter that have the force of law." *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 251, 304 S.E.2d 251, 255 (1983) (citations and quotation marks omitted). Because the land use plan "may be changed at any time," *Id.*, there can be no uniform rule, and there is a danger of favoritism. *See Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 80 (1970) ("[The ordinance] fails to furnish a uniform rule and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons.").

In the instant case, the zoning ordinance specifies that, with a special use permit, a tower may be constructed in the IM zoning district. Morrisville, N.C., Zoning Ordinance, part C, art. IV. Petitioner demonstrated that its tower complied with zoning requirements as enacted at the time of its application. Petitioner therefore established a *prima facie* case of conformity with the comprehensive plan. As of the date of respondent's decision, the subject property was still zoned IM, with no indication as to when or if it would ever be rezoned. *See* Morrisville, N.C., Zoning Ordinance, part A, art. 1, § 3 (indicating that the zoning map has not been updated). The land use plan is not an ordinance, but a policy statement that may be changed at any time. Respondent could have rezoned the property in question to conform within its land use plan since the plan has been in effect since 2009.

Respondent's contention, that a telecommunications tower is inconsistent with the land use plan's goal to eventually rezone the area, is without merit.

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4. Injury to the Value of Adjoining Property

In the instant case, respondent found petitioner's evidence on the issue of whether the proposed telecommunications tower would substantially injure the value of the adjoining property to be deficient in the following four areas:

- 1) the report was not benchmarked against other developments or against the market in general, 2) in the two subdivisions studied by Mr. Smith the cell tower was in place before the neighboring homes were built. (as opposed to the case at hand here), 3) the report did not attempt to study the effect of possible devaluation of property, and 4) the report did not take into account any potential loss of value due to the loss of "curb appeal" with the tower rising above the adjoining residential neighborhood.

Resolution 2010-064 of the Morrisville Town Council Pertaining to the Special Use Permit and Site Plan for American Towers, Inc./AT&T Clegg Telecommunications Tower off Weaver Forest Way (SUP 10-01), 2-3 (2010). Based on these findings, respondent held that petitioner failed to make out a *prima facie* case as to required showing B under the Morrisville Zoning Ordinance.

This Court was faced with a virtually identical fact situation in the case of *SBA v. City of Asheville City Council*. 141 N.C. App. 19, 539 S.E.2d 18 (2000). In *SBA*, one of the bases for rejecting the application for a conditional use permit to erect a telecommunications tower was the failure of petitioner to establish a *prima facie* case that the value of adjoining properties would not be adversely affected. We noted that

City Code § 7-16-2(c)(3) requires a showing that the value of properties adjoining or abutting the subject property would not be adversely affected by the proposed land use. The City's Staff Report submitted to respondent expressed concern that petitioners' Property Value Impact Study did not address properties in the vicinity of the subject property, but rather focused on towers and properties in other parts of the City. Petitioners' evidence was about other neighborhoods and other towers in the City. Their study did not even include information with respect to an existing cellular tower a short distance from the proposed site that potentially affected the same neighborhoods. Petitioners simply did not meet their burden of demonstrating the absence of harm to property adjoining or abutting the proposed tower as required by § 7-16-2(c)(3).

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Id. at 27, 539 S.E.2d at 23.

Based upon the holding of *SBA*, respondent was permitted to find that petitioner failed to present a *prima facie* case based upon perceived inadequacies in the methodology of its expert. We are bound by this ruling. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

We must therefore affirm the ruling of the trial court.

III. Conclusion

Petitioner met its burden to make out a *prima facie* case of two of the three general findings at issue in this case. However, we are bound by our decision in *SBA*, and hold that petitioner failed to make a *prima facie* showing that the proposed use would not substantially injure the value of adjoining properties. The judgment of the trial court is affirmed.

AFFIRMED.

Judges ERVIN and BEASLEY concur.

BUILDERS MUTUAL INS. CO., PLAINTIFF v. MEETING STREET BUILDERS, LLC, MEETING STREET COMPANIES, LLC MEETING STREET BUILDERS, LLC As SUCCESSOR IN INTEREST TO MS TENN TOWNS, LLC, MEETING STREET COMPANIES AS SUCCESSOR IN INTEREST TO MS TENN TOWNS, LLC, MS TENN TOWNS, LLC, JOSEPH T. ROY, IV INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MS TENN TOWNS, LLC, NANCY ROY, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MS TENN TOWNS, LLC, BUILDERS MANAGEMENT GROUP, INC., MEETING STREET AT TENNYSON ROW HORIZONTAL PROPERTY REGIME BY MEETING STREET AT TENNYSON ROW HOMEOWNERS ASSOCIATION, INC., DEFENDANTS

No. COA12-71

(Filed 4 September 2012)

Appeal and Error—interlocutory order—failure to join necessary party—no substantial right

Defendant's appeal from the trial court's order denying defendant's motion to dismiss for failure to join a necessary party was interlocutory in nature, and because defendant failed to show that a substantial right would be affected absent immediate disposition of this matter, the appeal was dismissed as premature.

BUILDERS MUT. INS. CO. v. MEETING ST. BUILDERS, LLC

[222 N.C. App. 646 (2012)]

Appeal by Defendants from order entered 29 September 2011 by Judge Gary E. Trawick in Wake County Superior Court. Heard in the Court of Appeals 15 August 2012.

Pinto Coates Kyre & Brown, P.L.L.C., by John I. Malone, Jr., and David G. Harris II, for Plaintiff.

Law Office of James T. Johnson, P.A., by James T. Johnson, for Defendants.

THIGPEN, Judge.

Defendants Meeting Street Builders, LLC, Meeting Street Companies, LLC, Meeting Street Builders, LLC as successor in interest to MS Tenn Towns, LLC, Meeting Street Companies, LLC as successor in interest to MS Tenn Towns, LLC, MS Tenn Towns, LLC, Joseph T. Roy, IV individually and as successor in interest to MS Tenn Towns, LLC, Nancy Roy individually and as successor in interest to MS Tenn Towns, LLC, and Builders Management Group, Inc. (collectively, “the Meeting Street Group”) appeal from the trial court’s order denying its Rule 12(b)(7) motion to dismiss Plaintiff Builders Mutual Insurance Company’s complaint for failure to join a necessary party. Because this appeal is interlocutory in nature, and because the Meeting Street Group has failed to show that a substantial right will be affected absent immediate disposition of this matter, the appeal must be dismissed as premature.

I. Factual & Procedural Background

In 2003, the Meeting Street Group began developing and marketing the Tennyson Row Townhomes in Mt. Pleasant, South Carolina. Defendants Meeting Street Builders, LLC and Meeting Street Companies, LLC, both North Carolina limited liability companies, participated in the construction of the Tennyson Row Townhomes. Defendant MS Tenn Towns, LLC, a South Carolina limited liability company, was formed to develop the Tennyson Row Townhomes, and Defendant Builders Management Group, Inc., a North Carolina corporation, was formed to manage, administer, and supply personnel for the project. Joseph and Nancy Roy, at all relevant times, were members of Meeting Street Companies, LLC, Meeting Street Builders, LLC, MS Tenn Towns, LLC, and Builders Management Group, Inc.

Plaintiff is a North Carolina corporation engaged in the insurance business. Plaintiff issued a commercial general liability policy (“the Policy”) listing Meeting Street Companies, LLC, Meeting Street

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Builders, LLC, MS Tenn Towns, LLC, and Builders Management Group, Inc. as the named insureds.

Between 2004 and 2006, the Meeting Street Group constructed the Tennyson Row Townhomes and obtained the relevant building permits and Certificates of Occupancy. At the time the 49 residences that comprise the Tennyson Row Townhomes were placed into the stream of commerce—in or about mid-2005—the residences “contained many latent building defects.” Thus, in 2008, Defendant Meeting Street at Tennyson Row Horizontal Property Regime by Meeting Street at Tennyson Row Homeowners Association, Inc. (“HOA”), a South Carolina organization formed to administer the Tennyson Row Townhomes, brought suit in South Carolina (“the South Carolina Action”)¹ naming the Meeting Street Group, among others, as defendants and alleging that the latent defects in the residences “regularly resulted in water intrusion and deterioration of the buildings. . . .”

On 19 October 2010, Plaintiff brought the present action seeking a declaratory judgment as to the relative rights and obligations of the parties under the Policy and seeking a declaration that the Policy does not provide coverage for any damages assessed against the Meeting Street Group in the South Carolina Action. Plaintiff named HOA in addition to the parties comprising the Meeting Street Group as defendants. On 17 December 2010, the Meeting Street Group filed an answer and motion to dismiss for failure to join a necessary party pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure. On 28 December 2010, Defendant HOA filed a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. By order entered 29 September 2011, the trial court granted HOA’s motion to dismiss for lack of personal jurisdiction and denied the Meeting Street Group’s motion to dismiss for failure to join a necessary party. The trial court further concluded that “HOA is not a necessary party to this action.” The Meeting Street Group filed its notice of appeal from the trial court’s order with this Court on 24 October 2011.

1. HOA instituted the South Carolina Action, captioned *Meeting Street at Tennyson Row Horizontal Property Regime by Meeting Street at Tennyson Row Homeowners Association, Inc., Plaintiff v. Meeting Street Builders, LLC et al*, in the Court of Common Pleas for the Ninth Judicial Circuit, Charleston County, South Carolina with case number 2008-CP-10-7217.

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II. Analysis

The threshold issue presented is whether this appeal is properly before this Court. The trial court's order denying the Meeting Street Group's motion to dismiss for failure to join a necessary party is interlocutory, as the order "d[id] not dispose of the case, but le[ft] it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); see also *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). Generally, an interlocutory order is not immediately appealable. See N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). An exception to this general rule 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). "A right is substantial if it will be lost or irremediably and adversely affected if the trial court's order is not reviewed before a final judgment." *Nello L. Teer Co., Inc. v. Jones Bros, Inc.*, 182 N.C. App. 300, 303, 641 S.E.2d 832, 835 (2007). The test for whether a substantial right has been affected consists of two parts: (1) "the right itself must be substantial[;] and [(2)] the deprivation of that substantial right must potentially work injury to [the appealing party] if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). "Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002).

This Court has previously held that the denial of a motion to dismiss for failure to join a necessary party does not affect a substantial right and is therefore not appealable. See *Fraser v. Di Santi*, 75 N.C. App. 654, 331 S.E.2d 217 (1985); *Godley Auction Co., Inc. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).² Nevertheless, the Meeting Street Group advances two reasons in support of its contention that the trial court's ruling in the instant case affects a substantial right: (1) "If the appeal of this matter is deferred until after a final judgment and the ruling is reversed, a new trial in South Carolina would likely be necessary, imposing needless expense on the parties and the Court

2. We have reiterated this view more recently in two unpublished decisions, *Hill v. Taylor*, No. COA01-555 (N.C. App. Mar. 19, 2002) and *Wilson v. Taylor*, No. COA01-524 (N.C. App. Mar. 19, 2002).

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System[;]” and (2) the ruling exposes the Meeting Street Group to the possibility of inconsistent jury verdicts in two separate trials.

While a party’s desire to avoid a trial and the associated costs of litigation, alone, is insufficient to affect a substantial right, *see N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 735, 460 S.E.2d 332, 335 (1995) (“[T]he right to avoid a trial is generally not a substantial right[.]”), our Supreme Court has held that the right to avoid two trials on the same issue may be a substantial right. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). “[T]he possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.” *Id.* The party asserting a substantial right in this context must show not only that the same factual issues would be present in both trials, but also that the possibility of inconsistent verdicts on those issues exists. *Moose v. Nissan of Statesville, Inc.*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994).

The Meeting Street Group asserts that HOA will not be bound by this action and that HOA could thus subsequently bring an action in South Carolina seeking a declaratory judgment on the same issues, *i.e.*, construction of the Policy to determine whether Plaintiff is liable for damages assessed against the Meeting Street Group (and in favor of HOA) in the South Carolina Action. However, this Court has previously held that a substantial right is not affected where the possibility of inconsistent verdicts is based upon mere speculation that there might be future litigation between the parties:

Plaintiffs filed a declaratory judgment action seeking interpretation of the scope of certain easements. Defendants contend that, after the trial court determines the parties’ rights as defined in the easements, a future tribunal in a hypothetical future proceeding might rule that rights granted by the easements differ from the rights granted by a different legal source. Such a result would not be an “inconsistent verdict,” but merely a reflection of the fact that one’s rights in a given situation are often determined by reference to more than one statute, rule, or other legal source of rights. Moreover, the possibility, if any, of inconsistent verdicts rests upon the speculation that there will be further litigation between the parties.

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Jones v. County of Carteret, 183 N.C. App. 142, 145, 643 S.E.2d 669, 671 (2007) (emphases removed); see also *Olde Point Prop. Owners Ass'n, Inc. v. Olde Point Assocs. Ltd. P'ship*, No. COA06-1639 (N.C. App. July 17, 2007)³ (“Defendants’ speculation that there will be further litigation between the parties is not proof of a substantial right. Accordingly, we dismiss defendant’s [sic] appeal as interlocutory.”).

While it is true that HOA will not be bound by the declaratory judgment declaring Plaintiff’s obligations under the Policy in the instant case, see *N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971), it is also true that the possibility of further litigation of these issues—and thus the possibility of inconsistent verdicts—is merely speculative. For instance, HOA would have an incentive to bring a separate declaratory judgment action in South Carolina only if the trial court here were to conclude that Plaintiff is not liable under the Policy. Moreover, the Meeting Street Group acknowledges the speculative nature of further litigation when it states in its brief that “since this action would not be binding on the HOA, a second declaratory judgment action would *likely* take place in South Carolina to determine the HOA’s rights under the Policy.” (Emphasis added). We note footnote 2 in the Meeting Street Group’s brief, which indicates that HOA has secured a judgment against “the builder entities” and has filed an additional action “against Plaintiff on the policies in South Carolina” in the United States District Court for the District of South Carolina, Charleston Division. It is unclear from this footnote whether the action in which “the HOA has proceeded to judgment” is a reference to the South Carolina Action and whether “the builder entities” is a reference to the Meeting Street Group. Regardless, the record is devoid of documentation to verify these assertions, and it is well established that this Court’s “review is limited to the record on appeal[.]” *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008); N.C. R. App. P. 9(a) (“[R]eview is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.”). The Meeting Street Group’s “brief is not a part of the Record on appeal[.]” *Civil Serv. Bd. of City of Charlotte v. Page*, 2 N.C. App. 34, 40, 162 S.E.2d 644, 648 (1968), and “[m]atters discussed in a brief but not found in the record will not be considered by this Court.” *W. v. G. D. Reddick*,

3. While we recognize that our decision in *Olde Point* is not binding precedent, *United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339 (1997), we nonetheless find the reasoning adopted therein persuasive in reaching our holding.

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Inc., 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980) *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981); *see also County of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494, 498 (2001) (“It is well established that this Court can judicially know only what appears in the record.”). Furthermore, and in addition to reciting matters outside the record, the aforementioned footnote contradicts the accompanying text, which states that a second declaratory judgment action is only “likely.”

In sum, we cannot conclude based upon the record before us that the possibility of inconsistent verdicts rests upon more than mere speculation. On these facts, we decline to depart from our substantial precedent holding that the denial of a motion to dismiss for failure to join a necessary party does not affect a substantial right; indeed, the Meeting Street Group has not cited a single decision in which a substantial right was affected in this context. The Meeting Street Group has failed to carry its burden in demonstrating that a substantial right has been affected, *see Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (“The burden is on the appealing party to establish that a substantial right will be affected.”), and we accordingly hold that this interlocutory appeal is prematurely before this Court and must be dismissed.

DISMISSED.

Judges BRYANT and STEPHENS concur.

MICHAEL A. GREEN AND DANIEL J. GREEN, PLAINTIFFS V. JACK L. FREEMAN, JR., CORINNA W. FREEMAN, PIEDMONT CAPITAL HOLDING OF NC, INC., PIEDMONT EXPRESS AIRWAYS, INC., PIEDMONT SOUTHERN AIR FREIGHT, INC., AND NAT GROUP, INC., DEFENDANTS V. LAWRENCE J. D'AMELIO, III, THIRD-PARTY DEFENDANT

No. COA11-548

(Filed 4 September 2012)

1. Fiduciary Relationship—breach of duty—company officer—minority shareholders—sufficient evidence

The trial court did not err in a breach of fiduciary duty case by denying defendant’s motions for directed verdict and judgment notwithstanding the verdict. Plaintiffs presented sufficient

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evidence that defendant was an officer or director in the Piedmont companies and a majority shareholder and therefore, owed a fiduciary duty to plaintiffs as minority shareholders; that defendant breached such duty; and that such breach was the proximate cause of plaintiffs' injury.

2. Corporations—piercing corporate veil—sufficient evidence

The trial court did not err by denying defendant's motions for directed verdict and judgment notwithstanding the verdict as to plaintiffs' claim for piercing the corporate veil. Plaintiffs offered sufficient competent evidence to show that plaintiff and the other defendants had domination and control over the Piedmont companies; that plaintiff used her control of the companies' finances to her personal benefit; and that her actions were the proximate cause of plaintiffs' loss of their investment monies.

3. Unfair Trade Practices—transactions in or affecting commerce—insufficient evidence

The trial court did not err in an unfair or deceptive business practices case by allowing defendant's motion for summary judgment. Plaintiffs failed to offer sufficient evidence that the transactions between plaintiffs and defendants occurring within Piedmont companies' business and based on investments or loans plaintiffs provided for defendants to start the new venture was "in or affecting commerce."

4. Appeal and Error—remaining arguments—agency—not addressed—harmless error

The Court of Appeals declined to address plaintiffs' remaining arguments that the trial court committed reversible error by granting defendant's motion for directed verdict and dismissing their claims against defendant based on agency. The Court of Appeals affirmed the trial court's judgment and these alleged errors would have amounted to harmless error.

Appeal by defendant Corinna Freeman and cross-appeal by plaintiffs from judgment entered 2 June 2010 and order entered 8 July 2010 by Judge Edwin G. Wilson, Jr. and order entered 6 October 2008 by Judge Ronald Spivey in Superior Court, Guilford County. Heard in the Court of Appeals 16 November 2011.

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Thomas B. Kobrin, for plaintiff-appellants.

Forman Rossabi Black, P.A., by T. Keith Black, and Gavin J. Reardon, for defendant-appellant Corinna Freeman.

STROUD, Judge.

Corinna Freeman (“defendant Corinna”) appeals from the trial court’s partial denial of her motions for directed verdict and the denial of her motion for judgment notwithstanding the verdict.¹ Michael A. Green and Daniel J. Green (“plaintiffs”) cross-appeal from the trial court’s rulings granting defendant Corinna’s motion for partial summary judgment and directed verdict, and not permitting the introduction of defendants’ depositions into evidence at trial. For the following reasons, we affirm the trial court’s orders and judgment.

I. Background

On 6 December 2006, plaintiffs filed a complaint against Jack. L. Freeman, Jr., and Corinna W. Freeman, individually; Piedmont Capital Holding of NC, Inc.; Piedmont Express Airways, Inc.; Piedmont Southern Air Freight, Inc.; and Nat Group, Inc. (referred to herein collectively as “defendants”). Plaintiffs alleged claims for (1) piercing the corporate veil; (2) fraud; (3) breach of contract; (4) conversion; (5) unjust enrichment; (6) breach of fiduciary duty; (7) Chapter 75-1.1 unfair or deceptive business practices²; (8) breach of contract, specifically against Nat Group, Inc.; and (9) tortious interference with a contract. After filing their answers to plaintiffs’ complaint, defendants, on 21 December 2007, moved for leave to file a third-party complaint against Lawrence J. D’Amelio, III (“defendant Lawrence”), seeking claims for indemnification and contribution, which was granted by order entered 7 February 2008. By order entered 12 February 2008, plaintiffs were permitted to amend their complaint to insert allegations against third-party defendant Lawrence. By order entered 6 October 2008, the trial court granted partial summary judgment, dismissing plaintiffs’ claims for fraud, breach of contract, and the Chapter 75-1.1 claim against defendant Corinna but denied her

1. Defendants Piedmont Capital Holding of NC, Inc., Piedmont Express Airways, Inc., Piedmont Southern Air Freight, Inc., individual defendant Jack L. Freeman, Jr., and third-party defendant Lawrence J. D’Amelio, III are not parties to this appeal.

2. We note that although the parties refer to plaintiffs’ claim as “unfair and deceptive trade practices” or UDTP, N.C. Gen. Stat. § 75-1.1 does not include the word “trade” in this claim. Therefore, we will refer to this specific claim as a “unfair or deceptive business practices” or as a “Chapter 75-1.1” claim.

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motion as to the claims of conversion, unjust enrichment, breach of fiduciary duty, and piercing the corporate veil. By orders entered 31 December 2008, the trial court granted plaintiffs' motions to amend their complaint and to reconsider its 6 October 2008 order. The trial court modified the 6 October 2008 summary judgment ruling to allow plaintiffs to proceed against defendant Corinna "for fraud, breach of contract and unfair and deceptive [business] practices under the theory of agency[.]" On 6 January 2009, plaintiffs filed an amended complaint to include allegations regarding agency, pursuant to the trial court's order. The individual defendants filed their answers to plaintiffs' second amended complaint. These claims were tried at the 15 February 2010 Civil Session of Superior Court, Guilford County. Evidence presented by plaintiffs tended to show the following: Plaintiff Michael Green ("plaintiff Michael") met defendant Jack Freeman, Jr. ("defendant Jack") in 2005. Defendant Jack told plaintiff Michael that he was looking for investors for an air freight enterprise for which he had secured a contract to work with the United States Department of Defense ("DOD"). Prior to his investment, plaintiff Michael received from defendant Jack and third-party defendant Lawrence, a partner in this new venture, several business summaries and descriptions. These documents stated that this new venture already had necessary agreements and certifications with the DOD and the "US Bank" "to provide transportation for cargo, property and personnel worldwide"; a contract with the United States Postal Service ("USPS") to transport air cargo a contract to provide passenger air service for a casino in Las Vegas, Nevada; a trucking company, Piedmont Express, which was established in 1995, to transport and store ocean containers and projected profits of over \$1 million. Defendants Jack and Lawrence told plaintiff Michael that they were turning away business because they did not have the \$100,000.00 necessary to secure a surety bond to do business with the DOD or to lease the airplane necessary for the USPS contract. They needed investments to get a surety bond and to encourage other investors. These representations convinced plaintiff Michael to invest in the new venture.

Plaintiff Michael decided to invest \$200,000.00 in the new venture and his brother plaintiff Daniel Green ("plaintiff Daniel") also invested \$200,000.00, based on plaintiff Michael's representations about the new venture. An investment proposal given to plaintiff Michael stated that his investment would be used first to obtain the surety bond necessary for the DOD contract and then they would "begin the process of implementing airline routes to move USPS mail."

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Also, in exchange for their investment, plaintiffs were to get an ownership interest in the new venture and plaintiff Michael was to get a sales job.

On 22 November 2005, an operating agreement for Piedmont Capital Holding of NC, Inc.; Piedmont Express Airways, Inc.; and Piedmont Southern Air Freight, Inc. (“the Piedmont companies”) was entered into to start this new venture.³ This agreement listed officers for the Piedmont companies as follows: defendant Jack as chief executive officer; defendants Corinna and Jack as “Chairperson[;]” defendant Lawrence as president, treasurer, and chief operating officer; and plaintiff Michael as vice president. It also listed shareholders as follows: defendant Corinna, with a majority of 33 shares; plaintiff Michael with 12 shares; and plaintiff Daniel with 5 shares.⁴ On the same date, plaintiffs and defendants Lawrence and Jack, on behalf of the Piedmont companies, entered into a loan agreement, stating that the investment monies were only for the security bond, operational expenses were not to exceed \$100,000.00, salaries were only to be paid when the company was “making money[.]” and the investment monies were to be put into an account to which only plaintiff Michael had access. Also, on the same date, defendant Lawrence, as president of the Piedmont companies, signed two promissory notes to plaintiffs Michael and Daniel for \$200,000.00, respectively.⁵

The investment money was deposited by defendant Lawrence under the corporate name Piedmont Capital Holding of NC Inc. into two First Citizen Bank accounts, with \$200,000 in a business checking account and \$200,000 in a money market savings account, which was to be used to encourage further investment but not for operational expenses. There was also an additional Wachovia business checking account for “Piedmont Express Airways[.]” This account

3. This “operating agreement” also states that the Piedmont companies are “a limited liability company[.]” However, in August of 2005, articles of incorporation were filed with the North Carolina Department of the Secretary of State for “business corporations” Piedmont Capital Holding of NC, Inc. and Piedmont Express Airways, Inc. listing defendant Lawrence as the registered agent.

4. Elizabeth F. D’Amelio also owned 25 shares and Beth Clay owned 25 shares, but are not parties to this action.ing the rights of the parties.

5. We recognize that as plaintiffs were investing in the Piedmont companies with the intention of becoming shareholders, there would appear to be no reason for these funds to be treated as a loan or for any promissory note to be executed. Despite the legal and logical inconsistency of these acts, this is what the evidence shows and is thus part of the failure of the defendants to observe proper corporate formalities in the formation of the Piedmont companies.

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was opened by defendant Corinna's late husband Jack Freeman, Sr., and defendant Corinna, signing as "CEO/OWNER[.]" There were also business credit cards, an American Express business credit card in defendant Corinna Freeman's name "C. Freeman PSA Airline" and a Wachovia credit card in the name of "C. Freeman." Plaintiff Michael testified that he was given a sales job with the Piedmont companies but learned that there were not any DOD contracts, USPS contracts, or any warehouse storage for ocean containers. He was repeatedly told by defendants Jack and Lawrence that \$100,000.00 of his money would be to get the surety bond and all that plaintiffs could lose would be \$100,000.00 for the bond. Defendant Jack was CEO and ran the business and defendant Lawrence controlled the finances and accounts for the Piedmont companies. Based on the promise by defendant Jack of a big sales account, on 26 January 2006, the ownership interests in the Piedmont companies were amended as follows: defendant Corinna owned 88 shares; plaintiff Michael owned 10 shares, and plaintiff Daniel owned 4 shares. This change of ownership interest was signed by plaintiffs and defendant Jack on behalf of defendant Corinna. After this change in ownership interest, plaintiff Michael's name was taken off the business bank accounts.

Shortly after the plaintiffs' money was deposited into the First Citizens business accounts, plaintiff Michael, and defendants Jack and Lawrence were paid weekly salaries. In addition to his salary, defendant Lawrence was also paid from December 2005 until March 2006 out of the First Citizen accounts over \$40,000, including approximately \$4,000 in "reimbursement" of expenses and a \$10,000 "loan." In addition to his salary, defendant Jack was paid from December 2005 until April 2006 out of the Piedmont companies accounts around \$36,000.00, including over 24 "reimbursements" for expenses. Also, from January 2006 until May 2006, the business First Citizen account was used to pay over \$20,000.00 charged to the American Express credit card and over \$11,000.00 charged to the Wachovia credit card. Credit card records and bank records showed that most of these reimbursement and expenses charged to the credit cards were for food and entertainment. From December 2005 until July 2006, there were expenditures of over \$34,000.00 in food expenses, \$3,600 in tips, and \$1,000 for entertainment. Defendant Jack reassured plaintiff Michael that the company was doing well but he had doubts because there was no money coming in and the assets were being depleted at a rapid rate. Plaintiff Michael stopped drawing a salary in May 2006 because of concerns that they were not making sales. Even though the Piedmont companies made some ground shipment sales, no

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money from any sales was ever deposited in the business accounts at the Piedmont companies and by June 2006 it was insolvent. The Piedmont companies also never obtained the surety bond. Plaintiff Michael never received any stock certificates from the Piedmont companies and no shareholder meetings were ever held. Neither the individual defendants nor the Piedmont companies ever repaid plaintiffs' loan. At the end of the presentation of plaintiffs' evidence, the trial court dismissed the individual claim of conversion against defendant Corinna.

Defendant Jack testified that in 2005 he and defendant Lawrence started talking about going into business together. He met plaintiff Michael in 2005, who was interested in investing in the new venture. Defendant Lawrence was to find investors and defendant Jack was to acquire an airplane to secure the postal and DOD contracts, which would require a \$100,000 bond that they did not have; they worked out of office space provided by defendant Lawrence in his law offices. Defendant Jack stated that defendant Lawrence made the representations to plaintiff Michael prior to his investment; he did not tell plaintiff Michael that they had contracts before his investment; he did not sign the promissory notes or give permission, as CEO, to defendant Lawrence to sign the promissory notes on behalf of the Piedmont companies; it was defendant Lawrence that opened the business accounts at First Citizens bank; defendant Lawrence kept track of the business accounts for the Piedmont companies; he did not approve all of the checks written out of those accounts; the Wachovia checking account was for Piedmont Southern Air Freight, opened by his parents, and was used as his personal checking account, since he had filed bankruptcy and could not get an account in his name; the Wachovia checking account was not part of the new venture with plaintiffs; the expenses paid by the First Citizen's checking accounts on the credit cards were reimbursements for business expenses incurred while he was working in North Carolina and Florida, not for personal expenses; he was able to get an airplane for the Piedmont companies through a deal with Nat. Group, Inc.; defendant Lawrence would not approve the money for the surety bond needed for the DOD contracts; he did not know about the withdrawals from the First Citizens money market account; and he had made sales for the Piedmont companies but did not know what happened to the proceeds from these sales or why they were not deposited in the business account. He admitted that he lived in a house owned in part by his mother and his ex-wife and he paid the mortgage for this property, Direct TV bills, power bills, and insurance

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from the Piedmont companies' business accounts. He further admitted that several checks from Nat Group, Inc., as part of a deal that was never finalized, were deposited in the Wachovia account for him, while he still was earning a salary from the Piedmont companies. As to his mother defendant Corinna, defendant Jack testified that she never used the credit cards; the credit cards, along with the Wachovia account, were set up prior to the new venture; she was the owner of Piedmont Southern Air Freight, for a time, but had given him control of the company in 2001; and he never consulted his mother defendant Corinna before putting her in the operating agreement for the Piedmont companies.

Defendant Lawrence testified that it was defendant Jack's idea to put the ownership of the Piedmont companies in defendant Corinna's name, so it would look like it was a minority-owned company. However, defendant Lawrence stated that defendant Corinna did not exercise any authority or control over the company and he reported to defendant Jack, who was running the company as CEO. There were no shares of stock issued, no elections of officers, no shareholder meetings or directors meetings, and no corporate books kept. He turned over control of the Piedmont companies' bank accounts to defendant Jack in mid-January 2006 after he resigned as President; he did not know about the credit cards or the Wachovia business account; defendant Jack would not allow him to pay the \$100,000.00 to get the surety bond; defendant Jack authorized him to sign the promissory notes; and the \$10,000.00 from the First Citizen's account was to reimburse him for expenses that he had fronted for the companies such as health insurance, dental insurance, and computer and phone expenses. Defendant Corinna was present at trial but did not testify.

At the end of the presentation of all evidence, plaintiffs dismissed their claims against defendant Nat. Group. Inc. Also, defendant Corinna moved for directed verdict on all claims. The trial court granted in part her motion, dismissing all claims against her for fraud, breach of contract, and unfair or deceptive business practices under a theory of agency and the unjust enrichment claim, but denied her motion regarding plaintiffs' claims against her for piercing the corporate veil and breach of fiduciary duty.

On 24 February 2010, a jury returned verdicts in favor of plaintiffs. Specifically, the jury found the following:

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6. Did the defendant Corinna W. Freeman control Piedmont Capital Holding of NC, Inc. or Piedmont Express Airways, Inc., or Piedmont Southern Air Freight, Inc., with regard to the acts or omissions that damaged the plaintiffs?

ANSWER YES

. . . .

18. Were the plaintiffs damaged by the failure of the defendant Corinna W. Freeman to discharge her duty as a corporate director or officer?

ANSWER: YES

19. What amount are the plaintiffs entitled to recover from the defendant Corinna W. Freeman?

ANSWER: \$400,000

On 5 March 2010, plaintiffs filed a motion requesting that the trial court reconsider its dismissal of plaintiffs' Chapter 75-1.1 claims as the jury result mandated a finding of "unfair and deceptive [business] practices" and requesting the trial court to enter judgment in conformity with the jury verdict and award treble damages. On 10 March 2010, defendant Corinna filed a motion for judgment notwithstanding the verdict ("JNOV") and in the alternative for a new trial. On 2 June 2010, the trial court entered a judgment consistent with the jury's verdict, ruling that individual defendants Jack Freeman, Jr., Corinna Freeman, and Lawrence D'Amelio were jointly and severally liable to plaintiffs for the sum of \$400,000.00 with interest. By order entered 8 July 2010, the trial court denied plaintiffs' motion to reconsider and defendant Corinna's motions for a JNOV or a new trial. On 17 August 2010, defendant Corinna Freeman filed a notice of appeal from (1) the trial court's 2 June 2010 judgment; and (2) the 8 July 2010 order denying the parties' post-trial motions. On 26 August 2010, plaintiffs' appealed from (1) the 8 July 2010 order denying the parties' post-trial motions; (2) the 6 October 2008 order granting in part and denying in part defendant Corinna's motion for summary judgment; and (3) the 2 June 2010 judgment. We will address defendant Corinna's appeal first.

II. Defendant Corinna Freeman's appeal

On appeal, defendant Corinna Freeman contends that the trial court erred in denying her motions for a directed verdict and JNOV. She argues that as to the claim of breach of fiduciary duty "plaintiffs

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failed to adduce competent evidence” that she (a) owed them a fiduciary duty, (b) that she breached any such duty, or (c) that any wrongful action or inaction by her “was the proximate cause of any injury to [plaintiffs.]” As to plaintiffs’ claim for piercing the corporate veil, she argues that (a) she was not in a position of domination or control of any of the defendant companies; (b) she did not use any position of dominance or control to breach any duty to plaintiffs; and (c) her actions were not the proximate cause of any loss complained of by plaintiffs in this action. Defendant Corinna requests that “this Court reverse the trial court’s denial of those motions, and remand the matter with instructions that JNOV be entered in her favor on both such issues, and that all claims against her be dismissed with prejudice.”

A. Standard of Review

The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.

A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim. A scintilla of evidence is defined as very slight evidence.

Springs v. City of Charlotte, ___ N.C. App. ___, ___, 704 S.E.2d 319, 322-23 (2011) (citations and quotation marks omitted); see *Hodgson Constr., Inc. v. Howard*, 187 N.C. App. 408, 412, 654 S.E.2d 7, 11 (2007) (emphasizing that “[t]he standard is high for the party seeking a JNOV: the motion should be denied if there is more than a scintilla of evidence to support the plaintiff’s *prima facie* case.” (citation and quotation marks omitted)), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 28 (2008). Evidence which tends to contradict the plaintiff’s evidence must be disregarded in this analysis. On a motion for JNOV

any of defendant’s evidence which tends to contradict or refute plaintiff’s evidence is not to be considered, but the plaintiff is entitled to the benefit of defendant’s evidence which is favorable to plaintiff, *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E.2d 159 (1976), or which tends to clarify plaintiff’s case, *Home*

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Products Corp. v. Motor Freight, Inc., 46 N.C. App. 276, 264 S.E.2d 774, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 105 (1980).

Koonce v. May, 59 N.C. App. 633, 634, 298 S.E.2d 69, 71 (1982).

Therefore, “a motion for judgment notwithstanding the verdict is cautiously and sparingly granted.” *Hodgson Constr., Inc.*, 187 N.C. App. at 411, 654 S.E.2d at 10 (citation and quotation marks omitted). We have further stated that “our review of [a] motion for judgment notwithstanding the verdict is *de novo*. Therefore, we consider the matter anew and . . . freely substitute our judgment for that of the trial court[.]” *Id.* at 412, 654 S.E.2d at 11.

B. Breach of Fiduciary Duty

[1] Defendant Corinna argues that the trial court erred in denying her motions for directed verdict and JNOV, as plaintiffs did not present any evidence that she (a) owed them a fiduciary duty, (b) that she breached any such duty, or (c) that any wrongful action or inaction by her “was the proximate cause of any injury to [plaintiffs.]”

“For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). A fiduciary relationship has been defined as

one in which “there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] ‘it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other.*’ ”

Id. at 651, 548 S.E.2d at 707-08 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (emphasis in original)).

“Under North Carolina law, directors of a corporation generally owe a fiduciary duty to the corporation, and where it is alleged that directors have breached this duty, the action is properly maintained by the corporation rather than any individual creditor or stockholder.” *Governors Club, Inc. v. Governors Club Ltd. P’ship*, 152 N.C. App. 240, 248, 567 S.E.2d 781, 786-87 (2002) (emphasis omitted) (citations omitted), *aff’d per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003). However, this Court has held that directors, officers, and majority shareholders owe a fiduciary duty to minority shareholders.

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Meiselman v. Meiselman, 58 N.C. App. 758, 774-75, 295 S.E.2d 249, 259-60 (1982) (reversing the trial court ruling and affirming the plaintiff minority shareholder's argument that the majority shareholder, director, and officer had a fiduciary duty not to enter into a contract providing for profits only to the majority shareholder), *affirmed in part and modified in part by*, 309 N.C. 279, 307 S.E.2d 551 (1983). The Supreme Court in *Meiselman* further defined part of that duty, in the corporate opportunity doctrine, as follows:

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.

309 N.C. at 308, 307 S.E.2d at 568 (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270, 5 A. 2d 503, 510 (1939)). "This Court has held that breach of fiduciary duty is a species of negligence or professional malpractice. Consequently, these claims require[] proof of an injury proximately caused by the breach of duty." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006) (citations and quotation marks omitted).

1. Fiduciary Duty

Defendant Corinna argues that plaintiffs failed to show any evidence of two essential elements necessary to establish a fiduciary duty: (1) that plaintiff actually reposed confidence in her, the alleged fiduciary and (2) that confidence resulted in her having domination and influence over plaintiffs. Defendant Corinna argues that plaintiffs

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never offered any evidence they reposed any confidence in her as they admitted she never made any representations to them, she never spoke or provided them with any written communications, and they never met her; but it was plaintiff Daniel that reposed confidence in his brother plaintiff Michael, who relied exclusively on representations from defendants Jack or Lawrence. Likewise, defendant Corinna argues that plaintiffs presented no evidence of dominion and control, as plaintiffs never “claimed that [she] had any influence over them” and her only interest if any “was as a minority shareholder without the ability to force any decisions.” Defendant Corinna further argues even though a director of a corporation would have a fiduciary duty, that “the issue of director liability should not have been allowed to go to the jury because there was no evidence that [she] even was a director.” (Emphasis in original.) Defendant Corinna further contends that even if she were a director or officer, “directors and officers have no fiduciary duties to shareholders (as individuals), creditors, or to other directors except under special circumstances, none of which apply in the present case.” Defendant Corinna argues that if she was an officer it was as “Chairperson” but her authority was specifically limited to organizing meetings and she did not have any discretionary authority over any operations, financial or voting rights, which would not rise to any fiduciary relationship. Plaintiffs counter that there was sufficient evidence presented showing that defendant Corinna was an officer or director in the Piedmont companies to establish a fiduciary duty and to support the denial of defendant’s motion for a directed verdict and JNOV.

Plaintiffs’ claims for breach of fiduciary duty were based on a duty owed to plaintiffs “as shareholders and investors” and defendants “[a]s directors, officers and employees of the Piedmont Companies[.]” Although defendant Corinna did not testify at trial, there were several documents introduced into evidence illustrating her involvement in the Piedmont companies. In the operating agreement for Piedmont Capital Holding of NC, Inc.; Piedmont Express Airways, Inc.; and Piedmont Southern Air Freight, Inc., defendant Corinna, in a listing of corporate “officer[s,]” is specifically named as the “Chairperson[.]” A reasonable inference from this evidence would be that defendant Corinna was in an corporate officer position named “Chairperson” or it could also be inferred that she was “Chairperson” for the board of directors or in this case shareholders. This same operating agreement listed defendant Corinna owning a majority interest of 33 shares and plaintiffs Michael and Daniel as minority shareholders of the Piedmont companies, owning 12 shares and 5

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shares, respectively. Later, defendant Corinna became the exclusive majority owner with 86% of the shares on 26 January 2006, with plaintiffs Michael and Daniel owning the remaining shares. In an application to Wachovia Bank for a company checking account in 2005, defendant Corinna listed herself as “CEO” of Piedmont Express Airways, Inc., one of the Piedmont companies. No evidence was presented that she resigned as CEO. This designation would further the inference that she was an officer in the Piedmont companies. On documents filed with the North Carolina Secretary of State, she used the designation “Owner/Chairperson” when she signed and filed those documents for Piedmont Southern Air Freight, Inc., one of the Piedmont companies. Likewise, this would further the inference that she was chairperson of the directors or shareholders. Viewing this evidence in the light most favorable to plaintiffs and giving plaintiffs the benefit of every reasonable inference drawn therefrom, we hold that a juror could reasonably infer that defendant Corinna was an officer or director in the Piedmont companies and a majority shareholder and therefore, owed a fiduciary duty to plaintiffs as minority shareholders. *Springs*, ____ N.C. App. at ____, 704 S.E.2d at 322-23; *Meiselman*, 58 N.C. App. at 774-75, 295 S.E.2d at 259-60.

2. Breach

Defendant Corinna argues that there was also no showing by plaintiffs that she breached any fiduciary duty owed to them because evidence showed that she never made any false representations to them, wrongfully failed to disclose any information to them, used her influence “in any manner contrary to their interests, wrongfully, or otherwise[,]” or took “part in direct[ing], or control, any of the actions of which plaintiffs complain.” Plaintiffs counter that evidence was presented that defendant Corinna improperly diverted for her own personal use corporate funds from the Piedmont companies and failed to do anything to stop “the complete wastage of the corporate assets[.]”

At trial, evidence was presented that mortgage payments, Direct TV bills, and other utility bills for real property co-owned by defendant Corinna were paid directly out of checking accounts belonging to the Piedmont companies. The jury could easily and reasonably draw an inference that defendant Corinna knew how her own personal financial obligations were being paid. Certainly, she knew that she herself was not paying them, yet her house was not foreclosed and her utilities were not shut off for nonpayment. This would support an inference that defendant Corinna breached her fiduciary duty by using her “position of trust and confidence to further [her] private

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interests.” See *Meiselman*, 309 N.C. at 308, 307 S.E.2d at 568. Also plaintiff presented evidence that defendant Corinna was involved in the finances of the Piedmont companies. Documents allowed into evidence at trial, showed that she as “CEO/Owner” opened a Wachovia business account for Piedmont Express Airways, Inc. in January 2005 checks were signed by defendant Corinna from that account; a PSA American Express credit card was in the name of “C. Freeman/PSA Airlines” and she knew of the credit cards and she allowed defendant Jack to use them. Evidence was also presented that defendants Jack and Lawrence diverted money loaned to the Piedmont companies for their own personal uses. A juror could reasonable infer that although defendant Corinna had some control over the finances of the Piedmont companies, she did nothing to prevent the “wastage” and malfeasance by the other officers of the corporation, thereby breaching her fiduciary duty as an officer or majority shareholder of the Piedmont companies. See *Meiselman*, 309 N.C. at 308, 307 S.E.2d at 568. Viewing this evidence in the light most favorable to plaintiffs and giving plaintiffs the benefit of every reasonable inference drawn therefrom, we hold that a jury could reasonable infer that defendant Corinna breached her fiduciary duty as an officer or majority shareholder in the Piedmont companies. See *Springs*, ____ N.C. App. at ____, 704 S.E.2d at 322–23.

3. Proximate Causation

Defendant Corinna further argues that plaintiffs did not put forth any evidence that the breach of her fiduciary duty was a proximate cause of injury to plaintiffs but their own testimony showed that “if they were wrongfully injured *Jack’s* actions, and *not Corinna’s*, were the proximate cause of those injuries.” (Emphasis in original.) But if defendant Corinna breached her fiduciary duty, it would be easy for a juror to infer that her use of the Piedmont companies funds for her personal expenses and failing to stop further “wastage” of the assets of the Piedmont companies by other company officers did proximately cause damage to plaintiffs in the form of loss of their investment monies, which are the subject of this action. Accordingly, we hold that the trial court did not err in denying defendant Corinna’s motions for a directed verdict and JNOV as to plaintiffs’ claims for breach of fiduciary duty.

We note that most of defendant Corinna’s arguments point us to evidence refuting plaintiffs’ contentions and evidence, but we are not to consider this evidence in our review from a trial court’s ruling on directed verdict or JNOV. See *Koonce*, 59 N.C. App. at 634, 298 S.E.2d

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at 71. As noted above, because there was “more than a scintilla of evidence supporting each element of” plaintiffs’ claim, *see Springs*, ___ N.C. App. at ___, 704 S.E.2d at 322–23, the trial court did not error in denying defendant Corinna’s motions for directed verdict and JNOV for this claim, and defendant Corinna’s arguments are overruled.

C. Piercing the Corporate Veil

[2] Defendant Corinna next contends that the trial court erred in denying her motions for directed verdict and JNOV as to plaintiffs’ claim for piercing the corporate veil because plaintiff failed to “adduce sufficient competent evidence to show” that (1) she had domination and control over the Piedmont companies; (2) she used any position of domination or control to breach any duty to plaintiffs; or (3) her actions were the proximate cause of any loss to plaintiffs.

This Court summarized liability based upon piercing of the corporate veil as follows:

Our courts will disregard the corporate form and pierce the corporate veil where an individual exercises actual control over a corporation, operating it as a mere instrumentality or tool. Under these circumstances, the controlling individual is liable for the torts of the corporation. The instrumentality rule has been set forth by our Supreme Court as follows:

When a corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Liability may be imposed on an individual controlling a corporation as an instrumentality when he had:

(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

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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.

Becker v. Graber Builders, Inc., 149 N.C. App. 787, 790-91, 561 S.E.2d 905, 908 (2002) (quoting *Glenn v. Wagner*; 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985)). Factors to consider in piercing the corporate veil include: Inadequate capitalization, non-compliance with corporate formalities, complete domination and control of the corporation so that it has no independent identity, and excessive fragmentation of a single enterprise into separate corporations. *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31. Additional, factors "to be considered to determine whether sufficient control and domination is present to satisfy the first prong of the three-pronged rule known as the instrumentality rule" include "non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the dominant shareholder, non-functioning of other officers or directors, [and] absence of corporate records." *Id.* at 458, 329 S.E.2d at 332. However,

[i]t is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, 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 [shareholders] or corporation.

Id. (citations and quotation marks omitted).

1. Domination or Control

Defendant Corinna argues that there was no evidence presented that would establish that she had domination and control of the Piedmont companies because evidence showed that she did not have authority to sign on behalf of the company; she never provided instruction to the CFO of the companies; she did not know that she was an officer in the Piedmont companies; as "Chairperson" her only authority was to organize and conduct meetings; no evidence presented that she ever invested in the companies or was issued any shares of stock; and there was no evidence she performed any managerial duties. Plaintiffs counter that they presented sufficient evidence of defendant Corinna's dominion and control of the Piedmont companies to support their claim for piercing the corporate veil.

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Plaintiffs pursued the claim of piercing the corporate veil against all the individual defendants including defendant Corinna. A piercing the corporate veil claim can be brought against multiple parties or shareholders involved in the control. *See Glenn*, 313 N.C. at 454-56, 329 S.E.2d at 330-31. The jury found that all individual defendants did have control of the Piedmont companies. To support the claim that the Piedmont companies were mere instruments of all of the defendants, evidence showed that the Piedmont companies never became legal entities; no shareholders or directors meetings were held; no stock was issued; no corporate minute books or forms were made or kept; the Piedmont companies were undercapitalized; and by the time of trial, the Piedmont companies were insolvent. As to defendant Corinna, as discussed above, she had control over the finances of the Piedmont companies, as checking accounts were opened in her name as “owner” or “CEO[;]” checks were signed by defendant Corinna from business accounts; and one of the Piedmont companies credit cards was in her name. Also, defendants were the majority shareholders in the company, as defendant Corinna became the majority owner with 86% of the shares on 26 January 2006. In addition, all of the evidence as to what defendant Corinna did or did not know is based upon testimony of other witnesses—mainly defendants Jack and Lawrence—as defendant Corinna did not testify at the trial. The jury is the sole judge of the credibility of the evidence, *see Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 664 (1997), and given the conflicting stories told by defendants Jack and Lawrence, each attempting to blame the other, it is likely that the jury believed neither of them. Viewing the evidence in the light most favorable to plaintiffs and giving plaintiffs the benefit of every reasonable inference drawn therefrom, we hold that a jury could reasonable infer that defendant Corinna and the other defendants exercised sufficient domination and control over the Piedmont companies. *See Becker, Inc.*, 149 N.C. App. at 790-91, 561 S.E.2d at 908; *Springs*, ____ N.C. App. at ____, 704 S.E.2d at 322-23.

2. Breach

Defendant Corinna argues that assuming *arguendo* that she had domination and control, plaintiffs “adduced no evidence whatsoever that [she] personally did anything wrongful[.]” she was “never even called upon to perform her minimal ministerial duties[.]” and “[t]he only evidence before the jury of alleged acts of wrongdoing suggested wrongful acts done solely by [defendants] Jack and [Lawrence.]”

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As noted above, evidence was presented that defendant Corinna's mortgage payments, Direct TV bills, and utility bills were paid directly out of the Piedmont companies' checking accounts. Viewing this evidence in the light most favorable to plaintiffs, a juror could easily and reasonably draw an inference that defendant Corinna was using her control of the companies' finances to her personal benefit, "in contravention of plaintiff's legal rights" as investors and shareholders in the Piedmont companies. *See Becker*, 149 N.C. App. at 790-91, 561 S.E.2d at 908; *Springs*, ____ N.C. App. at ____, 704 S.E.2d at 322-23.

3. Proximate Causation

Defendant Corinna further argues that any breach was not a proximate cause of injuries to plaintiffs. If defendant Corinna used her control of the Piedmont companies to divert monies for her personal benefit, it would be easy for a juror to infer that her breach did proximately cause damage to plaintiffs in the form of loss of their investment monies, which are the subject of this action. As noted above, we disregard defendant Corinna's arguments based on contrary evidence. *See Koonce*, 59 N.C. App. at 634, 298 S.E.2d at 71. Accordingly, we hold that the trial court did not err in denying defendant Corinna's motions for a directed verdict and JNOV as to plaintiffs' claims for piercing the corporate veil. Thus, we overrule defendant Corinna's arguments.

III. Plaintiffs' Appeal

Plaintiffs appeal from the trial court's order granting defendant Corinna's summary judgment motion and defendants Jack, Corinna, and Lawrence's motions for directed verdict dismissing their Chapter 75-1.1 claims. Plaintiffs also appeal from the trial court's dismissal of their claims against defendant Corinna based on agency and ruling that plaintiffs could not introduce depositions of defendants at trial.

A. Standard of Review

We apply a *de novo* review from a trial court's rulings for either summary judgment or directed verdict.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment receives

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de novo review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Mitchell, Brewer, Richardson v. Brewer, ___ N.C. App. ___, ___, 705 S.E.2d 757, 764-65 (citations and quotation marks omitted), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). As noted above, the standard of review for a ruling entered upon a motion for directed verdict

is whether upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury. We apply *de novo* review to . . . a trial court's denial of a motion for directed verdict[.]

Denson v. Richmond County, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003) (citations and quotation marks omitted).

B. Chapter 75-1.1 Claims

[3] Plaintiffs argue that there was sufficient evidence regarding its claim for unfair or deceptive business practices to survive defendant Corinna's summary judgment motion. Plaintiffs further argue that since there was sufficient evidence to support claims for breach of fiduciary duty and fraud, there was evidence of unfair or deceptive business practices as a matter of law. Plaintiffs conclude that since the trial court committed reversible error, this Court should remand to the trial court to enter judgment that all defendants committed unfair or deceptive business practices, and for the award of treble damages and attorney's fees. Defendant Corinna counters that the trial court did not err in granting her motion for summary judgment or granting defendants' motions for directed verdict at trial dismissing plaintiffs' claims for unfair or deceptive business practices, as plaintiffs failed to allege or present any evidence supporting that any breach by defendants was "in or affecting commerce[.]"

In order to establish a Chapter 75-1.1 unfair or deceptive business practices claim "a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citation omitted). "Before a practice can be declared unfair or deceptive, it must first be determined that the practice or conduct which is complained

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of takes place within the context of [§ 75-1.1's] language pertaining to trade or commerce." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 62, 554 S.E.2d 840, 848 (2001) (citation and quotation marks omitted). N.C. Gen. Stat. § 75-1.1(b) (2007) defines "commerce" as "all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

Subsection (b) of this section of the Act defines the term "commerce" to mean "business activities." "Business activities" is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized.

Hajmm Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). Our Supreme Court has further explained that

the General Assembly did not intend for [North Carolina's unfair and deceptive practices act's] protections to extend to a business's internal operations. . . . [T]he Act is not focused on the internal conduct of individuals within a single market participant, that is, within a single business. To the contrary, . . . the General Assembly intended the Act's provisions to apply to interactions between market participants. As a result, any unfair or deceptive conduct contained solely within a single business is not covered by the Act. As the foregoing indicates, this Court has previously determined that the General Assembly did not intend for the Act to intrude into the internal operations of a single market participant.

White v. Thompson, 364 N.C. 47, 53, 691 S.E.2d 676, 680 (2010) (citations omitted); *See also Oberlin*, 147 N.C. App. at 62, 554 S.E.2d at 848 (where the Court held that because the loan agreement was primarily a capital-raising device, it was not in or affecting commerce).

Plaintiffs brought claims for unfair or deceptive business practices against defendants based on allegations of fraud or misrepresentations in getting plaintiffs to invest in or lend money to the Piedmont companies; as officers and directors of the Piedmont companies in breaching their fiduciary duty to plaintiffs as shareholders and investors; and based on their breach of contracts, specifically the loan agreement and promissory notes. Therefore, plaintiffs' claims are based on transactions between plaintiffs and defendants occurring within Piedmont companies' business and based on investments or loans plaintiffs provided for defendants to start the new venture. However, raising capital is not a business activity contemplated

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within the Act. *See Oberlin*, 147 N.C. App. at 62, 554 S.E.2d at 848. Therefore, plaintiffs have failed to show that the transaction was “in or affecting commerce.” Accordingly, the trial court properly dismissed plaintiffs’ Chapter 75-1.1 claims and plaintiffs’ argument is overruled.

C. Agency and Defendants’ Depositions

[4] Plaintiffs next contend that the trial court committed reversible error by granting defendant Corinna’s motion for directed verdict and dismissing their claims against her based on agency because there was sufficient evidence presented to show that defendant Jack was defendant Corinna’s agent. Plaintiffs further contend that the trial court committed reversible error by not permitting plaintiffs to introduce the depositions of defendants. Yet as to both of these arguments, plaintiffs admit that these errors would amount to harmless error if this Court affirms the trial court’s judgment on the grounds discussed above, as their recovery would be the same either way. As we have affirmed the trial court’s judgment, we agree with plaintiffs that there is no need to address these additional arguments as we are affirming the judgment for the reasons stated above and consideration of these issues would have no effect upon the outcome.

For the foregoing reasons, we affirm the trial court’s orders and judgment.

AFFIRMED.

Judge BRYANT concurs.

Judge CALABRIA dissents in a separate opinion.

CALABRIA, Judge, dissenting.

I agree with the majority that the trial court properly dismissed Michael A. Green’s (“Michael”) and Daniel J. Green’s (“Daniel”) (collectively “plaintiffs”) Chapter 75-1.1 claims. However, I find that the trial court erred by denying Corinna W. Freeman’s (“Corinna”) motions for directed verdict and JNOV on the issue of breach of fiduciary duty. I find the trial court also erred by denying Corinna’s motions for directed verdict and JNOV on the issue of extending her liability for corporate obligations beyond the confines of a corporate separate entity by piercing the corporate veil. Therefore, I respectfully dissent.

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I. Standard of Review

Upon a defendant's motion for directed verdict, the question "is whether the evidence, considered in the light most favorable to [the] plaintiff, is sufficient to take the case to the jury and to support a verdict for [the] plaintiff." *Barnard v. Rowland*, 132 N.C. App. 416, 421, 512 S.E.2d 458, 463 (1999). The motion should be denied "[i]f there is more than a scintilla of evidence to support plaintiff's *prima facie* case in all its constituent elements..." *Id.* (internal quotations and citation omitted). The same standard of review applies to a JNOV motion as to a motion for directed verdict. *Id.*

II. Fiduciary Duty

I agree with Corinna that the trial court committed reversible error by denying her motions for directed verdict and JNOV on the issue of director/officer liability because plaintiffs failed to adduce evidence of a fiduciary relationship, or evidence that Corinna personally breached any duty to plaintiffs proximately resulting in their harm.

A. Fiduciary Relationship

While normally a jury question, the plaintiff must provide sufficient evidence that a fiduciary relationship exists between the parties. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665-66, 391 S.E.2d 831, 832-33 (1990). "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Harrold v. Dowd*, 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002). In North Carolina, essentially one party has to "figuratively [hold] all the cards" for example, "all the financial power or technical information" to find that "the special circumstance of a fiduciary relationship has arisen." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008).

In North Carolina, "directors of a corporation generally owe a fiduciary duty to the corporation..." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 26, 560 S.E.2d 817, 822 (2002). "[A] director, officer, or agent of a corporation is not, merely by virtue of his office, liable for the torts of the corporation or of other directors, officers, or agents." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 57, 554 S.E.2d 840, 845 (2001). However, "an officer of a corporation may be individually liable" for torts "in which he actively participates." *White v. Collins Bldg., Inc.*, ____ N.C. App. ____, ____, 704 S.E.2d 307, 310 (2011) (citation omitted). "A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with

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the bylaws.” N.C. Gen. Stat. § 55-8-40(a) (2011). “Each officer has the authority and duties set forth in the bylaws....” N.C. Gen. Stat. § 55-8-41 (2011).

In the instant case, plaintiffs produced no evidence that Corinna was a director of Piedmont Capital Holding Of NC, Inc. (“PCH”), Piedmont Express Airways, Inc. (“PEA”), and Piedmont Southern Air Freight, Inc. (“PSAF”) (collectively “Piedmont”). The Operating Agreement did not list her, or anyone else, as a director. Jack L. Freeman, Jr. (“Jack”) indicated that Corinna was not a director of the company. Therefore, there is no evidence that Corinna breached her fiduciary duty as a director of Piedmont.

As the majority concludes, plaintiffs presented some evidence from which a reasonable inference could have been drawn that Corinna was an officer of the company. In the Operating Agreement, Corinna was designated as a chairperson of Piedmont. The Operating Agreement indicated that a chairperson was an officer of Piedmont. According to the Operating Agreement, she had the authority and responsibility to organize, conduct, serve as Chair and run meetings of the shareholders or officers. No other duties were listed for Corinna in the Operating Agreement.

However, Michael’s testimony showed that Corinna did not perform any duties as chairperson.

[Corinna’s counsel]: All right, and there’s two people listed as chairpersons, correct?

[Michael]: Yes.

[Corinna’s counsel]: And Corinna Freeman is listed there, correct?

[Michael]: Correct.

[Corinna’s counsel]: Along with Jack Freeman.

[Michael]: Right.

[Corinna’s counsel]: There was never a meeting where my client ran it on behalf of the companies, was there?

[Michael]: Not that I attended. Not that I remember.

[Corinna’s counsel]: Well, you never received notice of one.

[Michael]: Pardon?

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[Corinna's counsel]: You never received notice of a meeting that she called on behalf of the officers or shareholders that allegedly existed, correct?

[Michael]: Yeah, I don't remember anything like that.

[Corinna's counsel]: She never did anything pursuant to being the chairperson, correct?

[Michael]: No. She did other things, but not what's in there.

[Corinna's counsel]: Well, this gives her position. She's not listed as having any other position in the company, is she?

[Michael]: No.

Neither stockholders nor directors meetings were ever held nor was stock ever issued. Plaintiffs produced no evidence that Corinna was aware of her role as chairperson of Piedmont. Therefore, plaintiffs failed to show an existence of a fiduciary relationship based on Corinna's role as a "chairperson" of Piedmont.

Plaintiffs and the majority rely on Corinna's signature on several documents as "chairperson" and her signature on the January 2005 Wachovia deposit account application as "CEO" to maintain that she had a fiduciary duty to plaintiffs. Plaintiffs produced no evidence that Corinna ever signed any documents as chairperson or "CEO" after plaintiffs' involvement in November 2005. In addition, the Operating Agreement, signed by plaintiffs, listed Jack as the CEO, therefore, even if Corinna acted as CEO prior to November 2005, after plaintiffs invested and the Operating Agreement was executed her sole role in the company was a designation by the Operating Agreement that she was a chairperson.

The majority also concludes that Corinna had a fiduciary duty to plaintiffs as the majority shareholder. It is well established in North Carolina "that a controlling shareholder owes a fiduciary duty to minority shareholders." *Farndale Co. v. Gibellini*, 176 N.C. App. 60, 67, 628 S.E.2d 15, 19 (2006) (citations omitted). "To constitute the defendant a stockholder, it was necessary to show, not only that the stock had been issued, but that it had been actually or constructively accepted by the defendant." *Corp. Comm'n v. Harris*, 197 N.C. 202, 203, 148 S.E. 174, 175 (1929). However, the simple fact that the share certificates were never given to the defendant does not conclude that the defendant was not a shareholder. See *Marzec v. Nye*, 203 N.C. App. 88, 92-3, 690 S.E.2d 537, 541 (2010).

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In January 2006, Jack increased Corinna's shareholder interest from 33 units to 88 units, making it appear that she was the majority stockholder in Piedmont. However, there is no evidence she knew of the original issuance of stock or of the increase. No stock certificates were ever issued and Corinna never signed any documents, either the original Operating Agreement or the Amendment that designated her as a shareholder. Since Corinna never knew she was a stockholder, plaintiffs failed to prove that she actually or constructively accepted the stock. Therefore, Corinna did not owe a fiduciary duty to plaintiffs as a majority shareholder.

B. Breach of Fiduciary Duty

Even assuming, *arguendo*, that a fiduciary duty existed, plaintiffs failed to prove that Corinna breached that duty. Plaintiffs suggest the breach of duty is evidenced because Corinna (1) took funds for her own benefit and (2) failed to stop the corporate waste by Jack and Lawrence J. D'Amelio, III ("D'Amelio").

Plaintiffs claim Corinna took funds for her own benefit based on several bills that were paid, allegedly on her behalf. These included mortgage payments, Direct TV bills, Northstate Communication bills and utility bills from a house Corinna co-owned located on Burrows Road in Jamestown, North Carolina ("Burrows Road house"). Initially, there were two bank accounts for PEA, an account at First Citizen's Bank ("PEA account") and a Wachovia account ("Wachovia account") that had been set up by Jack's parents. Jack L. Freeman, Sr. deposited \$20,000 in the Wachovia account for Jack and Jack used the account as his own personal checking account. When Jack drew a paycheck, he would deposit it into the Wachovia account. Plaintiffs' funds were deposited into two separate accounts with First Citizen's Bank, a money market account and a business checking account. Both accounts were in PCH's name. The bills from the Burrows Road house were not paid from the PCH accounts at First Citizen's where plaintiffs' money was deposited. Furthermore, while Corinna lived in the Burrows Road house at that time and co-owned the house, Jack testified that she had no knowledge of his actions and that he was living there and using those services for his own benefit.

The majority concludes that the evidence supported a reasonable inference that Corinna "knew how her own personal financial obligations were being paid" because "she knew that she herself was not paying them, yet her house was not foreclosed and her utilities were not shut off for nonpayment." According to the evidence at trial,

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Corinna co-owned the Burrows Road house but Jack lived in the house beginning in 1991 and paid the mortgage payments as rent. Corinna lived in Belmont, North Carolina until November 2004, when she moved back to the Greensboro area and moved in with Jack. Corinna stayed in the Burrows Road house until completion of a handicap accessible house, located on Stafford Oak Drive in Jamestown. The mortgage and utility bills that plaintiffs claim were paid for Corinna's benefit were payments related to the Burrows Road house where Jack lived and he paid those bills for his own benefit. Since Jack had been paying the mortgage and utilities for a significant period of time, he continued those payments for the Burrows Road house even after Corinna moved in with him. Plaintiffs produced no evidence that Corinna knew Jack was using corporate funds to pay those bills. The majority seems to believe that because the bills were paid, Corinna must have known that Jack used corporate funds to pay those bills. However, plaintiffs produced no evidence of this at trial.

In addition, plaintiffs and the majority claim that Corinna breached her fiduciary duty by failing to stop corporate waste. Yet, there is no evidence that Corinna knew of the waste. Plaintiffs' witness, Michael, confirmed that Corinna only worked at the office a few times and her work was limited to training employees in the back office. Michael testified that on the few occasions when Corinna came into the office he might have said "Hello" to her, but never discussed any of the company problems with her. David Noble ("Noble"), an attorney at Piedmont between February 2006 and June 2006, indicated that he did everything at Jack's direction, as did the other company employees. In addition, Noble never observed Corinna working in the offices, there was no indication that she controlled Piedmont, and more importantly, that any actions taken by the company required her authorization. There was no evidence that Corinna actively participated in the management of the office, the assets, or business decisions or had any knowledge about operating Piedmont.

Furthermore, the case law cited by plaintiffs regarding fiduciary duties states the director's duty is to "administer" the corporation's property "for the mutual benefit of all parties interested; and, when such directors receive an advantage to themselves not common to all, they are guilty of a plain breach of trust." *Meiselman v. Meiselman*, 58 N.C. App. 758, 774, 295 S.E.2d 249, 259 (1982) *affirmed in part and modified in part by*, 309 N.C. 279, 307 S.E.2d 551 (1983) (citation omitted). Initially, we note that *Meiselman* was a case about usurpa-

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tion of corporate opportunities, which is not at issue in the instant case. *Meiselman v. Meiselman*, 309 N.C. 279, 307, 307 S.E.2d 551, 567 (1983).

In addition, there is no evidence that Corinna “administered” plaintiffs’ funds for her benefit. Plaintiffs’ funds were deposited into two separate accounts with First Citizen’s Bank in PCH’s name. D’Amelio transferred funds from PCH’s business checking account into the PEA account. Crystal Byrd, the assistant treasurer, transferred funds from the money market account to the PEA account. There is no evidence that Corinna had access to either PCH account.

While Corinna did have access to the PEA account, the only evidence presented that she removed funds from that account is checks written as “signatory for C. Freeman.” These checks were used to pay a Wachovia credit card bill in Corinna’s name. Jack testified that Corinna helped him to get the credit card and allowed him to use her name because he had gone through a bad divorce and he had to file for bankruptcy. Jack indicated that even though the credit card was listed in Corinna’s name, she never used the credit card and that all the charges on that card were his expenses. The evidence at trial was clear that Jack used the corporate accounts for his benefit, not Corinna’s. When questioned about Corinna’s use of the card, Michael stated that he was “not sure that [they could] prove that or not. You’ll have to ask my lawyer...I don’t know exactly what my attorney’s plan is to do with that information.” Michael also indicated that while he believed people would present information about Corinna’s use of the card, he did not “know any particular exact thing that was hers.” Despite Michael’s claims that his attorney would admit evidence showing Corinna used the credit card, his attorney admitted that there was “no evidence before the [c]ourt right now that [Corinna] used the card...” Plaintiffs failed to show that Corinna breached her fiduciary duty by wrongfully administering plaintiffs’ funds or corporate property. Therefore, I find that the trial court erred in denying Corinna’s motions for directed verdict and JNOV on the issue of breach of fiduciary duty.

III. Piercing the Corporate Veil

I agree with Corinna that plaintiffs failed to adduce evidence that she exercised dominion and control over Piedmont, and therefore she was not the party who caused plaintiffs’ loss.

“[C]ourts will disregard the corporate form or ‘pierce the corporate veil’ and extend liability for corporate obligations beyond the

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confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). North Carolina uses the "instrumentality rule" which states that "[a] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of...affiliated corporations may be disregarded." *Id.* (citations omitted). The elements necessary to pierce the corporate veil under the instrumentality rule are:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 454-55, 329 S.E.2d at 330. Factors considered in piercing the corporate veil are "[i]nadequate capitalization ... [n]on-compliance with corporate formalities, [c]omplete domination and control of the corporation so that it has no independent identity," and "[e]xcessive fragmentation of a single enterprise into separate corporations. *Id.* at 455, 329 S.E.2d at 330-31 (internal citations omitted).

Complete control and domination over a company is only the first requirement that must be met. In the instant case, plaintiffs contend Corinna exercised control over Piedmont in three ways: (1) she "repeatedly told the world that she was the dominant voice in the business," (2) she was the principal owner of Piedmont, and (3) she controlled the finances.

The majority contends that in the light most favorable to plaintiffs, the evidence supported piercing the corporate veil in regards to Corinna. However, the evidence indicated that Corinna was not involved with Piedmont at the time of plaintiffs' investment. Plaintiffs claim that Corinna was the dominant voice of the business yet plaintiffs' witness, Michael, indicated he never met her prior to his investment:

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[Corinna's counsel]: In the 10 to 20 times that you met personally with Jack face-to-face, you never met my client, Corinna Freeman, did you?

[Michael]: No, I didn't

[Corinna's counsel]: You never talked to Corinna Freeman in any of the telephone calls that you had with Jack.

[Michael]: No, I didn't

[Corinna's counsel]: You never even asked to talk to Corinna Freeman in any of the meetings or telephone calls, did you?

[Michael]: No, I did not.

[Corinna's counsel]: Corinna Freeman provided no information to you when you were doing this investigation of this investment, did she?

[Michael]: No.

[Corinna's counsel]: You didn't ask her to produce any information for you, did you?

[Michael]: No.

[Corinna's counsel]: She didn't provide a single document to you, did she?

[Michael]: No; not directly.

[Corinna's counsel]: She never made any representation to you about this investment at all, did she?

[Michael]: No.

[Corinna's counsel]: She didn't make any representation to you as to how the companies would be organized, did she?

[Michael]: No.

[Corinna's counsel]: She didn't make any representation to you how they would be run, did she?

[Michael]: No.

[Corinna's counsel]: She didn't make any representation as to how your investment would be used, did she?

[Michael]: No.

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[Corinna's counsel]: She never told you anything about these companies, did she?

[Michael]: No.

[Corinna's counsel]: You never asked, did you?

[Michael]: No.

...

[Corinna's counsel]: And in these meetings with Jack and [D'Amelio], [Corinna] was never present, was she?

[Michael]: No.

[Corinna's counsel]: And you didn't ask for her to be present, did you?

[Michael]: No.

Plaintiffs contend that Corinna's name on several documents prove that she was the dominant voice of the business. However, the plaintiffs' evidence only showed that Corinna's signature appeared on three occasions: 30 November 2001, 20 January 2005 and 20 May 2005. Although the documents listed Corinna as chairperson, CEO or owner, these documents were all signed by Corinna prior to plaintiffs' involvement. When plaintiffs became lenders for Piedmont, it was composed of PCH, PSAF and PEA. When Jack and D'Amelio created the new venture, they determined that PCH owned 100% of PSAF and PEA, as shown in the Flight Services Requirements Agreement. Therefore, although Corinna was the original owner of PSAF, once Piedmont was created, Jack and D'Amelio's own company, PCH, owned PSAF. The articles of incorporation creating PCH and PEA were not signed by Corinna. They were both signed by D'Amelio and indicated the incorporators were Jack and D'Amelio. Plaintiffs produced no evidence that Corinna ever represented to plaintiffs that she was an owner/chairperson/CEO. In fact, there was no evidence that Corinna had control over the documents signed after plaintiffs' investment. Specifically, the 22 November 2005 Loan Agreement and Promissory Notes (which plaintiffs characterized as a loan to Piedmont) in the amount of \$400,000, the 22 November 2005 Operating Agreement, the two amended Exhibit Bs to the Operating Agreement, the 22 December 2005 agreement between NAT Group and PCH, and the Exhibit A amendment to the NAT Group agreement.

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Furthermore, an individual's mere position as an officer does not prove the requisite amount of domination and control to subject an officer to individual liability when piercing the corporate veil. *See Atl. Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 165, 398 S.E.2d 641, 644 (1990) (where the defendant wife believed she was secretary of the companies and her duties included managing the restaurant and ordering goods, the Court found that the plaintiffs failed to show the requisite amount of control to pierce the corporate veil). In the instant case, Corinna's signature on documents, signed prior to plaintiffs' loan agreement, failed to show that Corinna had the requisite amount of control to dominate the newly created company, Piedmont.

Plaintiffs also claim that Corinna used her dominance and control to increase her ownership interest. Plaintiffs received and signed an Operating Agreement that listed the ownership percentage of each shareholder. The Operating Agreement indicated Corinna owned 33 units of the company. Corinna never signed the Operating Agreement nor did she ever receive stock certificates evidencing her ownership. Corinna testified in her deposition that she had no knowledge that she was considered a shareholder of Piedmont. Plaintiffs produced no evidence that Corinna was aware of her shareholder status or evidence that stock certificates were issued. In January 2006, two amendments to Exhibit B of the Operating Agreement listed Corinna's "CAPITAL CONTRIBUTION" [sic] as owning 88 units of something. One listed Michael with 10 units and was signed by Michael. The other document listed Daniel with 4 units and was signed by Daniel. Jack testified that without her knowledge or permission, he signed his own name on both documents on the lines above Corinna's typed name. Jack did not sign "Corinna Freeman by Jack Freeman" but only "by Jack Freeman." In addition, although Jack signed both documents listing Corinna as owning 88 units, Corinna never received any stock certificate or any type of proof that she owned 88 units. Again, plaintiffs produced no evidence that Corinna was aware that she owned 88 units of Piedmont. In fact, the evidence at trial confirmed that although Jack and Michael knew of the transaction, Corinna was unaware. On cross-examination, at trial, Corinna's attorney questioned Michael about the fact that Jack signed the document for Corinna:

[Corinna's counsel]: Okay. So you didn't get something signed by Corinna, did you?

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[Michael]: No. When I brought this back to Jack and said, “Jack, this has never—we still haven’t even signed this thing,” he said, “I have—I can sign for her.”

[Corinna’s counsel]: All right. My question is you never – you still don’t have something signed by her, do you?

[Michael]: Anything signed by her?

[Corinna’s counsel]: This document is not signed by Corinna Freeman, is it?

[Michael]: Correct; no.

[Corinna’s counsel]: You said you wanted something signed by Corinna Freeman, correct?

[Michael]: Correct.

[Corinna’s counsel]: Jack Freeman is not Corinna Freeman, is he?

[Michael]: No.

[Corinna’s counsel]: You didn’t say, “Jack, I want it signed by your mother,” did you?

[Michael]: No.

[Corinna’s counsel]: You didn’t call for a meeting of the shareholders at that time, did you?

[Michael]: No.

Plaintiffs failed to provide a scintilla of evidence that Corinna knew about the 33 units, knew that Jack increased that interest to 88 units, or approved or accepted in the increase. Jack testified that he never asked Corinna’s permission to represent that she had any interest in the company or sought her approval to increase her interest. Jack and D’Amelio misrepresented that the company was a minority company by typing Corinna’s name on the document because they wanted the company to be eligible for government contracts. Since plaintiffs failed to produce evidence that Corinna approved of an interest in the company, agreed to accept an increase, or was even aware of it, the purported transfer of 88 units of non-existing stock without her knowledge or permission does not prove that she exercised control over the company or that she used her control to increase her interest in Piedmont.

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Finally, plaintiffs and the majority conclude that Corinna controlled the finances because her name appeared on some of the corporate accounts and because she benefitted from corporate funds. Although her name appeared on checks and credit cards, there is no indication that she dominated or controlled corporate funds by using these accounts. The checks “signed” by Corinna prior to June 2006 were signed “signatory for C. Freeman.” Since Corinna’s actual signature does not appear on the checks, the plaintiffs produced no evidence indicating that she signed or had knowledge that the checks were signed without her approval.

The checks Corinna actually wrote from Piedmont accounts were checks that were written in June 2006. There were three checks written to Piedmont employees and the memo section in the corner of the checks indicated that they were written as loans until NAT Group paid. These checks were written from the Wachovia account, not from the First Citizen’s accounts where plaintiffs’ funds were deposited. After the company relocated from D’Amelio’s office to the new office and funds became scarce, Jack paid salaries and rent for the office from the Wachovia account. Corinna wrote all three checks at Jack’s request.

Additionally, the plaintiffs produced no evidence that Corinna orchestrated payments for her bills or had knowledge that Jack used corporate funds to pay her bills. The mortgage and utility bills that plaintiffs claim were paid for Corinna’s benefit were payments related to the Burrows Road house where Jack lived and those bills were paid for his own benefit. Plaintiffs produced no evidence that Corinna knew Jack was using a corporate account to pay those bills.

Corinna stated that she never saw the credit card statements or made payments towards those accounts. In fact, the bills for the two credit cards in Corinna’s name, the American Express credit card and the Wachovia credit card, were sent to Piedmont’s post office box. Plaintiffs failed to show that Jack’s repeated payments for the mortgage and utilities, as well as the use of his mother’s credit cards, were evidence that Corinna exercised dominance and control over Piedmont for purposes of piercing the corporate veil.

Plaintiffs mischaracterize Corinna’s argument concerning the reason she claims no liability under the theory of piercing the corporate veil. Plaintiffs claim Corinna argues that Jack and D’Amelio’s dominance over Piedmont precludes dominance by her. However, Corinna merely states that she simply did not exercise dominance or control

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over Piedmont. Plaintiffs and the majority are correct that factors articulated in *Glenn* are present in the instant case. Piedmont was undercapitalized, Jack and D'Amelio failed to comply with corporate formalities and excessively fragmented a single enterprise into separate companies. Therefore, it was appropriate that the jury found in favor of plaintiffs on the issue of piercing the corporate veil against Jack and D'Amelio. However, despite plaintiffs' claim, Corinna did not dominate Piedmont because Corinna did not exercise control over the Piedmont companies. Corinna never dominated or controlled Piedmont. In fact, Michael testified repeatedly that Jack was in control of the company, "it was [Jack's] way. It was just his company." Michael also indicated that Jack exercised control over financial decisions and was "in charge of everyone." Michael did not even claim that Corinna had control, instead indicating again that Jack was in control and that he believed that Corinna signed over control to Jack, but that she did not control Jack.

Piercing the corporate veil as to Corinna would also require that the control and breach of duty must proximately cause the unjust loss. However, since plaintiffs failed to prove Corinna exercised domination and control over Piedmont that would subject her to individual liability, plaintiffs failed to prove her liability for corporate obligations should extend beyond the confines of a corporate separate entity and Corinna's motions for directed verdict and JNOV on the issue of piercing the corporate veil should have been granted.

IV. Conclusion

I find that the trial court erred by denying Corinna's motions for directed verdict and JNOV on the issue of breach of fiduciary duty. The trial court also erred by denying Corinna's motions for directed verdict and JNOV on the issue of extending her liability for corporate obligations beyond the confines of a corporate separate entity by piercing the corporate veil.

IN RE C.A.C.

[222 N.C. App. 687 (2012)]

IN THE MATTER OF C.A.C.

No. COA12-305

(Filed 4 September 2012)

Termination of Parental Rights—notice—service by publication—statutorily insufficient

The trial court erred by terminating respondent father's parental rights to his minor child where petitioner's service by publication failed to comply with N.C.G.S. § 7B-1106(b)(4). The advertisement inserted into the newspaper completely omitted any reference to respondent father's right to counsel.

Appeal by respondent-father from order entered 8 December 2011 by Judge Angela Hoyle in Gaston County District Court. Heard in the Court of Appeals 20 August 2012.

Timothy T. Leach for petitioner-appellee mother.

Michael E. Casterline for respondent-appellant father.

HUNTER, JR., Robert N., Judge.

Respondent-father appeals from an order terminating his parental rights to C.A.C., the minor child. Because petitioner, the mother of the juvenile, failed to give the statutorily required notice, we vacate the trial court's order.

On 18 January 2011, petitioner filed a petition to terminate respondent-father's parental rights. Petitioner stated that she and respondent-father had been married in 2006 and divorced in 2008. Petitioner was granted custody of the juvenile by order entered 15 February 2008. Petitioner alleged that respondent-father had no relationship with the juvenile and had not seen the child in two years.

Initially, petitioner attempted to serve the summons on respondent-father at Neuse Correctional Institution, but the summons was returned unserved. Eventually, because respondent-father's whereabouts were unknown, petitioner sought permission to serve respondent-father by publication. On 24 August 2011, the trial court entered an order permitting petitioner to serve respondent-father via publication in a newspaper circulating in Gaston County. On 10 October 2011, petitioner filed an affidavit stating that respondent-father had been served by publication by way of an advertisement inserted into The Gaston Gazette.

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A hearing was held on the petition to terminate respondent-father's parental rights on 16 November 2011. Respondent-father did not appear at the hearing and was represented by appointed provisional counsel. The trial court determined that grounds existed to terminate respondent-father's parental rights and that it was in the best interests of the juvenile that respondent-father's parental rights be terminated. Respondent-father appeals.

Respondent-father first argues that the trial court lacked personal jurisdiction because petitioner failed to give proper notice. We agree.

Upon the filing of a petition to terminate parental rights, N.C. Gen. Stat. § 7B-1106(a)(1) (2011) requires that a summons regarding the proceeding be issued to the parents of the juvenile. Issuance of the summons is necessary to obtain personal jurisdiction over the parents. *See In Re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009) (“[S]ummons-related defects implicate personal jurisdiction.”). “Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j).” N.C. Gen. Stat. § 7B-1106(a) (2011). However, when the whereabouts of a parent are unknown, service may be by publication in accordance with N.C. Gen. Stat. § 1A-1, Rule 4(j1). *In Re Joseph Children*, 122 N.C. App. 468, 471, 470 S.E.2d 539, 541 (1996).

When serving a party by publication, a petitioner must also comply with the notice requirements set forth in N.C. Gen. Stat. § 7B-1106(b) (2011). *Id.* (citing former N.C. Gen. Stat. § 7A-289.27 and *In re Clark*, 76 N.C. App. 83, 86, 332 S.E.2d 196, 199, *appeal dismissed*, 314 N.C. 665, 335 S.E.2d 322 (1985)). Here, petitioner's service by publication failed to comply with N.C. Gen. Stat. § 7B-1106(b)(4) (2011). N.C. Gen. Stat. § 7B-1106(b)(4) provides that the summons must include “[n]otice that if the parent is indigent and is not already represented by appointed counsel, the parent is entitled to appointed counsel, that provisional counsel has been appointed, and that the appointment of provisional counsel shall be reviewed by the court at the first hearing after service[.]” The advertisement inserted into *The Gaston Gazette* completely omitted any reference to respondent-father's right to counsel.

We note that, even with a defective summons, a court “may properly obtain personal jurisdiction over a party who consents or makes a general appearance[.]” *K.J.L.*, 363 N.C. at 346, 677 S.E.2d at 837. In this case, however, respondent-father made no appearance. While respondent-father was represented by counsel, said counsel was

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only provisionally appointed and should have been dismissed when respondent-father failed to appear. *See* N.C. Gen. Stat. § 7B-1101.1(a)(1) (2011) (“At the first hearing after service upon the respondent parent, the court shall dismiss the provisional counsel if the respondent parent: (1) Does not appear at the hearing[.]”). Although the trial court failed to dismiss counsel prior to the termination hearing, the presence of provisionally appointed counsel was insufficient to constitute a general appearance and waive the defects in process. To conclude otherwise would defeat the purpose of notice and service requirements. Accordingly, because petitioner failed to give the statutorily required notice, the trial court’s order is vacated. *See In re Alexander*, 158 N.C. App. 522, 526, 581 S.E.2d 466, 469 (2003) (“[W]here a movant fails to give the required notice, prejudicial error exists, and a new hearing is required.”).

Vacated.

Judges BRYANT and BEASLEY concur.

INLAND HARBOR HOMEOWNERS ASSOCIATION, INC., PLAINTIFF v. ST. JOSEPHS MARINA, LLC, RENAISSANCE HOLDINGS, LLC, ST. JOSEPHS PARTNERS, LLC, DEWITT REAL ESTATE SERVICES, INC., DENNIS BARBOUR, RANDY GAINERY, THOMAS A. SAIEED, JR., TODD A. SAIEED, ROBERT D. JONES, AND THE NORTH CAROLINA COASTAL RESOURCES COMMISSION, DEFENDANTS

No. COA11-715-2

(Filed 4 September 2012)

1. Declaratory Judgments—ownership of bulkhead—plaintiff’s lack of ownership previously decided—title documents established defendants’ ownership

The trial court did not err in a declaratory judgment action by denying plaintiff’s motion for summary judgment and granting defendants’ on the issue of whether plaintiff owned the bulkhead which was the boundary between plaintiff and defendant’s property. The Court of Appeals had already decided, in *Inland Harbor I*, that the trial court did not err in denying plaintiff’s motion for summary judgment and the title documents established as a matter of law that defendants owned the bulkhead.

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2. Trespass—nuisance—no ownership of bulkhead—no riparian rights

The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claims for trespass by encroachment into riparian corridor, nuisance by unreasonable interference with riparian rights, and punitive damages based on the knowing and continuing encroachment into the bulkhead which plaintiff claimed was its property. Plaintiff did not own the bulkhead and had no riparian rights.

3. Deeds—judicial reformation—mutual mistake

The trial court did not err by granting summary judgment to defendants on plaintiff's claim for judicial reformation of a deed where plaintiff failed to meet its burden of showing a mutual mistake.

Appeal by Plaintiff from order entered 12 October 2010 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 November 2011.

Clark, Newton & Evans, P.A., by Don T. Evans, Jr. and Seth P. Buskirk, for Plaintiff-Appellant.

Marshall, Williams & Gorham, LLP, by John L. Coble and Williams Mullen, by Gilbert C. Laite, III and Kelly Colquette Hanley, for Defendants-Appellees.

BEASLEY, Judge.

Inland Harbor Homeowners Association, Inc. (Plaintiff) commenced this civil action on 2 December 2009. Plaintiff filed an amended complaint on 27 January 2010 alleging several causes of action against Renaissance Holdings, LLC, Dewitt Real Estate Services, LLC, St. Josephs Partners, LLC, St. Josephs Marina, LLC, Randy Gainey, Dennis Barbour, Robert D. Jones, Thomas A. Saieed, Jr., and Todd A. Saieed (Defendants). Plaintiff sought, *inter alia*, (1) a declaratory judgment to determine ownership of the bulkhead which is the boundary between Plaintiff and Defendant St. Josephs Marina's property; (2) nuisance and trespass damages against St. Josephs Marina; and (3) judicial reformation of a deed. On 27 August 2010, Plaintiff filed its motion for partial summary judgment seeking declaration of ownership of the bulkhead and judicial reformation of the deed. On 23 September 2010, Defendants filed their motion for partial summary judgment for the same causes of action, and for the nuisance and trespass claims.

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On 12 October 2010, the trial court entered the order of summary judgment which denied Plaintiff's motion for summary judgment and granted Defendants' motion. On 11 February 2011, Plaintiff voluntarily dismissed its final cause of action and filed notice of appeal on 7 March 2011. On 6 March 2012, this Court entered an opinion affirming the trial court's denial of Plaintiff's motion for summary judgment. *Inland Harbor Homeowners Assoc., Inc. v. St. Josephs Marina, LLC*, ___ N.C. App. ___, 724 S.E.2d 92 (2012) (*Inland Harbor I*). On 10 April 2012, Plaintiff filed a petition for discretionary review to our Supreme Court. On 13 June 2012, our Supreme Court issued an order allowing discretionary review for the limited purpose of remanding the case to this Court for consideration of whether Defendants' motion for summary judgment was properly granted by the trial court. The facts from *Inland Harbor I* are reprinted below.

Plaintiff and Defendants St. Josephs Marina and St. Josephs Partners, LLC own adjacent land in Carolina Beach, N.C. on the western side of the Myrtle Grove Sound. A portion of the subject property lies below the average high water mark and is completely submerged by water.

BWT Enterprises Inc. (BWT) was the record owner of the subject property and is the common predecessor in title to both Plaintiff and St. Josephs. In 1983, BWT owned a 5.8 acre tract of land (parent tract) adjacent to the Myrtle Grove Sound. Part of the parent tract was divided into two separate tracts. Tract 1 consisted of 1.44 acres which contained submerged land and Tract 2 consisted of 2.7 acres of dry land. Between 1984 and 1985, BWT built a bulkhead across the parent tract that divided Tract 1 and Tract 2. In 1984, BWT recorded a condominium plat (Condo Plat) which identified the "Bulkhead Line", common areas, and future development. Shortly after BWT recorded the Condo Plat, BWT also formed Plaintiff, Inland Harbor Homeowners Association Inc. BWT also recorded a "Declaration of Inland Harbor Condominiums Phase I" (Declaration). The Declaration designated part of Tract 1 to condominium ownership and future development.

In 1985, BWT formed the Inland Harbor Yacht Club Limited Partnership (Yacht Club) and BWT conveyed the parent tract to the Yacht Club, subject to the Declaration. At that point, the Yacht Club owned the original parent tract, except for one condominium unit that was sold when BWT owned the parent tract. Later that year, the Yacht Club conveyed the parent tract, less the condominium units that were sold, to Sundance Resorts, Ltd. (Sundance). Sundance exe-

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cuted a deed of trust to Branch Banking and Trust (BB&T) and in 1986 BB&T foreclosed and accepted a trustee's deed. After BB&T foreclosed, it obtained a Declaration of Title to Submerged Landscape for the submerged portions of the parent tract.

In 1989, BB&T conveyed the parent tract to FMS Development and Hyung Park (FMS and Park) and obtained a deed of trust. While FMS and Park held title, they amended the Declaration by executing "Amendment to Declaration of Unit Ownership and Covenants, Conditions and Restriction of Inland Harbor" (Amendment). In 1992, FMS and Park deeded the parent tract back to BB&T in lieu of foreclosure. In 1992, BB&T subdivided the parent tract and conveyed it in portions. BB&T conveyed the common areas located in Tract 1 to Plaintiff and conveyed the remaining parent tract to Mona Faye Black *et al.* (Blacks). The Blacks then conveyed a .28 acre parcel on Tract 1 to Plaintiff. In 2004, the Blacks conveyed all of their interest to St. Josephs Partners LLC (Partners).

In 2004, Plaintiff and Partners entered into an exchange agreement where Plaintiff agreed to exchange its .28 acres in exchange for .21 acres of Partners land. Partners also agreed to construct a pool with amenities, and perform other property maintenance. Subsequently, Partners began commercial development of the property. Partners rebuilt the bulkhead and constructed docks and marina facilities on the property. Partners applied for and was granted an easement over the submerged land with the boundaries running along the bulkhead. Plaintiff believes that it owns the bulkhead and the State improperly gave Partners an easement.

I.

[1] Plaintiff argues that the trial court erred in denying its motion for summary judgment and granting Defendants' on the issue of whether Plaintiff owns the bulkhead. We disagree.

Summary judgment "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." N.C. Gen. Stat. § 1A-1, Rule 56 (c) (2011). "[W]hen considering a summary judgment motion, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (internal quotation marks and citations). Appellate courts "review a trial court's order granting or deny-

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ing summary judgment *de novo*” meaning that “the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Id.* at 337, 678 S.E.2d at 354 (internal quotation marks and citations omitted).

We have already decided, in *Inland Harbor I*, that the trial court did not err in denying Plaintiff’s motion for summary judgment with regards to whether Plaintiff owned the bulkhead. *Inland Harbor I*, ___ N.C. App. at ____, 724 S.E.2d at 95. In so concluding, we dismissed Plaintiff’s arguments that (i) the bulkhead was a fixture attached to Plaintiff’s property, (ii) the Declaration and Condo Plat show that the bulkhead is a part of the condominium common areas, and (iii) that the Amendment is a boundary agreement that is binding upon St. Josephs Marina, as meritless. *Id.* at ____, 724 S.E.2d at 96-97. We now address Defendants’ argument that the title documents establish as a matter of law that Defendants own the bulkhead. Defendants point to the warranty deed filed after Partners purchased the property the Blacks received from BB&T. The deed describes six tracts of land in the subject property conveyed from the Blacks to Partners, including “[a]ll right, title and interest of the Grantors in any bulkheads adjoining Tract One and Tract Two. . . .” Given the clear language in the deed and the fact that Plaintiff’s arguments to the contrary have been deemed meritless, we find that the trial court did not err in granting Defendants’ motion for summary judgment on this issue.

II.

[2] Plaintiff next claims that the trial court erred in granting Defendants’ motion for summary judgment on Plaintiff’s claims for trespass by encroachment into riparian corridor, nuisance by unreasonable interference with riparian rights, and punitive damages based on the knowing and continuing encroachment into Plaintiff’s property. All of these tort claims are premised on the contention that Plaintiff has riparian rights in the bulkhead. As held in *Inland Harbor I*, Plaintiff has no riparian rights as Plaintiff does not own the bulkhead. Accordingly, the trial court did not err in concluding as a matter of law that Defendants were not liable for trespass or nuisance with regard to Plaintiff’s riparian rights where Plaintiff has no such rights.

III.

[3] Finally, Plaintiff argues that the trial court erred in granting summary judgment to Defendants on Plaintiff’s claim for judicial reformation of the deed based on mutual mistake. It is well-established that “[w]hen a party seeks to reform a contract due to an affirmative

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defense such as mutual mistake. . . the burden of proof lies with the moving party[.]” to prove mutual mistake by clear, cogent, and convincing evidence. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 749 (2003). In *Inland Harbor I*, we concluded that Plaintiff failed to meet this burden. Because Plaintiff failed to meet its burden of showing a mutual mistake, the trial court did not err in granting summary judgment to Defendants on this issue.

Affirmed.

Judges STEELMAN and GEER concur.

KAYLOR B. ROBINSON, BRENDA M. BELL, DANNY MCGEE, AND JAMES MCGEE,
PLAINTIFFS-APPELLANTS v. NYLE WADFORD, PAIGE WADFORD SMITH, TRENT
WADFORD, AND EDWINA WADFORD, DEFENDANTS-APPELLEES

No. COA12-199

(Filed 4 September 2012)

Statutes of Limitation and Repose—grave desecration—ten-year period—action time-barred

The trial court did not err by dismissing plaintiffs’ complaint for negligence and grave desecration where the action was barred by the statute of limitations. The alleged actions by defendants that gave rise to the claims did not occur within the ten-year period prior to the filing of plaintiffs’ complaint.

Appeal by Plaintiffs from order entered 23 September 2011 by Judge Robert F. Johnson in Superior Court, Orange County. Heard in the Court of Appeals 5 June 2012.

Bachman & Swanson, PLLC, by Glen D. Bachman, for Plaintiffs-Appellants.

Manning, Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for Defendants-Appellees.

McGEE, Judge.

Kaylor B. Robinson, Brenda M. Bell, Danny McGee and James McGee (Plaintiffs) filed a complaint on 17 June 2011 against Nyle

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Wadford, Paige Wadford Smith, Trent Wadford, and Edwina Wadford (Defendants). Plaintiffs sought to recover damages from Defendants based upon causes of action for negligence and grave desecration. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), Defendants filed a motion to dismiss on 18 July 2011, arguing that Plaintiffs' complaint was not timely filed. The trial court granted Defendants' motion to dismiss in an order entered 23 September 2011.

I. Allegations in Plaintiffs' Complaint

Plaintiffs alleged in their complaint that they are descendants of John R. Magee (Mr. Magee), who died on 4 April 1919. Mr. Magee and Mollie W. Magee were buried in marked graves (the graves). Albert F. Wadford (Mr. Wadford) was the father of Defendants and died on 1 June 1998. Mr. Wadford devised to Defendants by will his share of the real property on which Mr. Magee was buried.

Plaintiffs alleged that Thorton Ventures, LLC (Thorton) "acquired title to the property which is the subject matter of this litigation by Special Warranty deed recorded on December 12, 1999[.]" Plaintiffs' complaint contains, *inter alia*, the following, somewhat unclear, allegations:

17. That in 2001, Thorton Ventures, LLC sold this property to Forest Creek Limited Partnership.
18. That in August 2001, Urban Pipeline, Inc., under property owner Thorton Ventures, LLC, applied for demolition permits for seven (7) buildings which were located on the subject property.
19. That at the time Urban Pipeline, Inc. applied for the permits, Forest Creek Limited Partnership was the owner of this subject property and Urban Pipeline, Inc. was a subcontractor for Forest Creek Limited Partnership.
20. That the seven (7) buildings to be demolished were located on two different parcels of property. One parcel which contained three (3) buildings was owned by Thorton Ventures, LLC and the other which contained four (4) buildings was owned by Forest Creek Limited Partnership.

It is unclear whether Plaintiffs intended to allege that Thorton sold the real property in its entirety, or in part, to Forest Creek Limited Partnership, and which of these two companies was in charge of Urban Pipeline, Inc.

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Plaintiffs' complaint further alleged that Defendants "signed a quitclaim deed of the subject property to Thorton" in 2004. Plaintiffs alleged that, at the time Thorton "acquired the property," the graves were marked with concrete headstones and were surrounded by a wrought iron fence and gate. Plaintiffs alleged that Thorton "desecrated the grave sites during the grading portion of Forest Creek Limited Partnership's development." Plaintiffs further alleged that "sometime prior to 1999, . . . Defendants piled substantial amounts of old pallets, metal and tile on top of the grave sites in order to hide [the] existence [of the grave sites] at the time the property was quit-claimed to Thorton[.]"

II. Issue on Appeal and Standard of Review

Plaintiffs raise on appeal the issue of whether the trial court erred by dismissing Plaintiffs' complaint as being "barred by the statute of repose under N.C. Gen. Stat. § 1-52." Pursuant to Defendants' motion, the trial court dismissed Plaintiffs' complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "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).

III. Analysis

Plaintiffs argue the trial court erred in granting Defendants' motion to dismiss because Plaintiffs' complaint was timely filed. Plaintiffs contend their complaint was timely filed because both their causes of action accrued in 2004 and because both were subject to a ten-year statute of limitations. Reviewing the allegations of Plaintiffs' complaint, we disagree.

Plaintiffs contend that each cause of action falls under either N.C. Gen. Stat. § 1-52(16) or N.C. Gen. Stat. § 1-56, and that Plaintiffs had ten years within which to file their complaint. N.C. Gen. Stat. § 1-52

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generally provides a three-year statute of limitations for various causes of action, and subsection 16 provides for the delayed accrual of a cause of action based on discovery, as follows:

Unless 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). N.C. Gen. Stat. § 1-56 provides that “[a]n action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.” N.C. Gen. Stat. § 1-56 (2011). In Plaintiffs’ brief, they make arguments concerning the statute of limitations and the statute of repose, and appear to ignore the distinctions between the two. *See, e.g. Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 604 (1994) (citation omitted) (“ ‘Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.’ ”). However, it is clear from Plaintiffs’ brief that their argument relies on a ten-year statute of limitations.

Therefore, we review Plaintiffs’ complaint to determine whether the alleged actions by Defendants that gave rise to the claims occurred within the ten-year period prior to the filing of Plaintiffs’ complaint. Plaintiffs made the following pertinent allegations in their complaint:

15. That Thorton Ventures, LLC acquired title to the property which is the subject matter of this litigation by Special Warranty deed recorded on December 12, 1999 in Real Estate Book 2642, Wake County Registry.

16. That in 1999, Thorton Ventures, LLC subdivided the subject property into approximately twelve (12) tracts. Forest Creek Limited Partnership bought lots three (3) and four (4) which contained the cemetery and four (4) buildings.

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17. That in 2001, Thorton Ventures, LLC sold this property to Forest Creek Limited Partnership.

. . . .

21. That actual cemetery and remains of John R. Magee and Mollie W. Magee were located on the parcel owned by Forest Creek Limited Partnership.

22. That in 2004, . . . Defendants signed a quitclaim deed of the subject property to Thorton Ventures, LLC.

23. That at the time Thorton Ventures, LLC acquired the property, the grave sites of the Plaintiffs' ancestors were marked with two concrete headstones surrounded by a wrought iron fence and gate.

24. That the Plaintiffs are informed and believe that Thorton Ventures, LLC desecrated the grave sites during the grading portion of Forest Creek Limited Partnership's development.

25. That . . . Defendants knew of the existence of the grave sites located on the subject matter property when they sold said property to Thorton Ventures, LLC and did not disclose this knowledge during the sale.

26. That at sometime prior to 1999, . . . Defendants piled substantial amounts of old pallets, metal and tile on top of the grave sites in order to hide its existence at the time the property was quitclaimed to Thorton Ventures, LLC.

27. That in violation of NCGS § 14-149, . . . Defendants did disturb, destroy, vandalize and/or desecrate the grave sites of Plaintiffs' ancestors.

Plaintiffs alleged in their negligence claim that:

Defendants were negligent in that they:

- a. Piled on substantial amounts of old pallets, metal and tile on top of the grave sites in order to hide its existence at the time the property was quitclaimed to Thorton Ventures, LLC;
- b. Failed to disclose to Thorton Ventures, LLC or anyone with an ownership interest in the property of the existence of the grave sites located on the subject matter property.

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Plaintiffs alleged the following in their claim for grave desecration:

42. That in violation of NCGS § 14-149, . . . Defendants did disturb, destroy, vandalize and/or desecrate Plaintiff[s'] family grave sites by piling substantial amounts of old pallets, metal and tile on top of the grave sites in order to hide its existence at the time the property was quitclaimed to Thornton Ventures, LLC.

43. That in violation of NCGS § 14-149, . . . Defendants did disturb, destroy, vandalize and/or desecrate Plaintiffs' family grave sites by failing to disclose to the buyers of the subject matter property that there were grave sites located on said property.

We first note that Plaintiffs alleged that Defendants engaged in grave desecration in violation of N.C. Gen. Stat. § 14-149, a matter previously considered by this Court in *Robinson v. Forest Creek Ltd. P'ship*, ___ N.C. App. ___, 712 S.E.2d 895 (2011) (*Robinson I*). In *Robinson I*, this Court affirmed the trial court's grant of summary judgment in favor of the defendants on the grounds that the plaintiffs' had failed to allege an act of desecration on the part of Forest Creek. In so holding in *Robinson I*, this Court noted that, as in the present case, "[p]laintiffs allege[d] that [the] [d]efendants graded the property on which the gravesite is located 'in violation of the provisions of [N.C. Gen. Stat. §] 14-149,' a *criminal* statute." *Id.* at ___ n.2, 712 S.E.2d at 897 n.2. This Court observed that "a civil cause of action is not necessarily created by a violation of a criminal statute." *Id.* However, this Court ultimately held that "[p]laintiffs' complaint g[ave] sufficient notice of the wrong alleged—*i.e.*, desecration by grading over the gravesite—[that] [p]laintiffs' incorrect choice of legal theory" was not in itself fatal. *Id.* Therefore, in the present case we will address Plaintiffs' claim of civil grave desecration despite their reliance on N.C. Gen. Stat. § 14-149.

In *Robinson I*, this Court noted that we could find no case "delin[ing] the elements of a civil cause of action for wrongful desecration of a gravesite." *Robinson I*, ___ N.C. App. at ___, 712 S.E.2d at 897. Our Court held that "[n]evertheless, without contemplating all the elements that may be required for a successful desecration claim, we think it obvious that one essential element of such a claim must be that the defendant engaged in some *act of desecration*." *Id.* (emphasis added). This Court reviewed the following as examples of "acts of desecration:" (1) the wrongful injury to or removal of a grave monument; (2) the destruction of graves by leveling a hill on which a

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graveyard was situated; or (3) proximately causing, “ ‘directly or indirectly, defacement, damage, or other mistreatment of the physical area of the decedent’s grave site or common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others’ ” *Id.* (citation and emphasis omitted). Black’s Law Dictionary defines “desecrate” as: “To divest (a thing) of its sacred character; to defile or profane (a sacred thing).” Black’s Law Dictionary 511 (9th ed. 2009).

Plaintiffs filed their complaint on 17 June 2011 and they argue on appeal that their causes of action accrued in 2004 when some of the named Defendants executed a quitclaim deed in favor of Thornton. We disagree. Of all the allegations in Plaintiffs’ complaint, the sole allegation attributing any act of damage, removal, injury, defacement, or other mistreatment on the part of Defendants was the allegation that Defendants placed materials on the graves prior to 1999. In our review of the case law, we find no authority indicating that executing a quitclaim deed without informing the purchasing party of the existence of a gravesite amounts to an act of desecration. This interpretation is supported by N.C. Gen. Stat. § 14-149, which provides for the criminal prosecution of grave desecration and states that the crime of grave desecration occurs when a person does:

(1) Open, disturb, destroy, remove, vandalize or desecrate any casket or other repository of any human remains, by any means including plowing under, tearing up, covering over or otherwise obliterating or removing any grave or any portion thereof.

(2) Take away, disturb, vandalize, destroy, tamper with, or deface any tombstone, headstone, monument, grave marker, grave ornamentation, or grave artifacts erected or placed within any cemetery to designate the place where human remains are interred or to preserve and perpetuate the memory and the name of any person. This subdivision shall not apply to the ordinary maintenance and care of a cemetery.

N.C. Gen. Stat. § 14-149(a) (2011).

Plaintiffs allege in their complaint that the last act of “desecration” on the part of Defendants occurred in 1999. Plaintiffs’ complaint was filed in 2011. Plaintiffs contend they had a ten-year period within which to file their complaint. Because Plaintiffs filed their complaint twelve years after the last alleged act of “desecration[.]” their complaint was not timely filed and the trial court did not err in granting Defendants’ motion to dismiss.

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Plaintiffs argue on appeal that the failure to disclose the existence of a grave site amounts to an act of desecration. However, the sole case Plaintiffs cite in support of their argument concerning the failure to disclose the existence of a gravesite is a Maryland case, *Rhee v. Highland Development*, 958 A.2d 385 (Md.App. 2008). However, in addition to not being controlling authority, we find that *Rhee* is inapposite. *Rhee* involved a claim for fraud brought by the purchaser of real property against a developer who hid the presence of a cemetery on the real property sold by the developer to the purchaser. *See id.* *Rhee* is silent as to the right of relatives of decedents interred in a cemetery to recover from a developer who conceals the presence of that cemetery. We therefore are not persuaded by Plaintiffs' argument that the 2004 signing of a quitclaim deed was an act of desecration.

Plaintiffs also assert that Defendants Nyle Wadford, Paige Wadford Smith and Trent Wadford were under a duty to "disclose the existence of this material latent defect when they quitclaimed their interest." We likewise find this argument unpersuasive. Plaintiffs cite to the duty of a seller to disclose known material, but latent, defects to a buyer. However, assuming *arguendo* that Defendants did owe such a duty, even Plaintiffs recognize that the duty runs only from the buyer to the seller. We find nothing in our case law that would allow Plaintiffs to recover for Defendants' alleged breach of this duty to Thorton. As stated above, a cause of action for grave desecration must include some act of desecration and we hold that, on these facts, the latest act of desecration alleged in Plaintiffs' complaint was the 1999 covering of the graves. We are cognizant of the unique emotional issues involved in alleged desecration in family cemeteries. However, on the facts in the present case, we hold that the trial court did not err in dismissing Plaintiffs' complaint as untimely.

Affirmed.

Judges STEELMAN and ERVIN concur.

RUSSELL v. DONALDSON

[222 N.C. App. 702 (2012)]

ROBERT C. RUSSELL, JR., AS TRUSTEE FOR THE ROBERT CLINTON RUSSELL, JR. REVOCABLE TRUST U/A/D MARCH 14, 2003, AND PAMELA JEAN FORTNER-DENHAM, AS TRUSTEE FOR THE PAMELA JEAN FORTNER-DENHAM REVOCABLE TRUST U/A/D MARCH 14, 2003, AND ROBERT C. RUSSELL, JR., INDIVIDUALLY, PLAINTIFFS V. ALEXANDER M. DONALDSON AND WIFE, GEORGIA C. DONALDSON; DANIEL M. HOFFMAN AND WIFE, CHERYL E. HOFFMAN; R. FERMAN WARDELL AND WIFE, JOANA G. WARDELL; PHILLIP H. PEARCE AND WIFE, ANN M. PEARCE; THOMAS T. SWAIN, JR. AND WIFE, JUDITH H. SWAIN; AND HUGHES WILSON GROGAN AND STEVEN GRAY GROGAN, TRUSTEES OF THE JOHN GRAY GROGAN FAMILY TRUST, ESTABLISHED APRIL 28, 2003, AND THE FOREST AT BLOWING ROCK PROPERTY OWNERS ASSOCIATION, INC., DEFENDANTS

No. COA12-183

(Filed 4 September 2012)

Deeds—restrictive covenants—commercial or business purposes—short term vacation rentals not prohibited

The trial court did not err in a case involving the interpretation of restrictive covenants by granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment. The provisions of the restrictive covenants prohibiting the use of real property for commercial or business purposes did not prohibit short term vacation rentals.

Appeal by plaintiff from judgment entered 4 November 2011 by Judge F. Lane Williamson in Caldwell County Superior Court. Heard in the Court of Appeals 14 August 2012.

Miller & Johnson, PLLC, by Nathan A. Miller for plaintiff-appellants.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson for defendant-appellees Alexander Donaldson and wife, Georgia C. Donaldson, and Daniel M. Hoffman.

Patrick, Harper & Dixon, LLP, by David W. Hood for defendant-appellee The Forest at Blowing Rock Property Owners Association, Inc.

STEELMAN, Judge.

The provisions of the restrictive covenants prohibiting the use of real property for commercial or business purposes do not prohibit short term vacation rentals. The trial court properly granted summary judgment in favor of defendants.

RUSSELL v. DONALDSON

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I. Factual and Procedural History

Plaintiffs and the defendants, other than The Forest at Blowing Rock Property Owners Association, Inc., (POA) all own real property in The Forest at Blowing Rock, a residential development in Caldwell County, which is subject to restrictive covenants.

Item 1 of the restrictive covenants states: “All lots shall be used for one family residential purposes only and no duplexes or apartment houses shall be constructed or placed on any lot”. On 2 November 2010, plaintiffs filed a complaint against defendants Wardell, Pearce, Swain, and Grogan, who each own a 1/4 undivided interest in the piece of real property known as Lot 40 of the Forest at Blowing Rock. Plaintiffs alleged that defendants Wardell, Pearce, Swain and Grogan are not one family and are in violation of the restrictive covenants. Similar allegations were made against defendants Donaldson and Hoffman.

Item 5 of the restrictive covenants states “No lots shall be used for business or commercial purposes[.]” Defendants Donaldson are the owners of Lot 10 of the Forest at Blowing Rock and defendants Hoffman are the owners of Lots 15 and 18. All three lots are encumbered by the restrictive covenants. Defendants Donaldson and Hoffman have entered into short term rental arrangements of their residences when they are not using them. Plaintiffs’ complaint alleged that the short term rental activity by the Hoffmans and Donaldsons violated the restrictive covenants. On 20 January 2011, defendants Donaldson filed an answer and counterclaim seeking declaratory judgment interpreting the restrictive covenants to permit rental of the property for residential purposes and damages for trespass against plaintiffs. On 19 January 2011, defendants Hoffman filed an answer and a counterclaim for declaratory judgment.

POA has the duty to enforce the restrictive covenants. Plaintiffs’ complaint alleged that POA was not enforcing the restrictive covenants and sought monetary damages. On 10 December 2010 POA answered and moved to dismiss.

On 15 August 2011, plaintiffs voluntarily dismissed their damages claim against POA. On 30 August 2011, POA moved for summary judgment. On 5 October 2011 defendants Wardell, Swain, Pearce and Grogan moved for summary judgment. On 17 October 2011, plaintiffs moved for summary judgment against all defendants. On 17 October 2011, defendants Hoffman and Donaldson filed a motion for summary judgment. On 24 October 2011, defendants Donaldson dismissed their

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counterclaim for trespass. The trial court entered summary judgment in favor of all defendants on 4 November 2011.

Plaintiffs appeal.

II. Motion for Summary Judgment

A. 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619,629,684 S.E.2d 709, 717 (2009).

B. Analysis

Appellees have used the residences situated on their real property as short-term vacation rentals. The trial court determined that the restrictive covenants for The Forest at Blowing Rock do not preclude vacation rentals under the provision that “no lots shall be used for commercial or business purposes”.

We first review the principles that guide our analysis of restrictive covenants. “[J]udicial enforcement of a restrictive covenant is appropriate at the summary judgment stage unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest.” *Page v. Bald Head Ass’n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005).

“While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land.” *Hobby & Son v. Family Homes*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981). “The rule of strict construction is grounded in sound consideration for public policy: It is in the best interests of society

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that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.” *Hobby & Son*, 302 N.C. at 71, 274 S.E.2d at 179.

“The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.” *Wein II, LLC v. Porter*, 198 N.C. App. 472, 480, 683 S.E.2d 707, 713 (2009).

“Sound judicial construction of restrictive covenants demands that if the intentions of the parties are to be followed, each part of the covenant must be given effect according to the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking.” *J.T. Hobby & Son*, 302 N.C. at 71, 274 S.E.2d at 179 (citations omitted). “In interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed ordinarily control, and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent.” *Angel v. Truitt*, 108 N.C. App. 679, 681, 424 S.E.2d 660, 662 (1993) (citation and quotation marks omitted). “Intent is . . . properly discovered from the language of the document itself, the circumstances attending the execution of the document, and the situation of the parties at the time of execution.” *Id.* at 682, 424 S.E. 2d at 662 (citation omitted).”

Sanford v. Williams, ____ N.C. App. ____, ____, ____ S.E.2d ____ (2012).

The covenant at issue states, “No lots shall be used for business or commercial purposes[.]” We must determine if defendants’ rental activity qualifies as a business or commercial purpose in violation of the covenant. We look to the natural meaning of “business or commercial purposes” *Hobby & Son*, 302 N.C. at 71, 274 S.E.2d at 170. In the instant case, the restrictive covenant and the surrounding context fail to define “business or commercial purpose.” Plaintiff suggests looking at other North Carolina statutes to provide definitions of ambiguous words in the covenant. Plaintiff does not cite any authority in support of this proposition. Rather, when covenants are ambiguous, as in the instant case, all ambiguities will be resolved in favor of the unrestrained use of the land. *Hobby & Son*, 302 N.C. at 74, 274 S.E.2d at 181.

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i. North Carolina Case Law

Our prior cases in North Carolina have dealt with “affirmative” covenants requiring the use of land for residential purposes. *Hawthorne v Realty Syndicate, Inc.*, 300 N.C. 660, 662, 268 S.E.2d 494, 496 (1980). Plaintiff cites us to *Walter v. Carignan*, 103 N.C. App. 364 (1991). However, the instant case deals with a “negative” covenant, prohibiting the use of land for business or commercial purposes. We hold that the cases cited by plaintiff are not sufficiently similar to the instant case to be binding authority. In the absence of persuasive and binding North Carolina cases, we examine the law of other states.

ii. Negative Covenant Cases from other Jurisdictions

In *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997), the Supreme Court of Oregon held that a restrictive covenant prohibiting the use of property for commercial enterprise was ambiguous. It held that the owners of the property could use the property for short term rental because the use was “not plainly within the provisions of the covenant.” *Yogman*, 937 P.2d at 1023.

Similarly, in *Silsby v. Belch*, 952 A.2d 218, 222 (Me. 2008) the Supreme Judicial Court of Maine held that the owner’s rental use of their property did not violate the covenant’s prohibition against use “for any commercial purposes” because the covenant did not expressly forbid the activity.

Finally, *Slaby v. Mountain River Estates Residential Assoc., Inc.*, ____ So.3d ____, ____, 2012 WL 1071634, (Ala. 2012) held that a covenant prohibiting commercial usage of property did not prohibit the rental of the property on a short term basis for residential purposes. “Neither [the] financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial.” *Slaby*, ____ SO.3d at ____.

Each of these cases deals with negative covenants and fact patterns that are nearly identical to the covenant and facts in the instant case. We find these authorities to be persuasive and hold that the short term rental of the properties does not violate the restrictive covenants.

III. Conclusion

Under North Carolina case law, restrictions upon real property are not favored. Ambiguities in restrictive covenants will be resolved

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in favor of the unrestricted use of the land. A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals. The trial court did not err in granting defendants' motion for summary judgment and in denying plaintiffs' motion for summary judgment.

Plaintiffs' brief makes no argument concerning the dismissal of its claim against defendants based upon Item 1 of the restrictions. Pursuant to Rule 28 (b)(6) of the Rules of Appellate Procedure, this argument is deemed abandoned.

AFFIRMED.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. DERRICK ALLEN

No. COA11-744

(Filed 4 September 2012)

1. Appeal and Error—challenged findings—no argument advanced on appeal—abandoned—binding

The State abandoned its challenges to certain findings of fact for which no argument was advanced on appeal. Those facts were deemed binding for purposes of appellate review.

2. Discovery—disclosure of evidence—impeachment value—prior to guilty plea—timely disclosure

The trial court erred in a first-degree murder, felony child abuse, and first-degree statutory sex offense case by concluding that the State flagrantly violated defendant's rights under *Brady v. Maryland*, 373 U.S. 83, both prior to the entry of his plea and prior to the hearing on defendant's dismissal motion, by failing to disclose, in a timely manner, certain evidence. Although a polygraph report and a witness's statement tended to undermine her credibility and did, for that reason, have impeachment value, the State was not constitutionally required to disclose material impeachment evidence prior to defendant's decision to enter a guilty plea. Further, as defendant's guilty pleas were subsequently vacated and the State provided the relevant information to defendant approximately six months prior to the hearing on his dis-

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missal motion, defendant received the evidence in question at a time when he had ample opportunity to make effective use of it.

3. Discovery—violations—willful failure to provide honest lab report—material not exculpatory

The trial court erred in a first-degree murder, felony child abuse, and first-degree statutory sex offense case by concluding that the State flagrantly violated defendant's rights under *Brady v. Maryland*, 373 U.S. 83, by willfully failing to provide an accurate, honest lab report documenting the negative results of confirmatory blood testing and by providing defendant with a deceptively written report designed to obscure the fact that confirmatory blood testing was performed and yielded negative results. Certain components of the trial court's findings of fact lacked adequate record support; the undisclosed information did not constitute material exculpatory evidence for purposes of *Brady*; defendant's trial counsel could have, through independent investigation, determined what certain notations in the lab report meant; and defendant had been allowed to withdraw his guilty pleas, which meant that he occupied the position of a defendant awaiting trial rather than the position of a convicted criminal defendant.

4. Discovery—disclosure of evidence—not required prior to guilty plea—timely disclosure

The trial court erred in a first-degree murder, felony child abuse, and first-degree statutory sex offense case by concluding that the State's failure to disclose information concerning the practices and procedures employed in the SBI laboratory constituted a violation under *Brady v. Maryland*, 373 U.S. 83. *Brady* does not require the disclosure of material impeachment evidence prior to the entry of a defendant's plea and disclosure was made in time for defendant to make effective use of the evidence at any trial that may eventually be held in this case.

5. Evidence—confirmatory blood testing results—not material misstatement

The trial court erred by concluding that the charges of first-degree murder, felony child abuse, and first-degree statutory sex offense should be dismissed based on the presentation of false information at the time of defendant's initial plea hearing. Although the trial court's findings that Special Agent Elwell informed the prosecutor that stains on the victim's underwear gave positive indications for the presence of blood in preliminary

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testing but that subsequent confirmatory testing produced negative results were supported by the record, the trial court erred by concluding that the prosecutor made a material misstatement of fact at defendant's plea hearing, given that the confirmatory testing results did not constitute "material" evidence. Furthermore, given that defendant's guilty pleas were vacated, defendant had already received any relief to which he would ordinarily have been entitled as a result of any misconduct on the part of the State.

6. Constitutional Law—right to trial—threat of death penalty—coercion of guilty plea—withholding critical information

The trial court erred by concluding that the State's use of the threat of the death penalty as leverage to coerce defendant into entering a guilty plea and waiving his constitutional right to trial, while simultaneously withholding critical information to which defendant was statutorily and constitutionally entitled, constituted a flagrant violation of defendant's constitutional rights. The record contained sufficient evidence to establish that the State was entitled to pursue defendant's case capitally and the results of a witness's polygraph examination were not discoverable.

Appeal by the State from order entered 10 December 2010 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 22 February 2012.

Attorney General Roy Cooper, by Senior Deputy Attorney General William P. Hart, Sr., Assistant Attorney General Daniel P. O'Brien, and Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel K. Shatz, for Defendant-Appellee.

ERVIN, Judge.

The State appeals from an order granting Defendant Derrick Allen's motion to dismiss with prejudice the first degree murder, felony child abuse and first degree statutory sex offense charges that had been lodged against him. On appeal, the State contends that the trial court erred by: (1) making certain findings of fact which lacked adequate evidentiary support; (2) concluding that Defendant's constitutional rights had been violated and that dismissal was the appro-

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appropriate remedy for these violations pursuant to N.C. Gen. Stat. § 15A-954(a)(4); and (3) concluding that the State had violated applicable discovery requirements and that dismissal was the appropriate remedy for these violations pursuant to N.C. Gen. Stat. § 15A-910. After careful consideration of the State'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.

I. Factual Background

A. The Death of Ava¹

In February 1998, Defendant lived with his girlfriend, Diane Jones, and Ms. Jones' two-year old daughter, Ava. On the morning of 9 February 1998, Ms. Jones left for work, leaving Defendant and Kia Ward to care for Ava. About 30 minutes after Ms. Ward's departure, Defendant telephoned 911 and indicated that Ava was unresponsive. A short time later, emergency medical personnel arrived and attended to Ava, who had no pulse and had what appeared to be a small amount of blood on the inside left leg of her sleepsuit. According to Defendant, Ava had complained of leg pain and became unresponsive following her removal from the bathtub.

Ava was taken to a nearby emergency room, where attempts to revive her proved unsuccessful. An examination of Ava's body by the attending physician revealed a "fresh noticeable tear in [Ava's vagina with] . . . some blood [being] found inside the vagina and on the clothes [Ava] wore to the hospital." An emergency room nurse reported that, after Ava had been pronounced dead, Defendant had been looking at Ava's vaginal area.

A subsequent autopsy revealed abrasions or lacerations to Ava's vaginal orifice, including a "focal hemorrhage[.]" coupled with subdural and subarachnoid hemorrhaging of the brain, moderate cerebral edema, epidural and subarachnoid hemorrhaging of the spinal column, and bilateral retinal hemorrhaging. The medical examiner concluded that Ava's death resulted from shaken baby syndrome.

On that same date, Defendant was arrested and charged with first degree sexual offense. On 16 February and 2 March 1998, the Durham County grand jury returned bills of indictment charging Defendant with first degree sex offense, felony child abuse, and first degree murder.

1. Ava is a pseudonym used for the purpose of protecting the privacy of the minor victim and for ease of reading.

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B. Investigation1. Blood Testing

Investigator Grant Gilliam of the Durham Police Department submitted a number of items to the SBI for examination. Special Agent Jennifer Elwell of the SBI analyzed these items for the presence of blood and stated that testing performed on stains found on a single pair of Ava's "training pants," or underwear, and two of Ava's "sleeper[s,]" was positive, or "[i]n other words, [that the] sample exhibited chemical properties consistent with what [she] would see in a bloodstain."² In addition, Special Agent Elwell conducted a Takayama test, which she described as a "confirmatory blood test," on the sleepers and underwear which yielded "negative" results. As a result, Special Agent Elwell placed a "-" adjacent to the word "Takayama" in her lab notes with respect to each tested item.

According to Special Agent Elwell, when one performed a Takayama test, "[y]ou were looking specifically for a crystal kind of formation that would occur" and, "[i]f the crystals didn't appear, then you would say that the test was negative" or, in some instances, inconclusive. A negative Takayama test result "only means that [the analyst] was not able to see a crystal formation . . . with this test." Although Special Agent Elwell's laboratory notes contained the "-" notation," her report made no reference to the Takayama results and merely stated that the sleepers and the underwear "gave chemical indications for the presence of blood." When asked to justify the wording of her report, Special Agent Elwell testified that, "[w]hen [the] Takayama worked, it was very good[;]" that, "if the Takayama test did not work, that did not mean that blood wasn't present on [the] sample[;]" and that, in instances involving negative Takayama results, the SBI's practice was to simply report the last valid test result without further comment. Special Agent Elwell did not perform DNA analysis on the sleepers and underwear on the grounds that DNA evidence was useful in cases involving "some sort of a transfer between a victim and a suspect;" that there was no reason to believe that such a transfer had occurred in this instance; and that "we cannot put a . . . time stamp on a bloodstain."

2. Ava was wearing one of the two sleepers when emergency medical personnel arrived at the residence. The training pants and the second sleeper were recovered from the bathroom in which Defendant allegedly assaulted Ava.

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2. Ms. Ward's Interview and Statement

On 10 February 1998, Ms. Ward gave investigating officers a written statement. According to her statement, Ms. Ward awoke at around 10:00 a.m. and cared for Ava until Defendant woke up about an hour later. Ms. Ward said that Defendant became frustrated with Ava for wetting her clothes, took her into the bathroom, bathed her, and spanked her. After Defendant dressed Ava, the two of them returned to the bathroom, at which point Ms. Ward “could hear [Defendant] fussing about [Ava using] the bathroom on herself.” As Defendant left the bathroom with Ava on his shoulder, Ms. Ward noticed that Ava was “shaking - almost like she was having a seizure. . . .” When Ms. Ward asked what was wrong, Defendant responded that “[Ava] was on [his] back . . . [while he] was giving her a piggy-back ride, and she fell.”

After subsequently hearing a noise, Ms. Ward went into Ava's room, where she observed Defendant sitting in the floor, changing Ava's underwear, and “mumbl[ing] something—like they [are] dirty or . . . tight.” When Defendant asked Ms. Ward if she had noticed that Ava had been limping, Ms. Ward responded in the affirmative. At that point, Defendant picked Ava up, took her into Ms. Jones' room, and placed her on the bed. Ms. Ward left the home at around 2:00 p.m.

On 28 February 1998, Investigator Gilliam requested that Special Agent Mike Wilson of the SBI conduct a polygraph examination of Ms. Ward in which he asked her the following questions: “(1) [d]id you insert any object into the vagina of [Ava]?[;] (2) [d]id you shake [Ava]?[;] (3) [have] you been truthful with Investigator [] Gilliam?[;] [and] (4) [h]ave you been truthful with [m]e, the [p]olygraph [o]perator?” At the ensuing polygraph examination, Special Agent Wilson had the following exchange with Ms. Ward: “[Q:] Did you shake [Ava]? Response: No[;] Q: Did you intentionally hurt [Ava]? Response: No[;] Q: Did you cause the death of [Ava]? Response: No.” “Based upon the results of this examination, [Special Agent Wilson concluded] that [Ms. Ward] was not deceptive regarding these questions.”

On the same day, Investigator Gilliam questioned Ms. Ward, who stated that she had smelled marijuana “coming from the back room that morning before [Defendant] came out to where [Ava] and [Ms. Ward] were.” Although Ms. Ward admitted that she smoked marijuana, she declined Defendant's invitation to “hit this” because she “wanted to be clear when [her] grandmother . . . got there” and denied having consumed any marijuana on either the day before or the day

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of Ava's death. In addition, although Ms. Ward acknowledged having had sexual intercourse with Defendant two summers earlier, she had not had any such contact with Defendant since that time and had "kind of been like enemies" with Defendant in more recent times.

C. Capital Certification

On 2 April 1998, the State filed a notice that it intended to prosecute Defendant capitally. On 6 July 1998, a Rule 24 conference was conducted before Judge Henry Hight, who determined that the State was entitled to seek the death penalty against Defendant.

D. Discovery Hearing

Defendant's trial counsel filed numerous pre-trial motions, including a motion to preserve evidence, a motion for discovery, a motion for the production of prior written statements by State's witnesses, a motion for the production of statements by witnesses that the State did not intend to call at trial, a motion for the production of exculpatory evidence, a motion that written reports be provided by the State's experts, and a motion to produce data, tests, procedures, and diagrams. On 4 March 1999, a hearing concerning pending pre-trial motions was held before Judge David Q. LaBarre. At the conclusion of that hearing, Assistant District Attorney Freda Black made notes to the effect that Judge LaBarre had "allowed" the motion for the production of exculpatory evidence and that the State had an "ongoing obligation" to disclose such evidence. In addition, Ms. Black noted that the State did not have (1) "any statement of any witness or from any source, exculpating the [D]efendant or otherwise indicating a lessened role of the [D]efendant in [the] case[;]" (2) "any evidence of any mental or emotional illness or drug or alcohol use by any of the prosecution witnesses at the time of [the] offense or any time thereafter[;]" and (3) the "names and addresses of any individuals who were considered at any time during the case as possible suspects . . . [.]"

On 22 March 1999, Judge LaBarre entered a written order which, among other things, (1) granted Defendant's motion for production of exculpatory evidence; (2) granted Defendant's motions that the State be required to provide written reports from its expert witnesses and any relevant data, test procedures and diagrams; (3) denied Defendant's motion for prior written or recorded statements made by the State's witnesses; and (4) denied Defendant's motion for the production of statements by witnesses whom the State did not intend to call at trial. After the hearing, the State filed a "response to Defendant's request for voluntary discovery" stating that the State was pro-

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viding the “rough notes” of the SBI’s investigation, which included Special Agent Elwell’s lab notes containing the “-” notation adjacent to “Takayama.”

E. Defendant’s *Alford* Pleas

On 18 August 1999, Ms. Black wrote Defendant’s trial counsel for the purpose of indicating that a plea offer that the State had already made constituted the State’s “bottom line” and voluntarily disclosing two additional statements by Ms. Ward which inculpated Defendant in Ava’s death. On 26 August 1999, Defendant entered *Alford* pleas to first degree sexual offense and second degree murder before Judge A. Leon Stanback. In return for Defendant’s pleas, the State dismissed the felony child abuse charge that had previously been lodged against Defendant and did not seek to have him convicted of first degree murder. At Defendant’s plea hearing, Ms. Black made a factual basis statement which included (1) a summary of Ms. Ward’s statement concerning the events of 9 February 1998; (2) a recitation of the nurse’s comments concerning Defendant’s behavior at the emergency room; and (3) an assertion that “the most significant item . . . found [by officers at Ms. Jones’ home] was a pair of [Ava’s] bloody [underwear] on the floor of the bathroom . . .” At the conclusion of the plea hearing, Judge Stanback sentenced Defendant to a term of 237 to 294 months imprisonment based upon his conviction for second degree murder and to a consecutive term of 288 to 355 months imprisonment based upon his conviction for first degree sexual offense.

F. Withdrawal of Defendant’s Guilty Pleas

On 27 January 2004, Defendant filed a *pro se certiorari* petition with this Court challenging his convictions. On 10 February 2004, this Court allowed Defendant’s *certiorari* petition and remanded this case to Durham County Superior Court for resentencing. On 4 September 2007, Defendant filed a motion for appropriate relief requesting that the judgments in his case be vacated and that he be allowed to withdraw his guilty pleas because Judge Stanback had (1) sentenced Defendant in the aggravated range based upon his second degree murder plea despite the absence of any evidence tending to show the existence of an aggravating factor and (2) sentenced Defendant as a prior record level II without adequate proof of his criminal history. On 19 March 2009, the trial court entered an order vacating Judge Stanback’s judgments and granting Defendant’s motion to withdraw his guilty pleas.

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G. Additional Discovery

On 18 February 2010, Lisa A. Williams was appointed to represent Defendant. On 13 and 15 April 2010, Ms. Williams inspected what was alleged to be the complete files relating to Defendant's case in the possession of the Durham County District Attorney's Office. At the conclusion of her inspection, Ms. Williams wrote to Assistant District Attorney T. Mitchell Garrell for the purpose of indicating her belief that she had not been provided with an opportunity to inspect the State's complete files and requesting that she be provided with specific information that she believed to be missing from the State's files, including pages 63 through 86 of Investigator Gilliam's supplemental report.

After the State provided the missing pages from Investigator Gilliam's report on 10 July 2012, Ms. Williams concluded that certain information contained in that material had not been previously provided to Defendant, including the results of Ms. Ward's 7 April 1998 polygraph examination, Special Agent Wilson's statement concerning Ms. Ward's polygraph examination, and the transcript of Investigator Gilliam's interview with Ms. Ward. As a result, Defendant filed several discovery-related motions, including: (1) a 27 July 2010 motion for discovery; (2) a 27 July 2010 motion to compel the investigating officers to turn over all information relating to Defendant's case; (3) a 28 July 2010 motion for disclosure concerning any tests that had been performed and any data that had been developed during the testing process; (4) a 9 September 2010 motion that the identity of the information provided by the prosecutor pursuant to an open file policy be memorialized in writing; (5) a 9 September 2010 motion to compel the disclosure of certain specific items of evidence; and (6) a 2 November 2010 motion to compel discovery. The State consented to the entry of orders requiring that responses to all discovery requests submitted by Defendant be provided prior to 10 December 2010.

H. Swecker-Wolf Report

In August 2010, the Attorney General's Office released the Swecker-Wolf report, an independent review of the SBI crime laboratory. According to the Swecker-Wolf Report, an SBI "policy issued in 1997 [and remaining in effect until 19 March 2001] specifically guided serology [a]nalysts to report only the results of positive presumptive tests for blood even though one or more confirmatory tests[, such as a Takayama test,] were recorded as inconclusive in their lab notes." Under established SBI policy, when "a presumptive test for the pres-

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ence of blood . . . was positive but confirmatory tests yield[ed] ‘inconclusive results . . . [,]’” the laboratory report should read that the examination “‘revealed chemical indications for the presence of [blood,]’” and “[n]egative test results were to be reported as ‘failed to reveal the presence of blood.’” In the opinion of the authors of the Swecker-Wolf Report, “this reporting method failed to adequately place the reader on notice as to the existence of subsequent tests[,]” had “the potential to be material to the preparation of a defense to charges where the presence of blood was a central issue[,]” and could “lead to violations of *Brady* and/or North Carolina Discovery rules if the presence of blood was a central issue in deciding the guilt or innocence of the defendant and/or material to the preparation of a defense” The Swecker-Wolf Report listed Special Agent Elwell’s report in Defendant’s case as one of a number of reports that “overstate[d] or incorrectly report[ed] test results” because it “[did] not reflect the negative confirmatory tests results.” On the other hand, the Swecker-Wolf Report concluded that “[n]o evidence was found that laboratory files or reports were concealed or evidence deliberately suppressed” given that “[a]nyone with access to the lab notes could discover the discrepancies and omissions described in [the] report.”

I. Continuing Discovery Issues and Motion to Dismiss

On 12 October 2010, the trial court entered orders granting Defendant’s motions seeking (1) the disclosure of concessions or deals between the State and potential witnesses; (2) to have investigating officers compelled to turn over all information in their possession to the prosecutor; (3) to have open file discovery provided pursuant to N.C. Gen. Stat. § 15A-903; (4) to have portions of the 4 March 1999 discovery order which were inconsistent with current discovery statutes vacated; and (5) to memorialize the discovery provided to Defendant pursuant to the open file discovery process and various orders of the court and to have the State directed to “timely comply” with all orders entered by the trial court. On 12 October 2010, Defendant filed a motion seeking the dismissal of the charges that had been lodged against him on the grounds that (1) the State “knew or should have known that the written conclusion contained in [Special Agent Elwell’s] lab report contained false, misleading, and incomplete information[;]” (2) the State had failed to disclose information concerning Ms. Ward’s polygraph examination in a timely manner; (3) the State had failed to treat Ms. Ward as a suspect in Ava’s death; and (4) several key items of evidence that were once in exis-

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tence had been destroyed or lost, including all physical specimens and samples taken from Ava's body. The State, through either Mr. Garrell or District Attorney Tracey Cline, who had assisted Ms. Black during earlier stages of this proceeding, consented to the allowance of all discovery requests that were submitted by Ms. Williams prior to 10 December 2010. On 2 November 2010, Defendant filed a motion to compel discovery in which he contended that the disclosures made by the State on 21 October 2010 did not contain certain previously-requested items, including: (1) a master copy or original form of the 911 calls and police traffic communications related to Defendant's case; (2) the handwritten notes that had previously been provided to Judge LaBarre for *in camera* inspection; (3) any indication as to what, if any, evidence obtained from Ava's body had been lost or destroyed during the previous twelve years; (4) Ava's medical records; (5) reports prepared by and curriculum vitae for any expert used or consulted by the State, including Special Agent Elwell, Special Agent David Spittle of the SBI, Special Agent Wilson, and the medical examiner who conducted Ava's autopsy; (6) the underlying data generated in connection with Special Agent Wilson's polygraph examination of Ms. Ward; (7) the SBI and Durham Police Department manuals governing the reports generated with respect to the polygraph examination of Defendant; (8) information concerning Ernesto Allen, an alternate suspect who was no longer alive; and (9) the State's file relating to a small child's contention that she had been molested at a time when Defendant was incarcerated.

On 18 November 2010, Defendant filed an affidavit executed by Ms. Williams and certain attachments indicating the extent to which discovery had been provided in a digital format. According to this affidavit, the State had provided information which was not located in what had been represented to be the State's entire files in the discovery disclosure made on 21 October 2010. In addition, Ms. Williams also indicated that the document tendered to the trial court by the State to memorialize the discovery provided to Defendant contained new information which had not been previously provided to Defendant and omitted information that had been previously provided during the discovery process.

After both the State and Defendant agreed that Defendant's dismissal motion would be heard on 9 December 2010, Ms. Williams indicated that Defendant would need to receive responses to the dismissal motion and the discovery requests sufficiently in advance of the hearing to permit adequate preparation. Based on representations

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made by Ms. Cline, the trial court entered an order on 29 November 2010 requiring the State to file a response to Defendant's dismissal motion and to comply fully with Defendant's discovery requests (or explain its inability to do so) by 1:00 p.m. on 1 December 2010. On 1 December 2010, Mr. Garrell filed a response to Defendant's dismissal motion. On 8 December 2010, Ms. Cline directed Mr. Garrell to make a discovery disclosure to Defendant regarding the practices and procedures utilized by the SBI laboratory. Ms. Williams accepted service of this disclosure on 9 December 2010, the date of the hearing on Defendant's dismissal motion.

Defendant's dismissal motion came on for hearing before the trial court at the 9 December 2010 session of Durham County Superior Court. After hearing testimony from Ms. Cline, Ms. Black, Special Agent Wilson, Special Agent Elwell, Investigator Gilliam, and other witnesses, the trial court dismissed the charges against Defendant with prejudice "due to the failure [by the State] to disclose exculpatory information to the [D]efendant, . . . in a manner that allowed for the protection of his constitutional rights" On 10 December 2010, the trial court entered a written dismissal order which concluded, in pertinent part, that (1) the State's failure to provide an "honest lab report documenting the negative results of confirmatory blood testing . . . [;]" (2) the State's provision of "a deceptively written report designed to obscure the fact that confirmatory blood testing" had been performed and "yielded negative results[;]" (3) the State's failure to provide "the statement given by [Ms.] Ward in which [she] acknowledges a prior sexual relationship with [Defendant], acknowledges that she subsequently considered him an enemy, and . . . admitted smoking marijuana around the time [of Ava's death]; (4) the State's failure to provide Defendant "with information regarding systemic problems within the SBI laboratory which demonstrated the pro[-]prosecution bias of its [a]gents . . . [and] impeached the credibility of its [a]gents['] reports;" (5) the State's conduct in "fraudulently inducing [Defendant] "to waive his constitutional right to a jury trial;" (6) the State's "intentional misrepresentation of material fact to the Court at [Defendant's] plea hearing[;]" and (7) "[t]he State's use of the threat of the death penalty as leverage to coerce [Defendant] into entering a guilty plea . . . while simultaneously withholding critical information" which Defendant was entitled to receive "flagrantly violated" Defendant's constitutional rights and that each of these violations, considered separately, had "caused such irreparable prejudice" as to necessitate the dismissal of the charges that had

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been lodged against him. In addition, the trial court concluded that (1) the State's "failure to fully and completely report the results of the blood testing performed by [Special] Agent Elwell" and (2) the State's failure to "report the results of the polygraph testing [of Ms. Ward]" violated Defendant's statutory discovery rights and that each of these violations, considered separately, necessitated the dismissal of the charges that had been lodged against Defendant. The State noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"In reviewing a trial judge's findings of fact, we are '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. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citation omitted and quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). "A trial court's 'mislabeling' a determination, however, is 'inconsequential' as the appellate court may simply re-classify the determination and apply the appropriate standard of review." *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010) (citation omitted).

B. Findings of Fact

[1] As an initial matter, we note that the State contends that several of the trial court's findings of fact lack adequate evidentiary support. Based upon its belief that "it is difficult . . . to fully apprise [the] Court of the totality of [the] factual and legal errors contained in [the trial court's] [o]rder" given the page limits applicable to briefs filed in this Court, the State has provided a list of allegedly unsupported findings of fact which includes Finding of Fact Nos. 20, 23(a), 55, 61, 68, 70-71, 75, 82(q), 87(a)-(i), 87(k)-(m), 87(o)-(r), 87(t)-(y), 88(d), 90, 92-96,

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100, 104-108, 110-116, 119, 121, 127-129, 132-135, 138-139, 141-142, 144-150, and 152-157 in its brief. However, given that the State has only advanced arguments directed to the sufficiency of the evidentiary support for a limited number of these findings, we conclude that the State has abandoned its challenges to the remaining findings, which will be deemed binding for purposes of appellate review. *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) (stating that “[u]nchallenged findings of fact . . . are presumed to be supported by competent evidence and [are] binding on appeal”) (citation, brackets, and quotation marks omitted)). We will address the State’s remaining challenges to certain of the trial court’s findings at the appropriate point in this opinion.

C. Alleged Constitutional Violations

1. N.C. Gen. Stat. § 15A-954(a)(4)

N.C. Gen. Stat. § 15A-954(a)(4) provides, in pertinent part, that “[t]he court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: . . . [(1) [t]he defendant’s constitutional rights have been flagrantly violated and [(2) there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.” “As the movant, [the] defendant bears the burden of showing the flagrant constitutional violation and . . . irreparable prejudice to the preparation of his case.” *Williams*, 362 N.C. at 634, 669 S.E.2d at 295. N.C. Gen. Stat. § 15A-954(a)(4) “ ‘contemplates drastic relief,’ such that ‘a motion to dismiss under its terms should be granted sparingly.’ ” *Id.* (quoting *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978)). “The decision that [a] defendant has met the statutory requirements of [N.C. Gen. Stat.] § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law” subject to *de novo* review. *Id.* at 632, 669 S.E.2d at 294. As a result of the fact that the trial court found that each of the alleged constitutional violations sufficed to justify the dismissal of the charges that had been lodged against Defendant, we must review the State’s challenges to each of the alleged violations set out in the order to determine whether the trial court’s order should be sustained on appeal.

2. *Brady*

As an initial matter, the State contends that the “trial court erred in making findings and conclusions that [D]efendant’s constitutional rights to due process as outlined in *Brady v. Maryland*[], 373 U.S. 83,

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83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] and its progeny were violated.” The State’s contention has merit.

In *Brady*, the United States Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. The State is required to disclose information under *Brady* even in the absence of a request, *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286, 301 (1999), including evidence “known only to police investigators and not to the prosecutor.” *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568, 131 L. Ed. 2d 490, 508 (1995). “To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial.” *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002) (citation omitted), *disc. review denied*, 356 N.C. 688, 578 S.E.2d 323 (2003); *see also Strickler*, 527 U.S. at 281-82, 119 S. Ct. at 1948, 144 L. Ed. 2d at 302.

“Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence.” *Williams*, 362 N.C. at 636, 669 S.E.2d at 296 (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985)). “[E]xculpatory evidence is ‘evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed.’” *State v. Lewis*, ____ N.C. ____, ____, 724 S.E.2d 492, 501 (2012) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532, 81 L. Ed. 2d 413, 420 (1984)), or “[e]vidence tending to establish a criminal defendant’s innocence.” *Black’s Law Dictionary* 577 (7th ed. 1999). On the other hand, impeachment evidence has been defined as “[e]vidence used to undermine a witness’s credibility[,]” *Black’s Law Dictionary* 578 (7th ed. 1999), with “[a]ny circumstance tending to show a defect in the witness’s perception, memory, narration or veracity [] relevant to this purpose.” *State v. Ward*, 338 N.C. 64, 97, 449 S.E.2d 709, 727 (1994) (citation and quotation marks omitted), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

“Evidence is considered ‘material’ if there is a ‘reasonable probability’ of a different result had the evidence been disclosed.” *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (citation omitted). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383,

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87 L. Ed. 2d at 494. The defendant bears the burden of proving that undisclosed evidence was material. *State v. Tirado*, 358 N.C. 551, 589-90, 599 S.E.2d 515, 541 (2004) (citation omitted), *cert. denied sub. nom. Queen v. North Carolina*, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

In challenging the trial court's order, the State contends that, since *Brady* is a trial right and since "[D]efendant has never . . . had a trial [and is currently awaiting trial], the State could not have violated his constitutional rights to due process of law . . ." As the State suggests, the Supreme Court has recognized that "due process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendant[] to make effective use of the evidence." *State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996) (citation omitted). In addition, the United States Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633, 122 S. Ct. 2450, 2457, 153 L. Ed. 2d 586, 597 (2002).³ Although neither the United States Supreme Court nor the appellate courts in this jurisdiction has directly addressed the extent to which prosecutors have a *Brady*-related obligation to disclose exculpatory evidence prior to entering into a plea agreement with a defendant, we need not decide this issue given the procedural posture in which we find ourselves in this case and the nature of the undisclosed evidence at issue here.⁴

3. According to Defendant, *Ruiz* merely stands for the proposition that "it is not unconstitutional for the government to negotiate a waiver of the defendant's right to receive impeaching evidence as part of a plea agreement." While *Ruiz* does resolve this narrow issue, it also addressed "whether the Constitution requires . . . pre[-]guilty plea disclosure of impeachment information" and concluded that "it does not." 536 U.S. at 629, 122 S. Ct. at 2455, 153 L. Ed. 2d at 595.

4. In his brief, Defendant contends that *Williams* expressly rejected the argument "that *Brady* is only a trial right." However, we do not read *Williams* as broadly as Defendant. In *Williams*, the State admitted during a pretrial hearing to the "existence, possession, and destruction of material evidence favorable to [the] defendant and acknowledged that it was impossible to produce the evidence at that time or, by implication, at any future trial." 362 N.C. at 629, 669 S.E.2d at 292. Although the Supreme Court did disagree with the State's contention that *Brady* "only require[d] the State to turn over evidence at trial," *Id.* at 637, 669 S.E.2d at 297, it narrowly tailored its holding to the factual circumstances present there by concluding that a trial judge need not wait to dismiss a pending case where the State had "ma[de] a pretrial admission to the existence and destruction" of *Brady* evidence and acknowledged that it was "impossible to produce the evidence at that time or, by implication at trial. . ." *Id.* at 638, 669 S.E.2d at 298 (emphasis omitted). In this case, on the other hand, Defendant is in possession of the evidence upon which his *Brady* claim is predicated, so we do not find *Williams* controlling.

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a. Ms. Ward's Polygraph Examination and Statements

[2] On appeal, the State contends that the trial court erred by concluding that the State flagrantly violated Defendant's *Brady* rights, both prior to the entry of his plea and prior to the hearing on Defendant's dismissal motion, by failing to disclose, in a timely manner, (1) the fact that Ms. Ward had taken a polygraph examination; (2) the results of Ms. Ward's polygraph examination; and (3) the fact that Ms. Ward told Investigator Gilliam that she had previously used marijuana, had had sex with Defendant, and considered him an enemy. We agree.

The trial court found as a fact that Ms. Ward was a critical witness for the State; that, if her testimony was to be believed, a "[t]rier of fact could conclude that [Defendant] inflicted [Ava's] injuries;" and that, in the event that Ms. Ward's testimony was not believed, that fact would render her a prime suspect or create the possibility that a third person, such as Ernesto Allen, had killed Ava. In addition, the trial court found that Ms. Ward's statement was material because it "impeached [her] credibility;" that the State's failure to provide this statement was "aggravated by the fact that[,] when Judge LaBarre ordered the disclosure of any *Brady* material," Ms. Black responded that the State had no evidence that any witness had been using drugs; and that, had Defendant known that Ms. Ward had taken a polygraph examination, he would have known that the State viewed Ms. Ward's credibility as suspect and declined to accept the State's plea offer.⁵ Assuming, without deciding, that the trial court's findings to the effect that the State willfully and intentionally failed to disclose evidence relating to Ms. Ward's polygraph examination and her 7 April 1998 statement to Investigator Gilliam have adequate evidentiary support, we are still compelled to hold that the failure to disclose this evidence did not violate *Brady*.

Although we agree with the trial court that the polygraph report and Ms. Ward's statement tended to undermine her credibility and did, for that reason, have impeachment value,⁶ the State is not con-

5. As a result of the fact that certain of the trial court's "findings" involve the application of legal principles to facts, they are more properly termed "conclusions of law," *Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675, and will be reviewed accordingly. *Hopper*, 205 N.C. App. at 179, 695 S.E.2d at 805.

6. Although the relevant findings are not entirely clear, we do not believe that the trial court concluded that the undisclosed information had independent exculpatory value given that none of the undisclosed information appears to have any evidentiary value aside from its tendency to impeach the credibility of Ms. Ward's testimony.

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stitutionally required to disclose material impeachment evidence prior to the defendant's decision to enter a guilty plea. *Rwiz*, 536 U.S. at 633, 122 S. Ct. at 2457, 153 L. Ed. 2d at 597. In addition, given that Defendant's guilty pleas were subsequently vacated and given that the State provided the relevant information to Defendant approximately six months prior to the hearing on his dismissal motion, Defendant received the evidence in question at a time when he had "ample opportunity" to make effective use of it. *Taylor*, 344 N.C. at 50, 473 S.E.2d at 607 (concluding that no *Brady* violation occurred given that the defendants received the evidence in question four days before the State rested its case and did not seek a continuance). As a result, we conclude that the trial court erred by determining that Defendant's *Brady* rights were "flagrantly violated" by the State's failure to disclose the polygraph report⁷ and Ms. Ward's statements.

b. Special Agent Elwell's Report

[3] Secondly, the State contends that the trial court erroneously concluded that the State flagrantly violated Defendant's *Brady* rights by "willful[ly] fail[ing] to provide . . . an accurate, honest lab report documenting the negative results of confirmatory blood testing on [Ava's] panties and sleepwear" and by providing Defendant "with a deceptively written report designed to obscure the fact that confirmatory blood testing was performed on [Ava's] panties and sleepwear and yielded negative results." More specifically, the State contends that (1) no *Brady* violation occurred because Defendant's case had yet to go to trial; (2) Defendant, through reasonable diligence, could have obtained the results of the Takayama tests by examining the lab notes that had been provided to him; (3) the absence of blood on Ava's underwear and sleepers did not constitute "exculpatory" or "material" evidence; and (4), "[a]t the time the trial court dismissed the charges, before any scheduled trial, . . . [D]efendant, through counsel, thoroughly understood the full import of the information, all of which had been turned over to [him prior to the entry of his *Alford* pleas]." We find the crux of the State's argument persuasive.

7. In addition, we note that polygraph evidence is not admissible, even by stipulation of the parties, in this jurisdiction. *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). In light of that fact, the results of Ms. Ward's polygraph examination could not be considered "material" evidence for *Brady* purposes. *Wood v. Bartholomew*, 516 U.S. 1, 6, 116 S. Ct. 7, 10, 133 L. Ed. 2d 1, 7 (recognizing that "[d]isclosure of . . . polygraph results . . . could have had no direct effect on the outcome of trial [] because" those polygraph results were inadmissible at trial under state law), *r'hrq denied*, 516 U.S. 1018, 116 S. Ct. 583, 133 L. Ed. 2d 505 (1995).

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In its brief, the State challenges the trial court's findings that "[t]he lab reports concerning the testing for blood on the panties and sleepwear were intentionally prepared in an inaccurate, incomplete and . . . misleading manner;" that, "[i]n the absence of a positive confirmatory test, there is no scientifically sound basis to conclude that an item is blood;" that both the negative test results themselves and information that Special Agents Elwell and Spittle "were engaged in a pattern of misconduct by failing to disclose material information" concerning the testing results and preparing misleading reports constituted *Brady* material; and that Special Agent Elwell's laboratory report was written in accordance with an SBI policy that "had the systemic effect of deliberately concealing negative test results." In addition, the trial court found that the absence of an "English language narrative stating that a Takayama test [had been] conducted, that such [a] test yielded negative results, or even that a Takayama test is a confirmatory test for the presence of blood" meant that Special Agent Elwell's report "failed to convey to a reasonable non-scientist . . . the complete results of the tests" that she had performed. As a result of its factual findings that the record "contain[ed] inconsistent descriptions of the injury to" Ava's vagina; the fact that the available medical information did not conclusively indicate that a sexual assault had occurred or the time at which Ava's vaginal injuries had been inflicted; and the fact that the presence of blood on Ava's underwear would have been "a highly graphic and disturbing piece of evidence" that would have "severely prejudiced" Defendant at a capital sentencing hearing, the trial court determined that the negative Takayama results "constituted exculpatory material and impeachment material under *Brady*" and that the resulting due process violation "was not cured by providing the rough notes which failed to adequately convey the negative results of confirmatory testing for blood."⁸ Assuming, without in any way deciding, that the trial court's findings concerning the motives with which various investigative officers acted have adequate record support, we still must hold that no *Brady* violation occurred given the record developed in this case.

As an initial matter, we note that the trial court's findings to the effect that (1) the relevant medical records and reports and Ava's

8. Once again, certain of the challenged findings are more properly termed "conclusions of law" and will be reviewed as such. Once again, certain of the challenged findings are more properly termed "conclusions of fact" and will be reviewed as such. *Helm*s, 127 N.C. App. at 510, 491 S.E.2d at 675; *Hopper*, 205 N.C. App. at 179, 695 S.E.2d at 805.

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autopsy report contained conflicting and inconsistent information concerning the nature and extent of her vaginal injuries; (2) there was no evidence concerning the time at which Ava's vaginal injuries had been inflicted; and (3) ascertaining whether blood did or did not appear on Ava's underwear and sleepers would assist in determining the time at which Ava's vaginal injuries had been inflicted lack any record support. The emergency room doctor who attended to Ava indicated that she had "fresh" vaginal tearing and that there was blood located in her vaginal vault, injuries which "usually result[] from some type of sexual trauma." Ava's autopsy report confirmed that she had sustained an "abrasion/laceration" to her vaginal orifice and had experienced vaginal "hemorrhaging." We are unable to discern any material difference between the descriptions of Ava's vaginal injuries as a tear, abrasion, or laceration. In addition, we find no record support for the trial court's finding that Ava's vaginal injury appeared in a 6 o'clock to 9 o'clock position and, even if such evidence existed, we see no material distinction between that description of Ava's injuries and a statement that she had been injured at "approximately [the] 4 o'clock to 7 o'clock [position.]" Finally, as Special Agent Elwell testified, the SBI had no ability to "place a date or a time on a bloodstain" and could only "say that the blood matches somebody or doesn't match somebody, [leaving her with] no idea how the blood gets there." As a result, these components of the trial court's findings of fact lack adequate record support.

Secondly, we do not believe, given the record before the trial court in this case, that the undisclosed information constituted material exculpatory evidence for purposes of *Brady*. A thorough review of the record indicates no evidence that anyone involved in the underlying events other than Ava had been bleeding. In addition, the record contains ample evidence tending to show that Ava had sustained injuries to her vagina which resulted in bleeding aside from the test results. The emergency medical personnel who came to Ms. Jones' home and the emergency room physician who attended to Ava both noted the presence of blood on the sleeper that Ava had been wearing. An evidence technician who processed the home found what appeared to be blood on additional items of clothing. A paper towel recovered from a bedroom and a bath towel recovered from the living room tested positive for the presence of blood as confirmed by both the presumptive and Takayama tests. As we have already noted, the available testing techniques did not permit a determination of when any bloodstain ultimately determined to exist had been created. As a result, based upon our review of the record as a whole, we do

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not believe that the negative confirmatory test results would have had any material tendency to establish Defendant's innocence of the crimes with which he had been charged.

Thirdly, a number of federal circuits have recognized that, "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (holding that a defendant was not entitled to *Brady* relief given that the defendant knew that a potential witness possessed possibly exculpatory information and could have questioned that witness prior to trial). The undisputed record evidence establishes that Defendant's trial counsel possessed the rough lab notes containing the "-" notation next to the "Takayama" reference and could, through independent investigation, have determined what this notation meant. *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980) (stating that, "when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim"). As a result, even if the negative Takayama results had constituted material exculpatory evidence, Defendant still would not have been entitled to relief on *Brady*-related grounds.

Finally, as we have previously noted, Defendant has been allowed to withdraw his guilty pleas, which means that he occupies the position of a defendant awaiting trial rather than the position of a convicted criminal defendant. As of the date of the hearing concerning Defendant's dismissal motion, Defendant obviously knew the import of a negative Takayama result and could make effective use of that information at any subsequent trial. *See State v. Wise*, 326 N.C. 421, 429-30, 390 S.E.2d 142, 147 (holding that the State did not violate *Brady* by failing to disclose the results of a medical examination of the victim given that the defendant knew the examination results and could have subpoenaed the examining physician to testify at trial), *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990). As a result, for all of these reasons, the trial court erred by concluding that the State had violated Defendant's *Brady* rights by failing to mention the Takayama testing in Special Agent Elwell's report and explain what those results meant.⁹

9. To the extent that the trial court concluded that the negative Takayama results constituted impeachment material, as compared to exculpatory evidence, we hold, consistent with *Ruiz*, that the State was not required to disclose these results prior to the entry of Defendant's guilty plea.

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c. Crime Laboratory Practices and Procedures

[4] In Conclusion of Law No. 4, the trial court determined that the State's failure to provide Defendant "with information regarding systemic problems within the SBI laboratory which demonstrated the pro-prosecution bias of its Agents as witnesses for the State and which impeached the credibility of its Agents['] reports of testing results" constituted a flagrant violation of Defendant's *Brady* rights. As the literal language of Conclusion of Law No. 4 recognizes, however, the information in question here tended, at most, to show that the SBI's analysts were biased in favor of the prosecution. As we have previously recognized, *Brady* does not require the disclosure of material impeachment evidence prior to the entry of a defendant's plea. *Ruiz*, 536 U.S. at 633, 122 S. Ct. at 2457, 153 L. Ed. 2d at 597. In addition, since Defendant clearly possessed the information in question prior to the hearing concerning his dismissal motion, "disclosure [was] made in time for . . . [D]efendant['] to make effective use of the evidence" at any trial that may eventually be held in this case. *Taylor*, 344 N.C. at 50, 473 S.E.2d at 607. As a result, the trial court erred by concluding that the State's failure to disclose information concerning the practices and procedures employed in the SBI laboratory constituted a *Brady* violation.

3. Factual Basis Statement

[5] Secondly, the State contends that the trial court erred by concluding that the State intentionally presented false evidence at Defendant's plea hearing by stating, during its factual basis showing, that there was blood on Ava's sleepers and underwear. More specifically, the State contends that (1) Ms. Black did not make any factual statement that did not rest on a reasonable inference drawn from the available evidence; (2) the extent to which blood was present on Ava's underwear and sleepers was not material; and (3) a negative Takayama result does not allow for a scientific conclusion that no blood is present. Once again, we conclude that the State's argument has merit.

In its order, the trial court found that, at the time that Defendant entered his negotiated guilty plea, Ms. Black "stated that one of the most important pieces of evidence for the State was the blood on [Ava's]" underwear. At the hearing on Defendant's dismissal motion, Defendant's Exhibit No. 26, a copy of Special Agent Elwell's phone log, was admitted into evidence. According to this phone log, Special Agent Elwell "gave [Ms. Black] the results [of her testing]" concern-

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ing all of the evidence in the case on 18 August 1998. At that time, the two of them “discussed DNA [testing] and decided it wouldn’t help prove anything at th[at] point[.]” When directly questioned concerning whether she had informed Ms. Black about the negative Takayama test results, Special Agent Elwell testified that she didn’t “recall that conversation[.]” Similarly, Ms. Black testified that, although she could not remember discussing the test results with Special Agent Elwell, the general practice at that time was for analysts to provide prosecutors with test result information over the phone. However, Ms. Black also pointed out that “[t]hey didn’t regularly give us notes back then,” so the fact that she discussed the test results with Special Agent Elwell did “not mean that she gave me these [lab] notes [indicating the negative Takayama results].” Ms. Black denied knowing that Ava’s underwear had “no blood and no semen on them” and stated that, if Special Agent Elwell had provided her with that information, she would have “never asserted to the Court . . . that there was blood on them.”

In its brief, the State challenges the trial court’s findings that Special “Agent Elwell informed [Assistant District Attorney] Black on August 18, 1998 that items on [Ava’s] panties and sleepwear gave positive indications for the presence of blood based on a presumptive test and that subsequent confirmatory testing had failed to indicate blood was present on the same items;” that, contrary to Special Agent Elwell’s testimony, “[I]nvestigator Gilliam did specifically request that . . . DNA testing [be performed] on various items submitted for analysis; that Ms. Black and Special Agent Elwell “decided to stop further testing of [these] items . . . because they believed further [DNA testing] would not prove inculpatory to [Defendant] and could possibly inculcate others;” and that Ms. Black knew when she made her factual basis statement at Defendant’s plea hearing “that the [SBI] had determined that it could not conclude that there was blood on the panties” and intentionally provided false contrary information to Judge Stanback.¹⁰

“[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217, 1221 (1959) (citations omitted). A defendant is entitled to a new trial only “[i]f the false evidence is *material* in the sense that there is ‘any reasonable likelihood that

10. Once again, although certain of the trial court’s determinations are labeled as findings of fact, they really constitute conclusions of law and will be treated as such.

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the false [evidence] could have affected the judgment of the jury[.]’ . . .” *State v. Wilkerson*, 363 N.C. 382, 403, 683 S.E.2d 174, 187 (2009) (emphasis added) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349-50 (1976)), *cert. denied*, ____ U.S. ____, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010). Although the trial court’s findings that Special Agent Elwell informed Ms. Black that stains on Ava’s underwear gave positive indications for the presence of blood in preliminary testing and that subsequent confirmatory testing produced negative results have adequate record support, we hold that the trial court erred by concluding that Ms. Black made a material misstatement of fact at Defendant’s plea hearing given that confirmatory testing results did not constitute “material” evidence. As we have previously determined, the absence of blood on Ava’s underwear was not “material” given that (1) substantial independent evidence indicated that Ava was bleeding when she was transported to the emergency room; (2) no other individual involved in this case appears to have been bleeding; and (3) the available blood testing procedures do not permit an analyst to “date or time” a bloodstain. Furthermore, given that Defendant’s guilty pleas have been vacated, Defendant has already received any relief to which he would ordinarily be entitled as a result of any misconduct on the part of the State. As a result, the trial court erred by concluding that the charges that had been lodged against Defendant should be dismissed based on the presentation of false information at the time of Defendant’s initial plea hearing.

3. Use of Death Penalty to Induce Plea

[6] Thirdly, the State contends that the trial court erred by concluding that “the State’s use of the threat of the death penalty as leverage to coerce [Defendant] into entering a guilty plea and waiving his constitutional right to trial, while simultaneously withholding critical information to which [Defendant] was statutorily and constitutionally entitled,” constituted a flagrant violation of Defendant’s constitutional rights. More specifically, the State argues that the record contains no evidence that the State sought the death penalty against Defendant “for leverage purposes or as a threat to the [D]efendant to improperly cause him to give up any constitutional right” and that the State did not act unlawfully by “pursuing [the] case as a capital case until [D]efendant entered a plea of guilty [without] disclosing all *Brady* material prior to that plea.” Once again, we conclude that the State’s argument has merit.

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In its order, the trial court found as a fact that Ms. Black wrote to Defendant's counsel on 18 August 1999 for the purpose of conveying the State's "bottom line" plea offer. At that time, Ms. Black provided certain inculpatory information to Defendant's counsel for the purpose of inducing him to accept the State's offer. According to the trial court, the State's decision to withhold "numerous items of evidence to which [Defendant] was constitutionally entitled" and to "provid[e Defendant with] a deliberately deceptive lab report" while threatening him with execution resulted in the entry of an involuntary, fraudulently-induced, guilty plea and flagrantly violated Defendant's constitutional rights.¹¹

"Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 611 (1978) (quoting *Brady v. United States*, 397 U.S. 712, 752, 90 S. Ct. 1463, 1471, 25 L. Ed. 2d 747, 758 (1970)). Although "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' and permissible 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" *Id.* at 364, 98 S. Ct. at 668, 54 L. Ed. 2d at 611 (citations omitted and quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31, 93 S. Ct. 1977, 1985, 36 L. Ed. 2d 714, 726 (1973)). As a result, no due process violation occurs simply because the prosecutor "openly present[s] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution. . . ." *Id.* at 365, 98 S. Ct. at 669, 54 L. Ed. 2d at 612.

After carefully reviewing the record, we cannot conclude that the State "fraudulently induced [Defendant] to plead guilty" by "us[ing] the threat of the death penalty as leverage to coerce [Defendant] into entering a guilty plea and waiving his constitutional right to trial." As an initial matter, the record contains sufficient evidence to establish that the State was entitled to pursue Defendant's case capitally, as Judge Hight recognized when he issued his Rule 24 order. Secondly, the trial court appears to have relied upon a combination of the State's alleged misuse of the capital nature of Defendant's case and other alleged constitutional and statutory discovery violations in concluding that the charges against Defendant should be dismissed,

11. Once again, although certain of the trial court's statements are designated as findings of fact, they are actually conclusions of law and will be reviewed as such.

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including the failure to disclose Ms. Ward's 7 April 1998 statement, the failure to disclose the results of Ms. Ward's polygraph examination, and the omission of the negative Takayama results from Special Agent Elwell's report. Having determined that the non-disclosure of these items did not constitute *Brady* violations, we are compelled to conclude that the trial court erred by determining that the State's decision to proceed against Defendant capitally coupled with the non-disclosure of these items constituted a flagrant violation of Defendant's constitutional rights. Thus, having determined that none of the constitutional grounds upon which the trial court predicated its decision to dismiss the charges lodged against Defendant have merit, we necessarily conclude that the trial court erred by determining that "[e]ach of the [constitutional] violations ha[d] individually caused such irreparable harm to [Defendant]'s case as to require a dismissal and . . . cumulatively caused such irreparable harm to [Defendant]'s case as to require a dismissal [pursuant to N.C. Gen. Stat. § 15A-954(a)(4)]."

D. Statutory Discovery Violations

Next, the State contends that the trial court erred by concluding that Defendant's case should be dismissed with prejudice pursuant to N.C. Gen. Stat. § 15A-910 based on determinations that the State "willful[ly] fail[ed] to fully and completely report" (1) the results of the blood testing performed by Special Agent Elwell and (2) the results of Ms. Ward's polygraph examination. More specifically, the State contends that the trial court erred by (1) finding that Judge LaBarre specifically intended that "the parties use all due diligence and comply immediately" with the discovery order entered on 4 March 1999; (2) determining that the statements contained in Ms. Williams' affidavit were "truthful and accurate[;]" (3) shifting the burden of proof to the State; (4) finding that the State's actions were "intentional and willfully designed to give the State an advantage;" and (5) determining that Defendant had been irreparably prejudiced by the alleged discovery violations. After carefully reviewing the record, we hold that the trial court erroneously concluded that the State had violated the applicable discovery statutes.

1. Standard of Review

According to the version of N.C. Gen. Stat. § 15A-903(e), *repealed by* 2004 N.C. Sess. Laws Ch. 154, Sec. 4, at 517-20 (revising N.C. Gen. Stat. § 15A-903 to delete former N.C. Gen. Stat. § 15A-903(e) as part

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of the enactment of open file discovery legislation), effective at the time of the 4 March 1999 discovery hearing:

Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

As a result, a criminal defendant is entitled “to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions” without the necessity for any showing “that such information [would] be material to the preparation of the defense or [was] intended for use by the State in its case in chief.” *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992).

According to N.C. Gen. Stat. §§ 15A-910(a)(3b) and (b), a trial judge who determines that a party has violated the statutory provisions governing discovery or a discovery order may “[d]ismiss the charge, with or without prejudice,” after “consider[ing] both the materiality of the subject matter and the totality of the [surrounding] circumstances.” However, “[i]f the court imposes any sanction, it must make specific findings justifying the imposed sanction.” N.C. Gen. Stat. § 15A-910(d). Given that “[d]ismissal of charges is an ‘extreme sanction’ which should not be routinely imposed,” *State v. Adams*, 67 N.C. App. 116, 121, 312 S.E.2d 498, 500 (1984), “orders dismissing charges for noncompliance with discovery orders preferably should [also] contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed.” *Id.* at 121-22, 312 S.E.2d at 501. A trial court’s decision concerning the imposition of discovery-related sanctions pursuant to N.C. Gen. Stat. § 15A-910 may only be reversed based upon a “find[ing] [that the trial court] abuse[d] [its] discretion,” *State v. Locklear*, 41 N.C. App. 292, 295, 254 S.E.2d 653, 656, *disc. review denied*, 298 N.C. 571, 261 S.E.2d 129 (1979), which means that the trial court’s “‘ruling was so arbitrary that it could not have been the result of a reasoned decision.’” *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002) (quoting *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d

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662, 667 (1987)), *appeal dismissed and disc. review denied*, 356 N.C. 687, 578 S.E.2d 320, *cert. denied*, 540 U.S. 842, 124 S. Ct. 111, 157 L. Ed. 2d 76 (2003).

2. Confirmatory Blood Testing Results

In its order, the trial court concluded that the State's failure to "fully and completely report" the results of the blood testing performed by Special Agent Elwell, including her failure to "properly report the confirmatory blood testing that yielded negative test results," constituted a violation of N.C. Gen. Stat. § 15A-903(e) sufficient to require dismissal pursuant to N.C. Gen. Stat. § 15A-910. After thoroughly reviewing the record, we conclude that the trial court erred in making this determination.

On 22 February 1999, Defendant filed a motion seeking the production of "[a]ll test procedures, test results, data compiled and diagrams produced" relating to the analyses performed by the SBI Crime Laboratory. In support of this request, Defendant asserted that Special Agent Elwell's laboratory report simply consisted of her analytical conclusions and that he was entitled to information concerning the testing procedures utilized and the data derived from those tests because, in the absence of such information, he would be unable to determine "what tests were performed, and whether the testing was appropriate, or to become familiar with the testing procedures." After a discovery hearing was held before Judge LaBarre and before Judge LaBarre entered an order granting Defendant's motion, the State filed a "response to Defendant's request for voluntary discovery" indicating that the "rough notes" of the SBI investigation, including Special Agent Elwell's lab notes, had been provided to Defendant.

In its order, the trial court found as fact that Special Agent Elwell's laboratory report did "not identify what test or tests were performed," "state that the test was only a preliminary test," or mention "that the State conducted confirmatory testing . . . that failed to confirm the presence of blood" on Ava's underwear; that Special Agent Elwell's report "obfuscated the test results," was "deceptive," and "was written in this manner" pursuant to an SBI policy that "had the systemic effect of deliberately concealing negative test results;" and that Special Agent Elwell's rough notes lacked an English language narrative explaining the nature of the confirmatory testing that had been conducted and the results of that confirmatory testing. Based upon these findings of fact, the trial court concluded that N.C. Gen. Stat. § 15A-903(e) required the State to affirmatively report and

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explain the negative Takayama testing results and that the release of Special Agent Elwell's rough notes did not constitute sufficient compliance with the State's discovery obligations given the absence of adequate explanatory material. We do not find the trial court's logic persuasive.

As we have previously noted, SBI laboratory reports usually consist of conclusory statements which "reveal[] only the ultimate result[s] of the numerous tests performed by" the analyst and shed little light on "what tests were performed and whether the testing was appropriate, or [allowed them] to become familiar with testing procedures." *Cunningham*, 108 N.C. App. at 196, 423 S.E.2d at 809.

Under our . . . [discovery] statutes and case law a defendant [was] entitled to the following discovery [pursuant to N.C. Gen. Stat. § 15A-903(e)]:

1. Results or reports of physical or mental examinations or of tests, measurements or experiments. N.C. Gen. Stat. § 15A-903(e).
2. Inspection, examination or testing of physical evidence by the defendant. *Id.*
3. Tests performed or procedures utilized by experts to reach their conclusions. *Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802.
4. Laboratory protocol documents. *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650.
5. Reports documenting "false positives" in the laboratory results. *Id.*
6. Credentials of individuals who tested the substance. *Id.*

State v. Fair, 164 N.C. App. 770, 773-74, 596 S.E.2d 871, 873 (2004). We do not read *Cunningham*, *Fair*, or any other decision interpreting former N.C. Gen. Stat. § 15A-903(e) as requiring either an affirmative explanation of the extent and import of each test and test result, which would amount to requiring the creation of an otherwise non-existent narrative explaining the nature, extent, and import of what the analyst did. Instead, our prior decisions concerning the State's disclosure obligations under former N.C. Gen. Stat. § 15A-903(e) contemplate the provision of information that the analyst generated during the course of his or her work.

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As the record in this case clearly reflects, Defendant requested to receive “[a]ll test procedures, test results, data compiled and diagrams produced” in connection with the analyses conducted by the SBI laboratory. In response to Defendant’s discovery request and Judge LaBarre’s discovery order, the State provided Defendant with Special Agent Elwell’s laboratory notes, which delineated the procedures she performed and the results that she developed during the course of her analysis, including a “-” notation beside the reference to “Takayama.” With reasonable inquiry, Defendant’s counsel could have determined what these notations meant. As the Swecker-Wolf report noted, “[a]nyone with access to the lab notes could discover the discrepancies and omissions described in [the laboratory] report.” As a result, given that the materials provided to Defendant gave him the ability to “become familiar with the test[ing] procedures” and to determine “what tests were performed” and “whether the testing was appropriate,” *Cunningham*, 108 N.C. App. at 196, 423 S.E.2d at 809, the trial court erred by dismissing the charges that had been lodged against Defendant pursuant to N.C. Gen. Stat. § 15A-910 based upon the State’s alleged failure to disclose adequate information concerning blood testing performed in the SBI laboratory.

3. Failure to Report Results of Polygraph Testing

The trial court also concluded that the State violated N.C. Gen. Stat. § 15A-903(e) by failing to “fully and completely report the results of the polygraph testing performed by Agent Wilson on [Ms. Ward]” and that the resulting prejudice required dismissal of Defendant’s case pursuant to N.C. Gen. Stat. § 15A-910. The trial court erred by making this determination as well.

In *State v. Brewington*, 352 N.C. 489, 506, 532 S.E.2d 496, 506 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001), the Supreme Court explicitly rejected the defendant’s claim that polygraph test results “f[e]ll within the category of ‘physical or mental examinations’ contemplated under [N.C. Gen. Stat.] § 15A-903(e).” *See also Dunn*, 154 N.C. App. at 6-7, 571 S.E.2d at 654 (recognizing that *Brewington* stands for the proposition that polygraph results are not discoverable pursuant to N.C. Gen. Stat. § 15A-903(e)). Assuming, without in any way deciding, that the record contained sufficient evidence to support the trial court’s determination that the State willfully and intentionally failed to disclose to Defendant the results of Ms. Ward’s polygraph examination and the underlying data developed during that examination, any such deter-

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mination would not support dismissal of the charges against Defendant given that such information is not discoverable. As a result, the trial court erred by concluding that the charges against Defendant should be dismissed as a result of the State's failure to provide Defendant with the results of Ms. Ward's polygraph examination.¹²

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by dismissing with prejudice the charges that had been lodged against Defendant. We do not, however, wish to be understood as commending the practices employed with respect to the testing of the blood allegedly found upon Ava's underwear and sleepers. On the contrary, we share the trial court's displeasure with the manner in which the blood testing results were disclosed to Defendant and the manner in which aspects of the prosecution of this case have been handled. Even so, given our inability to discern any legal basis for the sanction imposed in the trial court's order, we are obligated to reverse it. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.¹³

REVERSED AND REMANDED.

JUDGES CALABRIA AND THIGPEN concur.

12. Although the trial court also determined that the State's failure to disclose certain information violated its orders of 8 October, 12 November, and 23 November 2010, the trial court does not appear to have concluded that the State's inaction with respect to these items violated N.C. Gen. Stat. § 15A-903(e) or required the imposition of sanctions pursuant to N.C. Gen. Stat. § 15A-910. As a result, we need not address the extent, if any, to which the trial court erred by making these determinations.

13. Although Defendant repeatedly notes in his brief that various items of physical evidence have been destroyed, that fact goes to the issue of prejudice rather than whether actual constitutional or statutory violations occurred.

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STATE OF NORTH CAROLINA v. SILVINO ENRIQUE BROWN, JR.

No. COA12-110

(Filed 4 September 2012)

1. Probation and Parole—written statement of conditions—failure to participate in intake process

The trial court did not err in a probation revocation case by revoking defendant's probation even though he never received a written statement containing the conditions of his probation, as required by N.C.G.S. § 15A-1343(c). Because defendant was aware that he was required to report to the probation office for processing, written confirmation of this requirement was not necessary. Had defendant reported and participated fully with the process, defendant would have received a written statement explaining all the continuing conditions of his probation.

2. Probation and Parole—written statement of conditions—contained in judgments

Defendant's argument that the trial court erred in a probation revocation case by revoking his probation even though he never received a written statement containing the conditions of his probation, as required by N.C.G.S. § 15A-1343(c), was overruled. The judgments entered in this matter included many of the terms of defendant's probation and the record failed to show that defendant was not provided with copies of the judgments.

3. Probation and Parole—assignment of parole officer—failure to complete intake process

Defendant's argument in a probation revocation case that he could not have violated any conditions of his probation because he was not assigned a probation officer was overruled. Because defendant left in the middle of the probation intake procedure, he could not complain that he did not receive that which he prevented the State from giving him.

Appeal by Defendant from judgments entered 25 August 2011 by Judge Elaine M. Bushfan in Superior Court, Alamance County. Heard in the Court of Appeals 14 August 2012.

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Attorney General Roy Cooper, by Assistant Attorney General David Leon Gore, III, for the State.

Guy J. Loranger for Defendant-Appellant.

McGEE, Judge.

Silvino Enrique Brown, Jr. (Defendant) was indicted on 10 August 2009 on nine felony counts related to the possession, sale, and trafficking of cocaine. This matter was brought to trial, but a mistrial was declared on 22 April 2010 due to jury misconduct. The State and Defendant entered into a plea agreement on 26 July 2010, under which Defendant agreed to plead guilty to three counts of attempting to traffic in cocaine in return for the dismissal of the remaining six charges. Defendant agreed to accept three consecutive sentences of fifteen to eighteen months each, to be suspended, and Defendant would be placed on probation. Defendant's probation was to be transferred to Virginia. The trial court accepted the plea agreement and, in accordance with the agreement, judgments were entered on 26 July 2010. The judgments included numerous conditions of probation.

A probation violation report was filed on 11 August 2011, alleging Defendant had violated the following condition of probation:

“Report as direct[ed] by the [trial court] or the probation officer to the officer at reasonable times and places . . .” in that [Defendant] was placed on supervised probation by the [trial court] on 07-26-10. [Defendant] left the court house without permission and failed to be processed for probation. A bench warrant was taken out and [Defendant] was arrested in the Commonwealth of Virginia and extradited to North Carolina. [Defendant] was an absconder based on the fact that [Defendant] avoided supervision.

A probation revocation hearing was held on 25 August 2011. Both Assistant District Attorney Eugene T. Morris, Jr. (Morris) and Defendant testified at the hearing. Morris testified that before accepting the plea agreement, the trial court went over the conditions of probation thoroughly with Defendant. Defendant testified that the trial court did discuss the plea agreement with him, at least generally, but Defendant testified that he did not remember the trial court addressing the specifics of the agreement. Defendant testified that he knew he was supposed to report to the probation office, which was located downstairs from the courtroom and that, shortly after judg-

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ment was entered, he did report to the probation office. Defendant testified he gave some information to a man at the probation office who filled out some forms. Defendant was then informed that he would have to pay a \$180.00 fee to have his probation transferred to Virginia. Defendant was upset because he did not have the money at that time and he wanted to get back to Virginia. Morris testified that he was told of this conversation and that Defendant was also told that it would take one to two weeks for the transfer to occur.

Defendant left the probation office before the intake process was complete, apparently without telling anyone he was leaving. Because Defendant left, he was not assigned a probation officer, no probation official discussed the other conditions of Defendant's probation with him, and Defendant was not given a written explanation of the conditions of his probation. When it was discovered that Defendant had left without completing the intake process, the trial court issued a warrant for Defendant's arrest.

Defendant left North Carolina for Virginia. Defendant was in Virginia for approximately one year, during which time Defendant made no attempt to contact probation officials in either North Carolina or Virginia. Defendant was arrested in Virginia on an unrelated charge, whereupon Virginia officials discovered the arrest warrant from North Carolina. Defendant was arrested on the North Carolina warrant and was extradited to North Carolina.

A probation revocation hearing was conducted on 25 August 2011. The State argued that Defendant had absconded and was in violation of the conditions of his probation. Defendant argued that he did not realize he was not allowed to leave the probation office when he did so, and that he also did not know he was not supposed to leave North Carolina. Defendant further argued that he did not really know the conditions of his probation; that he assumed North Carolina probation officials would contact him and tell him what he needed to do; and that because he never received any written explanation of his probation conditions, he could not be found to have violated them. Defendant also argued that he could not be found to have violated probation because no probation officer was ever assigned him.

The trial court found that Defendant was in violation of his probation, and ordered that Defendant's probation be revoked and his sentences activated. Defendant appeals.

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I.

The issues on appeal are whether: (1) the trial court erred in revoking Defendant's probation because Defendant never received written notice of the conditions of his probation; and (2) the trial court erred in revoking Defendant's probation when Defendant had not been assigned a probation officer.

II.

[1] In his first argument, Defendant contends the trial court erred in revoking his probation because he never received a written statement containing the conditions of his probation, as required by N.C. Gen. Stat. § 15A-1343(c). We disagree.

Defendant's argument is based upon N.C. Gen. Stat. § 15A-1343(c), which states:

Statement of Conditions.—A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

N.C. Gen. Stat. § 15A-1343(c) (2011). This Court has held that “[o]ral notice to [a] defendant of his conditions of probation is not a satisfactory substitute for the written statement required by statute.” *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001) (citation omitted).

When the violation was a defendant's failure to initially report to a probation official for processing, however, this Court has taken a different approach. In *State v. Bouknight*, an unpublished opinion, this Court held that when the defendant received actual notice that she was required to report to a probation official for processing, her failure to report constituted a violation even though the record did not show that she had been given written notice of this condition. *State v. Bouknight*, ____ N.C. App. ____, 716 S.E.2d 87, 2011 WL 3891023, *3-4 (2011). We agree with the reasoning in *Bouknight* and hold that, because Defendant was aware that he was required to report to the probation office for processing, written confirmation of this requirement was not necessary. Defendant's obligation was not simply to report, but to report and participate fully with the process. Had Defendant done so, Defendant would have received a written statement explaining all the continuing conditions of his probation. This obligation imposed no unfair burden upon Defendant.

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[2] Defendant willingly entered into a plea agreement as a means of disposing of his charges. There is no dispute that Defendant knew he was entering into the plea agreement—Defendant argues only that he does not remember what the trial court told him regarding the provisions of the agreement and that he did not receive a written copy of the terms of the agreement. The judgments entered in this matter included the length of Defendant’s sentences, that the sentences were suspended, and that Defendant would be placed on special supervised probation. The judgments also stated the terms of Defendant’s probation, including a requirement that Defendant provide a DNA sample, pay various fees and charges amounting to \$5,329.00, and abide by both regular and special conditions of probation. Included in those conditions was the following:

Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. . . . Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, . . . answer all reasonable inquiries by the officer and obtain prior approval from the officer, and notify the officer of, any change in address or employment.

Included in the judgments was the requirement that Defendant serve “an active term of 3 . . . days . . . in the custody of . . . [the] Sheriff[.]” Defendant was given credit for the three days he had already spent in confinement. Defendant was also required to: “Report to a probation officer in the State of North Carolina within seventy-two (72) hours of [Defendant’s] discharge from the active term of imprisonment.”

Because those conditions were written on the judgments, if Defendant was provided with the judgments then he was provided written confirmation of these conditions as required by N.C. Gen. Stat. § 15A-1343(c). Defendant argues:

Even though the record contains judgments listing [Defendant’s] probation conditions, the record contains no evidence that he was ever served with these judgments. Thus, Mr. Brown’s probation conditions, including the N.C. Gen. Stat. § 15A-1343(b)(3) reporting condition that he allegedly violated, were invalid as prescribed the trial court on 26 July 2010.

The record also fails to show that Defendant was *not* provided with copies of the judgments. The judgments contained written conditions of probation. “Where the record is silent upon a particular point, the

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action of the trial court will be presumed correct.” *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988) (citation omitted). For this reason alone, Defendant’s argument fails.

Defendant’s substantive argument also fails. Defendant argues in his brief that “[b]ecause the trial court failed to comply with the written notice mandate of N.C. Gen. Stat. § 15A-1343(c),” Defendant was prejudiced. Again, Defendant does not show that the trial court failed to comply with N.C.G.S. § 15A-1343(c). Assuming *arguendo* Defendant was not provided with the judgments, we hold that the trial court did not err in revoking Defendant’s probation. The following colloquy occurred at the revocation hearing:

[The State] And no one told you, you were free to leave during the processing period, did they?

[Defendant] Umm, no, I know I was, I know I wasn’t free to leave. I know, you know.

Q And you left anyways?

A To go downstairs.

Q And when you went downstairs, no one told you, you were free to leave down there either?

A Nobody told me anything down there.

. . . .

Q So when you walked out of the courtroom, what was the understanding of your probation?

A I’m supposed to go in, report to the probation officer.

Q Okay. And when you reported to that probation office, you didn’t like what they had to tell you. Isn’t that correct?

A I wasn’t overjoyed, but it wasn’t, you know, I wasn’t angry.

Q Which probation officer did they assign to you?

A They didn’t get to do that.

Q Why not?

A I don’t know.

Q Because you left. Is that right?

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A Umm, the man was talking like, you know, he was doing my paperwork.

Q Okay. And so when you left, what were the last words that you had with that, with the person who was processing you?

A Umm, he, he was telling me about, he had stepped off for a minute, you know, and was doing something.

Q Okay. Well, you went back to Virginia, right?

A Yeah.

. . . .

Q All right. Did you know you were wanted in North Carolina for essentially absconding from your probation?

A I mean, you know, there wasn't nothing I could say. There wasn't, there wasn't nothing to my knowledge about that. It's always in the back of my mind.

Q It was always in the back of your mind?

A Yeah, that may be, you know.

Defendant's argument, at its core, is that, because Defendant did not allow officials in the probation office to complete processing before he decided to leave and thus did not afford the probation office the opportunity to provide Defendant with a "written statement of [his probation] conditions[,]" Defendant should not be held accountable for leaving the probation office before probation officials had the opportunity to finish processing and provide written documentation. Were we to follow Defendant's reasoning, any defendant who simply refused to report to a probation office for processing would never be accountable for violations of the conditions of probation set in lieu of an active sentence. We do not believe this absurd outcome is contemplated in N.C.G.S. § 15A-1343(c).

Defendant's own testimony contradicts some of his argument on appeal. Defendant testified on direct that he went to the probation office immediately following sentencing because "they were supposed to process me." Defendant was clearly aware that he needed to report for processing. Defendant testified that, while at the probation office, he was told that in order for his probation to be transferred to Virginia, he would have to pay \$180.00 in fees. Defendant told the probation official that he would not be able to pay that fee. Defendant

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knew that he could not leave North Carolina without permission, and Defendant knew that he did not have permission to leave.

Defendant's counsel made the following argument to the trial court:

[Defendant's counsel]: That's all for us, Judge. Judge, a very unusual case. We don't have that many transfers. I mean it happens regularly, but it's not, not every day. He comes in, takes a plea agreement. He's ordered by the Judge to do several things. He doesn't remember exactly what they are, but they're in the judgment. I mean, he was ordered to do certain things. *One was to get processed by probation. I think you can take [the ADA's] word for that. I think you can take judicial notice of the judgment, which should say the same thing.*

He left here. It's clear that he went down to probation, because [the ADA] talked to the probation officers who said that they had talked to him about transferring to [Virginia]. . . . He relates that they told him that he had to pay a fee to move to [Virginia], and that he was supposed to be processed in [Virginia], which is where he lived at the time, where he still lives, and where he's lived the whole time as far as we can tell. He did that. . . . He clearly didn't abscond because he wasn't processed. So I don't think that's a violation. The only question is whether or not he left without permission and failed to be processed. Well, he definitely went down there. I mean there's no doubt about that. Everybody agrees on that. The question was whether he left without permission. I mean he seems to think that he was there. He talked to them. Then they left him. He come around for about ten minutes, and then he left. That was his testimony. We don't know who in probation was there. We don't have anybody to talk to, to get verification. And so really, Judge, I don't think that the State can prove even by the lower preponderance of the evidence standard that he's violated on this violation. [Emphasis added.]

Prior opinions of this Court, such as *Lambert*, stand for the proposition that a defendant cannot be held to have violated a condition of probation when there is no evidence that the defendant was fully apprised of the condition. See *Lambert*, 146 N.C. App. at 368-69, 553 S.E.2d at 78. For every condition, except for one, this means a defendant must be given written confirmation of the conditions. This is completely reasonable, as a defendant might easily forget, for example, the exact amount of restitution owed, or where he is to report for

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substance abuse assessment. When a defendant is placed on supervised probation, however, he is unlikely to forget that he has been placed on supervised probation, and he is unlikely to forget that he needs to report to be processed into the system. If a defendant fails to report, or fails to complete the intake process, he may, as did Defendant in the present case, explain his failure to the trial court. It is in the trial court's discretion, however, whether to revoke probation in light of the violation. In the present case, the trial court was not swayed by Defendant's explanation and decided to revoke Defendant's probation. The trial court's ruling was discretionary and we hold that the trial court did not abuse that discretion. *State v. Crowder*, ___ N.C. App. ___, ___, 704 S.E.2d 13, 15 (2010).

III.

[3] Defendant further argues that he could not have violated any conditions of his probation because "he was not assigned a probation officer." We disagree.

Defendant was not assigned a probation officer because Defendant left in the middle of the probation intake procedure. Defendant was not assigned a probation officer for the same reason that Defendant did not receive a written explanation of his conditions of probation. Defendant did not need, and indeed could not have been assigned, a probation officer at that stage of probation—the initial intake stage. Having abandoned the process and left the State, Defendant cannot now complain that he did not receive that which he prevented the State from giving him. This argument is without merit.

Affirmed.

Judges STEELMAN and ERVIN concur.

STATE v. LEWIS

[222 N.C. App. 747 (2012)]

STATE OF NORTH CAROLINA v. ROBERT JOHN LEWIS, DEFENDANT

No. COA12-100

(Filed 4 September 2012)

1. Firearms and Other Weapons—improper storage of firearm—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of improper storage of a firearm. There was sufficient evidence of each element of the crime, including that defendant stored a handgun in such a manner that defendant knew or should have known that an unsupervised minor would be able to gain access to it.

2. Homicide—involutionary manslaughter—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of involuntary manslaughter. The State presented substantial evidence that defendant's improper storage of a firearm was the proximate cause of defendant's child's death.

3. Evidence—photograph—staged by law enforcement—no reasonable probability verdicts affected

Defendant's argument that the trial court abused its discretion in a prosecution for improper storage of a firearm and involuntary manslaughter by admitting into evidence a photograph staged by law enforcement which grossly misrepresented how defendant's legally owned weapons were kept was overruled. Even assuming *arguendo* that the trial court erred in admitting the photograph, in view of the overwhelming evidence presented by the State, there was no reasonable possibility that the verdicts returned by the jury were affected by the error.

4. Penalties, Fines, and Forfeitures—imposition of fine—remanded—clerical error

A judgment imposing a \$500 fine for involuntary manslaughter was remanded for correction of a clerical error where the trial court orally imposed a \$100 fine.

Appeal by defendant from judgments entered on or about 2 September 2011 by Judge Phyllis M. Gorham in Superior Court, Onslow County. Heard in the Court of Appeals 16 August 2012.

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[222 N.C. App. 747 (2012)]

Appellate Defendant Staple Hughes, by Kathleen M. Joyce, for defendant-appellant.

Attorney General Roy A. Cooper, III by Assistant Attorney General David N. Kirkman, for the State.

STROUD, Judge.

Defendant appeals his convictions for improper storage of a firearm and involuntary manslaughter. For the following reasons, we find no error but remand for correction of a clerical error.

I. Background

This case arises from the tragic death of defendant's three-year-old son, Sam.¹ The State's evidence tended to show that on the morning of 16 November 2009, defendant was at work and Ms. Kimberly Lewis, defendant's wife, was at home with Sam. After breakfast, Sam went to his room, and within ten seconds Ms. Lewis "heard a [loud] noise[.]" When Ms. Lewis entered Sam's room she saw Sam and a handgun "laying on the floor." Sam died from a "[g]unshot wound to the head." The evidence also showed that the handgun's trigger weight had been lessened which meant it "would require less force to activate the trigger[.]" and the gun was found, after the shooting, loaded with at least one hollow point bullet.

On or about 14 September 2010, defendant was indicted for possession of a weapon of mass destruction, storing a firearm in a manner accessible to a minor ("improper storage"), involuntary manslaughter, and contributing to the delinquency of a minor. On 24 March 2011, the trial court entered an order granting a mistrial as to the charges of improper storage, involuntary manslaughter, and contributing to the delinquency of a minor because the jury had been unable to reach a unanimous verdict on these charges. After defendant's second trial by jury, defendant was found guilty of involuntary manslaughter and improper storage. The trial court arrested judgment on defendant's conviction for improper storage, suspended defendant's sentence for involuntary manslaughter, and placed defendant on 36 months of supervised probation. Defendant appeals.

II. Motion to Dismiss

Defendant first contends that "the trial court erred when it denied . . . [his] motion to dismiss" the charges of improper storage

1. A pseudonym will be used.

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and involuntary manslaughter because “the State’s case rested on mere conjecture and was legally insufficient to withstand his motion to dismiss.”

The standard of review for a motion to dismiss is well known. A defendant’s motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant’s being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). Furthermore, in evaluating evidence, “[c]ircumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence.” *State v. Banks*, ___ N.C. App. ___, ___, 706 S.E.2d 807, 813 (2011) (citation and quotation marks omitted).

A. Improper Storage of a Firearm

[1] The crime of improper storage of a firearm is defined by North Carolina General Statute § 14-315.1(a) which provides that

[a]ny person who resides in the same premises as a minor, owns or possesses a firearm, and stores or leaves the firearm (i) in a condition that the firearm can be discharged and (ii) in a manner that the person knew or should have known that an unsupervised minor would be able to gain access to the firearm, is guilty of a Class 1 misdemeanor if a minor gains access to the firearm without the lawful permission of the minor’s parents or a person having charge of the minor and the minor:

- (1) Possesses it in violation of G.S. 14-269.2(b);
- (2) Exhibits it in a public place in a careless, angry, or threatening manner;
- (3) Causes personal injury or death with it not in self defense;
or
- (4) Uses it in the commission of a crime.

N.C. Gen. Stat. § 14-315.1(a) (2009).

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A plain reading of N.C. Gen. Stat. § 14-315.1(a) shows that in this case the State was required to prove: (1) the defendant “reside[d] in the same premises as a minor[;]” (2) the defendant “owns or possesses a firearm[;]” (3) the defendant “stores or leaves the firearm [(a)] in a condition that the firearm can be discharged and [(b)] in a manner that the [defendant] knew or should have known that an unsupervised minor would be able to gain access to the firearm[;]” (4) “a minor gains access to the firearm without the lawful permission of the minor’s parents or a person having charge of the minor[;]” and (5a) the minor “[p]ossesses [the firearm] in violation of G.S. 14-269.2(b);” or (5b) the minor “[e]xhibits [the firearm] in a public place in a careless, angry, or threatening manner;” or (5c) the minor “[c]auses personal injury or death with [the firearm] not in self defense; or” (5d) the minor “[u]ses [the firearm] in the commission of a crime.” *Id.*

Defendant does not dispute that he lived with Sam or that he owned the handgun at issue, satisfying the first two elements of improper storage. *See id.* Defendant also does not dispute that Sam gained access to the firearm without parental permission, and Sam died as a result of his self-inflicted gunshot wound, satisfying elements four and five of improper storage. *See id.* Lastly, defendant does not dispute that the gun was “in a condition that the firearm can be discharged” as the handgun was loaded and was not secured by any type of safety mechanism, satisfying the first portion of the third element of improper storage. *Id.* Thus, the second portion of the third element is the source of the dispute which requires this Court to determine whether there was substantial evidence that defendant stored the handgun “in a manner that the [defendant] knew or should have known that an unsupervised minor would be able to gain access to the firearm[.]” *Id.*; *see Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148.

Defendant argues that “[t]he State’s evidence did not show how or from where three-year old [Sam] got the Glock handgun that he use to shoot himself[;]” “the fact of [Sam]’s death is not ‘substantial evidence’ that Robert Lewis himself had stored or left the Glock handgun in a condition and manner accessible to [Sam;]” and “[t]he State’s evidence was limited to conjecture about how the Glock handgun might have been left the morning of [Sam]’s death.” But viewing the evidence in the light most favorable to the State, as we must, *Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148, Ms. Lewis testified that defendant was “responsible for storing” the handgun and was the last person seen with the handgun the night before the incident. The

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evidence also indicates that defendant normally kept the handgun on the top of an entertainment center that not even his wife was tall enough to reach, but on the day that Sam got the handgun, defendant and his family were in the process of moving, and the items on the entertainment center had been removed, and it had been moved out of the room in which it was normally located to the hallway of the home. While it is true that there is no direct evidence of how Sam managed to get the handgun, the circumstantial evidence strongly suggests that the handgun was not stored on top of the entertainment center when Sam gained access to it because Sam was not tall enough to reach the top of the entertainment center, but managed to get the handgun and shoot himself in approximately ten seconds. *See generally Banks*, ___ N.C. App. at ___, 706 S.E.2d at 813. In any event, the handgun was left in such a manner that Sam was able to access and discharge it within ten seconds or less of discovering it. *See N.C. Gen. Stat. § 14-315.1(a)*. Accordingly, the trial court properly denied defendant's motion to dismiss the charge for improper storage. *See Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148.

B. Involuntary Manslaughter

[2] We will next consider defendant's conviction for involuntary manslaughter. Defendant argues that the State presented insufficient evidence "that he had caused the death of [Sam] through an unlawful act or culpable negligence." However, defendant's argument is based upon a misapprehension of the elements of involuntary manslaughter. Our Supreme Court has clarified that

[i]nvoluntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.

Involuntary manslaughter has also been defined as the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.

The single essential element common to all four degrees of homicide is that there be an unlawful killing of a human being. Involuntary manslaughter is not distinguished from murder or voluntary manslaughter by the presence of an essential element not contained in the greater offenses; it is distinguished from those offenses by the absence of elements that are essential to the greater offenses but not to involuntary manslaughter. It is the

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absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury that separates involuntary manslaughter from murder and voluntary manslaughter.

Defendant argues in this Court that when the definitional test of *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), is applied to the charge in this case, involuntary manslaughter is not a lesser included offense of murder in the second degree. His theory is that involuntary manslaughter contains an essential element which is not found in murder: either (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. We disagree.

Contrary to defendant's arguments, these are not elements of involuntary manslaughter but are two methods of proving the essential element that the killing was unlawful. *If the state proves beyond a reasonable doubt that the killing was caused either by an unlawful act not amounting to a felony or by culpably negligent conduct, it has proven that the killing was unlawful. That the killing be unlawful is the essential element that must be proved; showing that the killing was by an unlawful act not amounting to a felony or by culpable conduct is evidence to prove that the killing was unlawful.*

State v. Greene, 314 N.C. 649, 651-52, 336 S.E.2d 87, 88-89 (1985) (emphasis added) (citations omitted). Thus, the only "essential element" the State must prove to establish involuntary manslaughter is an unlawful killing; the State proved this element by showing defendant committed the misdemeanor of improper storage which resulted in Sam's death, i.e., "an unlawful act not amounting to a felony." *Id.* at 652, 336 S.E.2d at 89; see N.C. Gen. Stat. § 14-315.1(a) (noting that violation of N.C. Gen. Stat. § 14-315.1 is a misdemeanor).

Though defendant also contends that the State failed to prove that his "conduct was the proximate cause of [Sam]'s death[.]" the State did present sufficient evidence, as discussed above, that Sam died from a self-inflicted gunshot wound because defendant improperly stored his firearm in violation of N.C. Gen. Stat. § 14-315.1. See *State v. Powell*, 336 N.C. 762, 771-72, 446 S.E.2d 26, 31 (1994) ("Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed."). Accordingly, the State presented "[s]ubstantial evidence" that defend-

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ant's improper storage of a firearm was the proximate cause of Sam's death, and thus the trial court did not err in denying defendant's motion to dismiss the charge of involuntary manslaughter. *Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148; see *Powell*, 336 N.C. at 771-72, 446 S.E.2d at 31.

III. Admission of Photograph

[3] At trial, evidence was presented that defendant was a former Marine; had sold firearms in a retail store; and at the time of Sam's death, was a civilian police officer. Over defendant's objection, a photograph of other weapons found in defendant's home was admitted into evidence. Deputy Michael Gibbs of the Onslow County Sheriff's Office testified that though the other weapons found in defendant's home were stored in cases, law enforcement "staged" the photograph by taking the weapons out of their cases and piling them in the middle of a room to show the "net effect[.]" Defendant argues "the trial court abused its discretion in admitting into evidence a photograph staged by law enforcement which grossly misrepresented how . . . [defendant]'s legally-owned weapons were kept." Defendant contends that admission of the photograph was erroneous as it was both irrelevant and the "probative value was far outweighed by the danger that it would mislead and unfairly prejudice the jury."

Even assuming *arguendo* that the trial court erred in admitting the photograph, Ms. Lewis' testimony alone establishing that defendant improperly stored the handgun which caused Sam's death is sufficient for this Court to conclude that "a different result would [not] have been reached" "had the error in question not been committed[.]" and thus we do not believe that admitting the photograph was prejudicial to defendant. *State v. Samuel*, 203 N.C. App. 610, 618, 693 S.E.2d 662, 667 (2010) ("Where a defendant has made a timely objection at trial, the admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown. A defendant is prejudiced 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." (citations, quotation marks, ellipses, and brackets omitted)); see *State v. Milby and State v. Boyd*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) ("It is well-established that the burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. . . . In view of the overwhelming evidence which was presented by the state, as well as the quality of the evidence, we conclude that there is no reasonable possibility that the verdicts

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returned by the jury were affected by the introduction of the handguns in question.” (citation omitted)).

IV. Fine Imposed

[4] At sentencing the trial court orally imposed a \$100.00 fine; however, the involuntary manslaughter judgment orders a \$500.00 fine. Defendant contends that “[t]he trial court erred by entering Judgment imposing a \$500 fine on . . . [defendant] after orally imposing a \$100 fine at sentencing.” Both defendant and the State agree that the discrepancy is the result of a clerical error. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (“When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth. Accordingly, we remand for correction of the clerical error found on the sentencing form.” (citation and quotation marks omitted)). As such, we remand for correction of the clerical error. *See id.*

V. Conclusion

For the foregoing reasons, we find no prejudicial error but remand for correction of a clerical error.

NO ERROR; REMANDED in part.

Judges CALABRIA and McCULLOUGH concur.

WAKEMED v. N.C. DEP'T OF HEALTH

[222 N.C. App. 755 (2012)]

WAKEMED, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT, AND REX HOSPITAL, INC., D/B/A REX HEALTHCARE, HOLLY SPRINGS SURGERY CENTER, LLC, AND NOVANT HEALTH, INC., REX HOSPITAL, INC., D/B/A REX HEALTHCARE, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT, AND WAKEMED, HOLLY SPRINGS SURGERY CENTER, LLC AND NOVANT HEALTH, INC.

No. COA11-1558

(Filed 4 September 2012)

1. Hospitals and Other Medical Facilities—surgery center—CON application—not impermissibly amended

The North Carolina Department of Health and Human Services, Division of Health Service Regulation did not err by approving Holly Springs Surgery Center, LLC's (HSSC) Certificate of Need (CON) application. HSSC did not impermissibly amend its application after it was submitted to the CON Section because the missing application sections and the missing letter of support filed by HSSC did not constitute material amendments to its CON application.

2. Hospitals and Other Medical Facilities—surgery center—CON application—statutory criteria complied with

Petitioners WakeMed's and Rex's arguments in a Certificate of Need (CON) case that respondent Holly Springs Surgery Center, LLC's CON application did not comply with all review criteria provided in N.C.G.S. § 131E-183(a) was overruled.

3. Hospitals and Other Medical Facilities—surgery center—CON application—comparative analysis—statutory criteria complied with

Petitioner WakeMed's contention that the Department of Health and Human Services, Division of Health Service Regulation's comparative analysis failed to properly consider the statutory criteria provided in N.C.G.S. § 131E-183(a)(3), (6), (13), and (18a) was overruled. There was substantial evidence to support the conclusion that the Certificate of Need Section properly approved Holly Springs Surgery Center, LLC's application.

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[222 N.C. App. 755 (2012)]

Appeal by petitioners from final agency decision entered 31 August 2011 by Director Drexdal Pratt of the North Carolina Department of Health and Human Services, Division of Health Service Regulation. Heard in the Court of Appeals 6 June 2012.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Terrill Johnson Harris, and Allyson Labban, for petitioner-appellant WakeMed.

K&L Gates LLP, by Gary S. Qualls, Colleen M. Crowley, and Susan K. Hackney, for petitioner-appellant Rex Hospital, Inc., d/b/a Rex Healthcare.

Williams Mullen, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondents-intervenors-appellees Holly Springs Surgery Center, LLC and Novant Health, Inc.

Attorney General Roy Cooper, by Assistant Attorney General Scott Stroud, for respondent-appellee North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.

HUNTER, Robert C., Judge.

Petitioners-appellants WakeMed and Rex Hospital, Inc., d/b/a Rex Healthcare (“Rex”) (collectively “petitioners”), appeal from the 31 August 2011 final agency decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation (“the Agency”). In that decision, the Agency concluded that a certificate of need to develop three operating rooms in Wake County was properly awarded by the Agency’s Certificate of Need Section (“CON Section”) to Holly Springs Surgery Center, LLC (“HSSC”), a subsidiary of Novant Health, Inc. (“Novant”), rather than to WakeMed or to Rex. On appeal, WakeMed and Rex ask this Court to reverse the final agency decision and to direct the CON Section to issue the certificate of need to WakeMed or Rex, respectively. After careful review, we affirm the final agency decision.

Background

In the 2010 State Medical Facilities Plan (“SMFP”), the North Carolina State Health Coordinating Counsel identified a need for three new operating rooms in Wake County. WakeMed, Rex, Duke University Health System, d/b/a Duke Raleigh Hospital (“Duke”), and HSSC filed separate applications seeking a certificate of need

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("CON") to develop the operating rooms. The applications were reviewed by Michael J. McKillip ("Mr. McKillip"), a CON Section Project Analyst, who with his supervisor, Section Chief Craig R. Smith ("Mr. Smith"), prepared the CON Section's decision.

Although the 2010 SMFP identified a need for three operating rooms in Wake County, it did not specify the type of operating rooms that were needed, shared versus ambulatory. Shared operating rooms accommodate both inpatient and outpatient surgeries, while ambulatory operating rooms can accommodate only outpatient surgeries. 10A N.C.A.C. 14C.2101(1), (11) (2012); N.C. Gen. Stat. § 131E-176(1b) (2011). WakeMed's CON application proposed the construction of three shared operating rooms at its WakeMed Cary facility. Duke's application proposed the addition of two shared operating rooms at Duke Raleigh Hospital. HSSC's application proposed the construction of an ambulatory surgery center with three ambulatory operating rooms in Holly Springs. Rex submitted two applications for the three operating rooms: one application proposed the construction of a shared operating room at Rex Hospital in Raleigh; the second application proposed the construction of two ambulatory operating rooms at Rex Healthcare of Holly Springs.

The CON Section reviewed the competing applications under the statutory review criteria provided in N.C. Gen. Stat. § 131E-183 and the regulations permitted by the statute, including 10A N.C.A.C. 14C.2100-.2106. The CON Section found the applications of WakeMed, Rex, and HSSC to be conforming to all review criteria, requiring an additional comparative analysis of these applications; Duke's application was found to be nonconforming to specific review criteria, and thus, unapprovable. As a result of the comparative analysis, the CON Section found HSSC's application to be superior. In a 28 July 2010 decision, the CON Section conditionally approved HSSC's CON application and denied the applications of WakeMed and Rex.

WakeMed, Rex, and Duke each filed petitions for contested case hearings, which were consolidated. HSSC was allowed to intervene in the contested cases filed by WakeMed and Rex, and WakeMed and Rex were allowed to intervene in the contested case filed by each other. Duke voluntarily dismissed its petition for a contested case before the consolidated hearing was held and is not a party to this appeal.

Following the contested case hearing, Administrative Law Judge Donald W. Overby ("ALJ Overby") issued a recommended decision recommending that the Agency reverse the approval of HSSC's appli-

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cation and approve WakeMed's application. The Agency issued its final agency decision ("FAD") rejecting ALJ Overby's recommended decision and affirming the CON Section's conditional approval of HSSC's application. WakeMed and Rex appeal from the FAD. Additionally, WakeMed cross-appeals to respond to Rex's arguments that the Agency erred in concluding WakeMed's application was conforming to the statutory review criteria and, thus, was a candidate for approval.

Discussion

Our review of the Agency's FAD in a CON determination is controlled by N.C. Gen. Stat. § 150B-51(b) (1999). *Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 534, 696 S.E.2d 187, 192 (2010), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 739, and, ___ N.C. ___, 705 S.E.2d 753 (2011). Modification or reversal of the FAD requires that the Agency's findings, inferences, conclusions, or decisions be:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1999). The first four grounds under section 150B-51(b) require law-based inquiries, subject to *de novo* review; the last two grounds require fact-based inquiries, such as determining whether sufficient evidence supports the Agency's decision, and invoke application of the whole-record test. *Parkway Urology*, 205 N.C. App. at 535, 696 S.E. 2d at 192. Under the whole-record test, we must determine whether the Agency's decision is supported by substantial evidence—relevant evidence that a reasonable mind could conclude supports a decision. *Id.* Significantly, we may not substitute our judgment for that of the Agency's regardless of whether the record contains evidence that could support a conclusion different than that reached by the Agency. *Id.*

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I. Amendment of Applications

[1] Initially, we address Rex's argument that the Agency erred by failing to conclude that HSSC's CON application could not be approved, because, Rex contends, HSSC impermissibly amended its application after it was submitted to the CON Section. We disagree.

Rex is correct in arguing that a CON applicant may not amend its application after it has been filed and deemed complete. *Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 537, 470 S.E.2d 831, 836 (1996); 10A N.C.A.C. 14C.0204. Here, the CON Section deemed HSSC's application complete on 16 February 2010. HSSC omitted Sections III.3—III.9 and a letter of support from Triangle Orthopedic Associates ("TOA") from its application. HSSC filed the missing application sections and the missing letter of support on 19 April 2010 during the responsive comment period of the application process. Rex contends the CON Section impermissibly relied upon the amended application in awarding the certificate of need.

Rex cites an unpublished opinion of this Court to contend that the test for whether a CON application has been amended is whether the Agency "considered" the information added to the application after the application had been filed. Yet, unpublished opinions of this Court do not constitute controlling legal authority. N.C. R. App. P. 30(e)(3) (2012). We conclude the proper standard for determining whether a CON application was impermissibly amended was the standard utilized by this Court in *Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 537, 470 S.E.2d at 836. In that case the CON applicant amended its application when it decided to change the management company it intended to use to oversee its operations at the facility it proposed in its application. This Court concluded the substitution of the management company was a "material amendment to its application" because "*all of [the applicant's] logistical and financial data in its completed certificate of need application was based*" on utilizing the original management company. *Id.* (emphasis added).

Here, HSSC did not make a material amendment to its CON application. The TOA letter of support submitted by HSSC in responsive comments was referenced in the application when the application was originally submitted to the CON Section; that the TOA surgeons had submitted a letter expressing their support for HSSC's proposed facility was one of the representations made in the application. The signatories to the TOA letter were identical to the TOA surgeons iden-

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tified by name in HSSC's application. Thus, providing the substance of the TOA letter did not amount to a "material change" to the representations made in HSSC's application.

As for Sections III.3 - III.9, the Agency found that these missing materials were not necessary to evaluate HSSC's application conformity because the answers for the questions in these sections were found elsewhere in the application. Additionally, Mr. McKillip and Mr. Smith testified that their approval of HSSC's application was not based on the materials HSSC filed after the application was deemed complete. Thus, we conclude the Agency did not err in determining that HSSC did not impermissibly amend its CON application, and Rex's argument is overruled.

II. Criterion 3

[2] WakeMed and Rex make multiple arguments as to why they believe the HSSC application did not conform to several of the statutory review criteria. An applicant for a certificate of need must comply with all review criteria provided in N.C. Gen. Stat. § 131E-183(a). *Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534, 470 S.E.2d at 834. First, WakeMed contends that the Agency erred as a matter of law by not concluding that the CON Section failed to adhere to its statutory obligation under N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") to determine the type of operating rooms, shared versus ambulatory, that would best meet the needs of Wake County identified in the 2010 SMFP. We disagree.

WakeMed cites no legal authority other than Criterion 3 in arguing that the CON Section must determine the type of operating rooms needed. Criterion 3 states:

The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C. Gen. Stat. § 131E-183(a)(3) (2011) (emphasis added). We conclude nothing in Criterion 3 requires the CON Section to determine whether shared or ambulatory operating rooms were required to meet the need identified in the SMFP. Additionally, the Agency's regulations promulgated under N.C. Gen. Stat. § 131E-183(b) for the

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review of CON applications specifically related to operating room facilities, N.C.A.C. 14C.2101–.2106, do not contemplate that the Agency must make a determination as to whether one type of operating room is needed to the exclusion of the other. Rather, these regulations require the applicant to demonstrate the need for its proposed services based on the applicant's projected utilization rates of its proposed facilities. *See* 10A N.C.A.C. 14C.2102(b)(4) (2012) (requiring CON applicants to provide projected inpatient and outpatient cases to be performed in each of the first three years of operation of the proposed facility); 10A N.C.A.C. 14C.2103(b) (providing a formula by which a proposal for new operating rooms shall demonstrate “the need” for the proposed facility). Thus, we conclude there is no legal requirement that the CON Section determine whether shared versus ambulatory operating rooms were required to meet the needs of the target population identified in the SMFP.

Second, WakeMed contends the CON Section applied the wrong standard under Criterion 3 by evaluating whether the applicants demonstrated their business need for the proposed facility rather than whether the applicant demonstrated that “the population to be served[,]” N.C. Gen. Stat. § 131E-183(a)(3), had a need for the services proposed. WakeMed appears to base this argument on one line in Craig Smith's testimony, which we conclude it takes out of context. A review of the transcript reveals that in response to questioning by WakeMed, Mr. Smith testified to the proper standard that is to be applied under Criterion 3 during the application review process:

[Counsel]: Mr. Smith, looking at Criterion (3) . . . it requires the applicant to demonstrate what patients need and not what the institution or the provider needs; is that right?

[Mr. Smith]: That's correct.

Thus, our review of the record reveals that the CON Section applied the proper standard under Criterion 3, and WakeMed's arguments are without merit.

Petitioners also argue there is insufficient evidence to support the conclusion that the HSSC application complied with Criterion 3. These arguments assert that: HSSC did not demonstrate that there is a need for ambulatory operating rooms in its proposed service area, or that there is a lack of geographic access to ambulatory surgery services in HSSC's proposed service area; and that HSSC's Medicaid and Charity Care Projections are not credible. Petitioners further contend that because HSSC failed to conform to Criterion 3, the application

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also failed to conform to Criteria 1, 4, 5, 6, 13c, and 18a, rendering the HSSC application unapprovable by the CON Section. We disagree.

Criterion 3 requires the CON application to (1) “identify the population to be served by the proposed project,” and (2) “demonstrate the need that this population has for the services proposed[.]” N.C. Gen. Stat. § 131E-183(a)(3). Although petitioners argue the Agency erred as a matter of law in approving HSSC’s application, the argument is one of sufficiency of the evidence—that the Agency’s decision lacked a proper evidentiary basis. Accordingly, we apply the whole-record test to determine if the record contains substantial evidence to support the FAD. *See Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 52-53, 625 S.E.2d 837, 841-42 (2006) (applying the whole-record test to review the Agency’s decision that a CON application was in compliance with N.C. Gen. Stat. § 131E-183(a)(3)).

A. Utilization Projections

Petitioners first argue that the Agency erred in concluding that HSSC’s application conformed to the review criteria because substantial evidence reveals HSSC failed to demonstrate that its “utilization projections” for the proposed facility were reasonable. Because, according to petitioners, the projected utilization rate was not reasonable, HSSC failed to demonstrate the target population’s need for its proposed surgical facility, as required by Criterion 3.

HSSC’s utilization projections for the proposed facility were calculated based on “use rate” and “market share” projections for the area in which the proposed facility would be located. HSSC selected a “primary service area” (the source of 90% of its total projected patients) comprised of six census tracts in southern Wake County and multiplied the projected population in the service area by the expected “use rate” (rate of surgical procedures per 1,000 people). HSSC calculated its projected “market share” within each of the six census tracks that comprised its projected service area. HSSC then estimated an additional volume of procedures to be provided to patients coming from outside its primary service area but who resided in Wake County (a total of 10% of its projected patients).

(1) Use Rate Projection

HSSC calculated its “use rate” utilizing a three-year historical average of ambulatory surgery cases performed county-wide divided by Wake County’s population. Petitioners argue HSSC’s assumptions

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were unreasonable because they were dependent on HSSC providing *all types* of surgical specialties at the proposed facility. Petitioners insist that HSSC could not demonstrate that it would be able to provide all surgical specialties due to a lack of demonstrated support from physicians indicating their willingness to operate in the proposed facility. However, a review of the record reveals there is substantial evidence to support the Agency's approval of the CON Section's decision that HSSC's utilization and market share projections were reasonable.

While HSSC only submitted letters of support for a limited number of surgical specialties, Rex's expert witness Daniel Carter, Jr., conceded that he did not believe support letters were necessary for every type of surgical procedure an applicant intends to offer. Mr. Smith testified that a county-wide use rate such as HSSC's could be reasonable even where the applicant intended to offer only a limited set of surgical procedures and that HSSC's top-20 proposed procedures included the most common types of surgeries performed in an ambulatory surgical facility in Wake County and at a national level. Additionally, HSSC's proposed facility is a "multispecialty facility" that would be open to all surgical specialties; HSSC planned to allow surgeons of all specialties to operate at the facility. HSSC's application stated that the company would engage in discussions with surgical specialties other than those for which it already held letters of support. Ultimately, Mr. Smith and Mr. McKillip testified that the CON Section was satisfied that HSSC's utilization projections were reasonable.

(2) Market Share Projection

Petitioners additionally contend that HSSC projected an unreasonable market share for a new healthcare facility. HSSC projected a 60% market share in the Holly Springs census tract (the highest estimation for all of the six census tracts comprising HSSC's proposed primary service area) after three years of operation but only a total market share of 5% in all of Wake County. Petitioners contend this market share projection is unreasonable because it assumes HSSC will obtain market share for all types of surgical specialties. Yet, petitioners contend that HSSC will only offer surgeries from a limited set of surgical specialties. This argument that HSSC failed to demonstrate that it would provide a multispecialty facility, however, has been shown to be without merit, as discussed above.

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Petitioners also contend HSSC's market share projections are unreasonable because the aggregate projection from all six census tracts in HSSC's proposed primary service area is higher than the market share projection the Agency rejected in its review of Novant's 2008 Holly Springs Hospital CON application. However, the record reveals that the Agency rejected the 2008 market share projections, in part, because Novant provided no support letters from Wake County surgeons or any doctors in southern Wake County. Here, HSSC's proposed facility is an ambulatory surgery center, not a hospital. Additionally, HSSC provided support letters from Wake County surgeons, physicians in southern Wake County, as well as from Durham and Orange County surgeons. Furthermore, Mr. McKillip testified that it was not appropriate to compare the HSSC application and Novant's 2008 application because they were so different in nature.

Additional evidence supporting the Agency's decision that HSSC's market share projection was reasonable includes the testimony of Craig Smith that the CON Section considered the high growth rate of the Holly Springs area in which HSSC's proposed facility would be located. Novant's Vice President of Ambulatory Care also testified that two Novant facilities had attained a 60% market share by their third year of operation.

(3) Geographic Access

After determining that the applications submitted by WakeMed, Rex, and HSSC conformed to the statutory review criteria, the CON Section compared each application to the others using the six comparative factors described above, including the geographic accessibility of the proposed facility to the target population. *See* N.C. Gen. Stat. § 131E-183(a)(3) (requiring the CON applicant to demonstrate "the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed"). WakeMed argues that the conclusion by the Agency that residents of southern Wake County—HSSC's proposed service area—lack geographic access to surgery services and that HSSC's application was comparatively superior with respect to geographic access is unsupported by substantial evidence. However, the record shows that the primary service area proposed by HSSC is home to 12% of Wake County's population and that not one of the County's 90-plus operating rooms is located in this area. Indeed, Rex's expert witness, Mr. Carter, and HSSC's expert witness, Nancy Bres Martin, testified that geographic access to health care

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services is a significant objective in CON law. *See* N.C. Gen. Stat. § 131E-175(3) (“[I]f left to the market place to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur[.]”). Thus, despite, WakeMed’s argument to the contrary, there is substantial evidence to support the Agency’s conclusion that HSSC’s application was comparatively superior in regards to the comparative factor of geographic access.

(4) Charity Care

WakeMed argues that the Agency erred in rejecting ALJ Overby’s conclusion that HSSC’s statements regarding its charity care policy and service to Medicaid patients were not credible. We disagree.

Specifically, WakeMed contends that the ALJ was correct in his assessment that the testimony provided by Novant’s Manager of Business Planning, Robert Johnson, Jr., was too contradictory and unfounded to be believed. WakeMed further contends it is the purview of the ALJ to determine the credibility of witnesses and that determination cannot be set aside absent clear and convincing evidence that the ALJ erred. However, our caselaw is clear that “although an ALJ makes a [r]ecommended [d]ecision, it is for the agency to decide the credibility of witnesses and conflicts in the evidence.” *Blalock v. N.C. Dep’t of Health & Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181-82 (2001) (applying the whole-record test to affirm the agency’s rejection of the ALJ’s recommended decision where “the agency’s final decision provided substantial reasons, including the credibility of witnesses, for rejecting the ALJ’s [r]ecommended [d]ecision”); *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 672, 599 S.E.2d 888, 902 (2004) (“It is well settled that ‘it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses’” (quoting *State ex rel. Utils. Comm’n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982))). Despite ALJ Overby’s conclusions that Mr. Johnson’s testimony was not credible, the Agency complied with its statutory duty by providing specific reasons, based on the evidence in the record, for rejecting the ALJ’s findings. N.C. Gen. Stat. § 150B-34(c) (2009)¹ (“For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on

1. Repealed by 2011 N.C. Sess. Laws ch. 398, § 18 (effective Jan. 1, 2012) (applying to contested cases commenced on or after that date).

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the evidence, for not adopting the findings of fact”); see *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005) (citing N.C. Gen. Stat. § 150B-34(c) and affirming the FAD in a CON proceeding where the agency rejected findings of fact in the ALJ's recommended decision, but “stated a specific reason why each was rejected”). Over twelve pages of its FAD, the Agency contradicted and rejected the findings of the recommended decisions concerning Mr. Johnson's testimony and concluded that his testimony was consistent in all material respects and was not contradicted by competent evidence. Accordingly, we overrule WakeMed's argument that the Agency erred in rejecting ALJ Overby's credibility determination as to testimony regarding HSSC's Medicaid and charity care projections. For the reasons stated above, we reject petitioners' contention that the Agency erred in concluding that HSSC's application complied with all the requirements of Criterion 3.

B. Conformity with Criterion 5

Rex also argues the Agency erred in rejecting ALJ Overby's conclusion that HSSC's application was nonconforming with N.C. Gen. Stat. § 131E-183(a)(5) (“Criterion 5”). We disagree.

Criterion 5 provides that:

Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon *reasonable projections* of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5) (2011) (emphasis added). That is, the applicant must demonstrate the proposed facility is financially feasible, based on reasonable projections of the facility's costs and charges. The Agency noted that the CON Section considered the applicant's assumptions, its projected revenue based on the proposed payor mix, and the projected expenses to determine conformity with Criterion 5.

Rex first argues that HSSC's application was nonconforming with Criterion 5 because it was nonconforming with Criterion 3, which is an estimate of HSSC's use rate and market share. As we concluded above, the Agency's decision that HSSC's application was conforming

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with Criterion 3 is supported by substantial evidence, therefore this argument is without merit.

Rex further argues that the evidence “undisputedly established” that there was no explanation for how HSSC’s costs, its charges, or its payor mix were derived, and thus there was no reasonable basis for concluding HSSC’s application was in compliance with Criterion 5. The “payor mix” is a categorization of the applicant’s projected payors, e.g., private insurance, Medicare, Medicaid, charity, etc. Robert Johnson, Jr., developed HSSC’s financial projections. Because HSSC does not have a history of providing surgical services in Wake County, Mr. Johnson based his projections on other facilities that are owned by its parent, Novant. Mr. Johnson testified that he used historical data from Novant’s Presbyterian Surgery Center Ballantyne as a starting point for his projections because he concluded it was the most similar Novant surgery center to the proposed HSSC center—a multi-discipline surgical center. Mr. Johnson determined the gross patient revenue for its application by dividing the total gross revenue per year from the Ballantyne facility by the total number of estimated procedures at that facility per year to arrive at an average gross charge per patient. These estimates were then adjusted for inflation. Mr. Johnson also testified that he calculated revenue, income, and expenses in a similar manner.

As respondents note, neither the statutory criterion nor the regulations require a particular method of projecting finances and payor mix beyond requiring that they be “reasonable.” See N.C. Gen. Stat. § 131E-183(a)(5). Rex’s expert witness, Mr. Carter, conceded that reasonableness is the only requirement an applicant must meet. As noted above, it is within the purview of the Agency, not the ALJ, to determine the credibility of witnesses and resolve conflicts in the evidence. *Blalock*, 143 N.C. App. at 475, 546 S.E.2d at 181-82. In doing so, the Agency is required to provide specific reasons for rejecting the ALJ’s findings. N.C. Gen. Stat. § 150B-34(c) (2009). Contrary to Rex’s assertion that the Agency ignored ALJ Overby’s findings that conclude Mr. Johnson’s testimony was not credible, the Agency provided an extensive explanation for why it disagreed and rejected those findings from the recommended decision. Additionally, we conclude the Agency’s decision that HSSC’s application conformed to Criterion 5 is supported by substantial evidence and we overrule respondents’ argument to the contrary.

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C. Conformity to Other Statutory Review Criteria

Respondents next contend that the Agency erred in concluding that HSSC's CON application was conforming to the additional statutory criteria N.C. Gen. Stat. § 131E-183(a)(1), (4), (6), (13)c, and (18a). We disagree.

N.C. Gen. Stat. § 131E-183(a)(13)c (2009) ("Criterion 13c") requires the applicant to demonstrate "[t]hat the elderly and medically underserved groups identified [in the statute] will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]" To comply with Criterion 13c, the CON application requires the applicant to provide an estimate of its payor mix. Rex contends that HSSC's projection of the percentage of Medicaid patients that comprise its payor mix is unreasonable because Holly Springs is located in an affluent part of Wake County with significantly fewer residents with incomes below \$25,000 compared to the Wake County average; this results in a lower percentage of potential Medicaid patients than HSSC estimated it would serve in its payor mix. However, the Agency addressed this concern noting that Fuquay-Varina is in HSSC's proposed primary service area and it has one of the highest rates of poverty in Wake County. CON Section Chief, Craig Smith, testified that in light of these demographics, HSSC's projected payor mix was reasonable. Indeed, Clarence A. Roberts, Jr., a WakeMed employee responsible for CON application preparation and analysis, conceded that he believed the Agency was correct in concluding HSSC's application was compliant with Criterion 13c. Thus, there is substantial evidence in the record to support the Agency's decision that HSSC's application was conforming to Criterion 13c.

Respondents argue the Agency erred in concluding that HSSC's application was conforming to N.C. Gen. Stat. § 131E-183(a)(1) ("Criterion 1") because the application failed to sufficiently address the three basic principles governing the SMFP ("Policy GEN-3"): promoting cost effective approaches, expanding health care to the medically underserved, and encouraging quality healthcare services. HSSC's direct responses to the questions on Policy GEN-3 were omitted from its application when the application was submitted. However, in the FAD the Agency noted that Mr. Smith and Mr. McKillip testified that it was customary during the CON application review to review all portions of an application to find information relevant to the review criteria; WakeMed's witness Daniel J. Sullivan

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conceded the CON Section is permitted to do so. As the Agency noted, the CON Section found information addressing Policy GEN-3 in other sections of HSSC's application. Our review of the record reveals that substantial evidence supports the Agency's conclusion that HSSC's application was conforming to Criterion 1.

Respondents argue that the Agency erred in concluding HSSC's application was conforming with N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4"), which requires the application to demonstrate "the least costly or most effective alternative has been proposed" for meeting the SMFP's proposed need. Respondents argue that because HSSC's application was not conforming with Criterion 3, it could not be conforming with Criterion 4 as the two are interdependent. Because we conclude that the Agency's decision that the application was conforming with Criterion 3 is supported by substantial evidence, this argument is without merit to the extent it relies on non-compliance with Criterion 3. Additionally, respondents contend that information regarding Criterion 4 was missing from HSSC's application and, thus, the application was nonconforming. However, as noted in the FAD, Craig Smith testified that the CON Section found sufficient information relevant to Criterion 4 in other portions of HSSC's application. Therefore, the Agency's decision regarding HSSC's compliance with Criterion 4 is supported by substantial evidence.

Respondents contend the Agency erred in concluding HSSC's application was conforming to N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6"), which requires an applicant to demonstrate "the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." Because we conclude that the Agency's decision that the application was conforming with Criterion 3 is supported by substantial evidence, respondent's argument that the application was nonconforming to Criterion 6 because it is nonconforming to Criterion 3 is without merit. Respondents further contend that HSSC simply failed to demonstrate that its proposed operating rooms were not an unnecessary duplication of existing facilities. This argument ignores the Agency's detailed findings in the FAD as to HSSC's compliance with Criterion 6, which we conclude are supported by substantial evidence including that HSSC proposed the only operating rooms in one of the fastest-growing areas of Wake County. Respondents' arguments are overruled.

Finally, respondents contend the Agency erred in concluding HSSC's application was conforming to N.C. Gen. Stat. § 131E-183(a)(18a) ("Criterion 18a"). This argument is without merit as it relies solely on

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respondents' contention that HSSC's application was non-conforming to Criterion 3, an argument we have overruled.

III. Comparative Analysis

[3] WakeMed contends that the Agency's comparative analysis was flawed in that it failed to properly consider the statutory criteria relating to need of and access to health care services by underserved groups as required by N.C. Gen. Stat. § 131E-183(a)(3), (6), (13), and (18a). We disagree.

The comparative analysis performed by the CON Section is a matter within its discretion, and "[t]here is no statute or rule which requires the [CON Section] to utilize certain comparative factors." *Craven*, 176 N.C. App. at 58, 625 S.E.2d at 845. We review the Agency's decision under the whole-record test to determine where there is substantial evidence in the record to support the Agency's decision. *Id.* at 59, 625 S.E.2d at 845. In doing so, "[i]t would be improper for this Court to substitute our judgment for the Agency's decision[.]" *Id.*

As discussed above, there is substantial evidence in the record to support the Agency's decision that: (1) HSSC proposed placing a facility in southern Wake County where there are currently no operating facilities; (2) HSSC proposed lower gross and net revenues and lower operating expense than the only other applicant that proposed ambulatory operating rooms; (3) HSSC projected the highest Medicaid percentage and third-highest Medicare percentage demonstrating it was superior for access by underserved groups; and (4) HSSC was found to be conforming to all review criteria. Our review of the record leads us to conclude there is substantial evidence to support the conclusion in the FAD that the CON Section properly approved HSSC's application. That petitioners, or this Court, could find evidence in the record to support a different conclusion is irrelevant as, absent an error of law, we cannot substitute our judgment for that of the reviewing agency. *See Parkway Urology*, 205 N.C. App. at 535, 696 S.E.2d at 192.

Because we conclude HSSC's application was properly approved, we need not reach petitioners' additional arguments: that WakeMed impermissibly amended its application after it had been filed with the CON Section; that WakeMed's or Rex's applications were nonconforming with several of the statutory review criteria; or that Rex's application was comparatively superior to all other applications.

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Conclusion

In summary, we conclude the Agency did not err in rejecting the recommended decision of ALJ Overby. We affirm the Agency's final agency decision.

AFFIRMED.

Judges GEER and BEASLEY concur.

MARIE WYATT WHITWORTH, PLAINTIFF V. RUBEN LEON WHITWORTH, DEFENDANT

No. COA12-24

(Filed: 4 September 2012)

**Divorce—equitable distribution—motion to intervene—
entered two years after resolution of case—void**

The trial court lacked subject matter jurisdiction in an equitable distribution action to enter a 12 August 2010 *nunc pro tunc* order three years after the hearing on intervenor's motion to intervene where the case itself had been over for almost two and a half years. The use of the phrase "*nunc pro tunc*" did not solve the jurisdictional problem. That order was, therefore, void and the trial court should have granted plaintiff's motion to set aside the order pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4).

Appeal by plaintiff from order entered 11 October 2011 by Judge Jeanie R. Houston in Wilkes County District Court. Heard in the Court of Appeals 10 May 2012.

Robinson & Lawing, L.L.P., by Kevin L. Miller, Michael L. Robinson, and H. Stephen Robinson; and The McElwee Firm, by William H. McElwee, III, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

Sigmon, Clark, Mackie, Hanvey & Ferrell, PA, by Forrest A. Ferrell and R. Jason White, for intervenor-appellee.

GEER, Judge.

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Plaintiff Marie Wyatt Whitworth appeals from an order denying her motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to set aside an order filed 12 August 2010 *nunc pro tunc* 14 August 2007 granting a motion to intervene. Also pending before this Court is Marie's appeal in related litigation from an order dismissing a superior court action. It appears that entry of the order at issue in this case was sought long after the conclusion of this district court proceeding in order to affect the superior court litigation. Likewise, it appears that the focus of the Rule 60 motion and this appeal is on the superior court litigation.

We resolve this appeal, however, based solely on the record before us and without regard to the second appeal. We hold that because the district court proceeding was concluded two and a half years before the intervention order was entered, the district court had no jurisdiction to enter the 12 August 2010 order *nunc pro tunc* to the original hearing date. The district court, therefore, erred by not granting the Rule 60 motion. Accordingly, we reverse the denial of the Rule 60 motion and vacate the 12 August 2010 order.

Facts

Marie Wyatt Whitworth and Ruben Leon Whitworth separated on or about 23 May 2007. On 6 August 2007, Marie filed a complaint seeking equitable distribution, injunctive relief, and an interim distribution. With respect to equitable distribution, Marie alleged that part of her marital property was "a substantial interest in Window World, Inc." Marie and Leon were the sole record owners of Window World's stock. Leon served as CEO of Window World, while Leon and Marie's son, Todd Whitworth, was the company's President. Leon, Marie, and Todd were all directors of the corporation.

On the same day that Marie filed her complaint, she also filed a motion for a temporary restraining order ("TRO") and preliminary injunction, asserting that Leon, Todd, and Todd's wife, Tammy, had met with third parties to discuss the sale or transfer of Window World and had intentionally concealed this meeting from her. The trial court entered an order on 6 August 2007 granting a TRO that prohibited Leon, among other things, from: (1) transferring any marital asset; (2) competing directly or indirectly with Window World; (3) engaging in negotiations regarding a potential sale of Window World or any interest in Window World without notice to Marie's counsel and an opportunity for Marie's counsel to participate in the negotiations; (4) declaring a dividend; (5) purchasing or leasing an airplane without

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written consent of Marie; (6) taking any action that resulted or had the potential to result in the removal of Marie as an officer and director of Window World or limited or impaired Marie's ability to function as an officer and director; (7) taking any action "that result[ed] in or ha[d] the potential to result in the diminution or dilution or elimination" of Marie's interest in Window World; and (8) taking any action that would cause Window World to incur indebtedness or expend any funds except in the ordinary course of business without written consent from Marie. The court set a hearing for 14 August 2007 on Marie's motion for a preliminary injunction.

On 8 August 2007, Window World moved to intervene in the equitable distribution action. In its motion, Window World asserted that the complaint "raises allegations directly related to Window World, Inc." and that "[t]he entry of the [TRO] and the entry of any preliminary or permanent injunction may as a practical matter impair and impede Window World, Inc.'s ability to carry on the daily business of the corporation, as well [as] impair and impede it's [sic] ability to protect its trademark, its business interests, and the interests of its licensees." The motion was noticed for hearing on 14 August 2007, the same day that the motion for a preliminary injunction was scheduled to be heard.

On 14 August 2007, during the hearing on the motion to intervene, Window World, represented by John G. "Jay" Vannoy, Jr., argued that resolution of the equitable distribution action between Marie and Leon would directly affect the day-to-day operation of the company to the point that the business would be impaired. Window World argued both intervention as a matter of right under Rule 24(a)(2) and permissive intervention under Rule 24(b). Marie's attorneys, William H. McElwee, III of the McElwee Firm, PLLC, and Jimmy H. Barnhill, of Womble Carlyle Sandridge & Rice, PLLC, opposed the motion to intervene, arguing that Leon could adequately represent the interests of Window World. Leon's attorneys, however, joined in the motion to intervene.

The trial judge, after hearing oral argument, announced:

I don't see any way for the company not to be a part of this.
It's just simply to pass their opinion as to whether it's going to
affect the company or not. . . .

. . . .

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So Mr. Vannoy, if you'll do an Order for me—we'll get on to the Restraining Order today, but if you'll do an Order for you to intervene, I'll allow you to at least take part in what discussions I think you all were already in the middle of when I called you in here. Is that okay?

MR. VANNOY: Yes, I'll draw that Order.

Mr. Vannoy, however, apparently failed to draft this order.

On 29 October 2007, Marie's attorneys moved to withdraw as her counsel on the grounds that Marie had told them that she no longer desired that they represent her. On 6 November 2007, a consent order was entered. Window World was identified in the caption as an intervenor. Following the trial judge's signature on the order, Marie, Leon, and Window World (by Todd Whitworth as Window World's President) signed, indicating their consent to the order. Twenty-five minutes after the consent order was filed, the order allowing Marie's attorneys to withdraw was entered.

The consent order stated that “[a]ll the parties wish to enter this Consent Order to resolve all the issues, claims, and contentions pending between them that relate specifically to Window World, Inc.” The order provided that Leon would give Marie 5,000 shares of Window World stock. Following that transfer, Marie and Leon would each give Todd 115 shares of stock. The order then provided that Marie and Leon “shall sign a Redemption Agreement whereby the Corporation will redeem all outstanding shares of Window World, Inc. stock owned by” Marie and Leon for compensation specifically set out in the order. Upon the execution of the Redemption Agreement, Marie and Leon were required to resign their positions as officers and directors of Window World. After additional provisions not pertinent here, the consent order provided that the order “shall resolve all pending issues, claims, and contentions of each party in 07 CVD 1179 which relate specifically to Window World, Inc.”

On 24 January 2008, the trial court entered a consent order/judgment finally resolving the parties' equitable distribution claims. At that point, Mr. Vannoy, who had been representing Window World, was now also representing Marie. The order expressly stated that “[t]his settles and resolves all claims raised by the pleadings.”

Todd Whitworth died on 5 February 2010. On 22 June 2010, Marie requested her file from Mr. Vannoy and, on the same day, filed an action in superior court against (1) the estate of Todd Whitworth, (2)

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Tammy Whitworth, both individually and as executor of Todd's estate, and (3) Window World, alleging breach of fiduciary duty, constructive fraud, fraud, rescission, breach of contract, conversion, and violation of the North Carolina RICO Act. She was represented in the superior court action by her present counsel, one of whom was originally counsel for her in this action.

On or about 21 June 2010, Leon also filed a claim against Todd's estate for monetary damages in the amount of \$33,000,000.00 under the Redemption Agreement and \$42,000,000.00 arising out of other transactions. Mr. Vannoy accepted service on behalf of the estate.

Defendants in the superior court action did not file an answer until 10 September 2010. In the meantime, on 12 August 2010, an order was filed in this action purportedly *nunc pro tunc* to 14 August 2007 allowing Window World's motion to intervene. According to Mr. Vannoy's testimony at the hearing below, he drafted the order, handed it up to the trial judge in a regular session of court, and asked her to sign and enter it. Mr. Vannoy acknowledged that prior to submitting the order to the trial judge, he did not provide a copy of it to Marie's or Leon's counsel. Mr. Vannoy also admitted that he did not serve Marie or Leon with a copy of the signed order.

The 12 August 2010 intervention order included a finding of fact that "Window World, Inc. is a closely held corporation owned in part by Leon, Marie, and Todd Whitworth." This finding of fact was contrary to findings in the 6 November 2007 consent order. The order also included the following conclusions of law:

1. This Court has jurisdiction over the subject matter and the parties to this action.
2. Window World, Inc. as Intervenor has an interest in the property which is the subject matter of this action.
3. The rights, obligations, and interests of Window World, Inc. will be impaired and impeded if it is not allowed to intervene in this action.
4. Since the parties to the underlying action are now adversaries, they cannot adequately represent the interests of Window World, Inc.
5. Window World, Inc. should be allowed to intervene as a matter of right in this matter.

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On 10 September 2010, after this order was filed, defendants in the superior court action—Todd’s estate, Tammy, and Window World—filed an answer asserting the defenses of res judicata and collateral estoppel based on the consent order in this action relating to Window World. Those defenses relied upon Window World’s having been a party to the district court action.

On 21 January 2011, Marie filed a motion to set aside the 12 August 2010 intervention order pursuant to Rule 60 of the Rules of Civil Procedure. The motion alleged that Marie was unaware of who prepared or presented the order to the court and had attempted to ascertain this information, but had not received a response. The motion asserted that a draft of the order had not been provided to Marie’s counsel and that the signed intervention order was not served on Marie or her counsel. According to the motion, Marie learned of the entry of the order only when it was included in defendants’ document production in the superior court action.

The Rule 60 motion requested that the intervention order be vacated because the order was not properly entered pursuant to Rule 60(a) in that it did not merely correct an error in the record; the order was entered without prior notice to the parties and as a result of an *ex parte* contact with the trial court; the order was not a permissible exercise of the trial court’s inherent power to control its proceedings; and entry of the order without notice to Marie violated her substantive and procedural due process rights. The motion further challenged the finding of fact that Window World was, as of 14 August 2007, owned in part by Todd.

Following a hearing on 9 August 2011 on the Rule 60 motion, the trial court entered an order on 11 October 2011 denying the motion. After concluding that the trial court had jurisdiction, the trial court found:

7. Jay Vannoy, Attorney for the Intervenor, prepared an Order allowing Window World, Inc.’s Motion to Intervene within a couple of weeks of the August 14 2007 hearing. A signed copy of the order was never properly filed; however, Jay Vannoy was allowed to participate and be a party to all of the proceedings and negotiations in the case. Neither any party nor attorney ever questioned or objected to this. On the contrary, Jay Vannoy was served as an Attorney of Record in all following actions.

The trial court then found that Mr. Vannoy as counsel for Window World had participated in negotiations in the case, that Window

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World was served as an intervenor with Marie's counsel's motion to withdraw, and that the consent order entered on 6 November 2007 resolving all issues relating to Window World was signed by intervenor Window World. The court therefore found that Marie and Leon and their attorneys treated Window World as an intervenor since the hearing on 14 August 2007.

Based on its findings of fact, the trial court concluded first that it had "jurisdiction over the parties and the subject matter of this action." The court then concluded:

2. On August 14, 2007, the Court allowed Window World, Inc.'s Motion to Intervene in open court and instructed Jay Vannoy to draw the Order.
3. The doctrine of equitable estoppel is based on principles of fair play and essential justice. Equitable estoppel arises when one party tries to abruptly change their position from that of a preceding legal proceeding; thereby gaining an advantageous legal position against the other party. The party is barred or "estopped" from taking a different position in the case at hand than she did at an earlier time if the other party or parties would be harmed by the change. This situation also exists in the case at hand.

Based on the findings of fact and conclusions of law, the trial court denied Marie's Rule 60 motion to set aside the 12 August 2010 order. Marie timely appealed to this Court from that order.

Discussion

Marie contends that the trial court lacked subject matter jurisdiction to enter the 12 August 2010 *nunc pro tunc* order three years after the hearing on Window World's motion to intervene, because the case itself had been over for almost two and a half years. We agree and hold that the trial court erred in concluding that it had jurisdiction to enter the 12 August 2010 order. The use of the phrase "*nunc pro tunc*" did not solve the jurisdictional problem.

"*Nunc pro tunc*" is defined as "now for then." *Black's Law Dictionary* 1174 (9th ed. 2009). It signifies "'a thing is now done which should have been done on the specified date.'" *Id.* (quoting 35A C.J.S. *Federal Civil Procedure* § 370, at 556 (1960)).

Nunc pro tunc orders are allowed only when "a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of

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the clerk . . . provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced.”

Long v. Long, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (quoting *State Trust Co. v. Toms*, 244 N.C. 645, 650, 94 S.E.2d 806, 810 (1956)). See also *Rockingham Cnty. Dep’t of Soc. Servs. v. Tate*, 202 N.C. App. 747, 751, 689 S.E.2d 913, 916 (2010) (holding that when no substantive ruling was made at hearing and written order was prepared long after hearing, “[e]ntry of the order *nunc pro tunc* does not correct the defect” because “[w]hat the court did not do then . . . cannot be done now . . . simply by use of these words”); *Hill v. Hill*, 105 N.C. App. 334, 340, 413 S.E.2d 570, 575 (1992) (holding that “like any other court order, an alimony order cannot be ordered (*nunc pro tunc*) to take effect on a date prior to the date actually entered, unless it was decreed or signed and not entered due to mistake and provided that no prejudice has arisen”), *rev’d on other grounds*, 335 N.C. 140, 435 S.E.2d 766 (1993).

In *Long*, the parties signed a separation agreement, including an alimony provision, on 2 April 1987. 102 N.C. App. at 20, 401 S.E.2d at 402. The defendant husband then filed for bankruptcy and was discharged on 4 February 1988 from all debts existing on 27 October 1987, including alimony. *Id.* at 20-21, 401 S.E.2d at 402. The plaintiff wife then sought specific performance of the alimony provision, and the defendant husband moved to dismiss the complaint. *Id.* at 20, 401 S.E.2d at 402. The hearing on the defendant husband’s motion to dismiss occurred on 17 October 1988, but the court announced no ruling. *Id.* at 21, 401 S.E.2d at 402. A year and a half later, on 6 April 1990, an order was filed, granting the defendant husband’s motion to dismiss *nunc pro tunc* 17 October 1988. *Id.*, 401 S.E.2d at 403.

This Court concluded on appeal that “[t]he trial court’s attempt to enter the order *nunc pro tunc* to 17 October 1988 was ineffective” because the trial court did not announce its order in open court and, therefore, no decision had been rendered on that date. *Id.* at 21-22, 401 S.E.2d at 403. The Court further held that even if a decision had been rendered, nothing in the record indicated the delay in entering the written order was due to accident, mistake, or neglect by the clerk. *Id.* at 22, 401 S.E.2d at 403.

Therefore, before a court order or judgment may be ordered *nunc pro tunc* to take effect on a certain prior date, there must first be an order or judgment actually decreed or signed on that prior date. If such decreed or signed order or judgment is then not entered due

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to accident, mistake, or neglect of the clerk, and provided that no prejudice has arisen, the order or judgment may be appropriately entered at a later date *nunc pro tunc* to the date when it was decreed or signed.

Here, any rendition in open court did not precisely set out the trial court's order on the motion to intervene. After generally noting the likely inability of Marie and Leon to agree on matters relating to Window World, the need for retired parents to allow children to run their company, and a desire not to bind Todd's hands, the court merely stated regarding the order that "if [Mr. Vannoy will] do an Order for [Window World] to intervene, I'll allow you to at least take part in what discussions I think you all were already in the middle of when I called you in here."

Thus, the trial court made no oral findings of fact, although the written order contained specific findings. Indeed, among the findings in the written order was a finding that Todd Whitworth was one of the owners of the company, a matter of significant dispute among the parties and one that was not resolved until entry of the consent order three months *after* the motion to intervene hearing.

Further, while Window World argued that it should be allowed to intervene either as a matter of right or permissively, the trial court did not state in open court on which basis it was allowing the intervention. Moreover, it is not apparent from that oral ruling the degree to which the court intended to allow Window World to participate in the proceedings. Orally, the trial court merely stated that it was going to allow the company to participate in the ongoing "discussions."

It is apparent that the trial court expected the details of the order granting intervention to be fleshed out in a written order. This non-specific ruling is not a sufficient rendering to support the entry three years later of a detailed written order *nunc pro tunc*.

The 12 August 2010 order did not simply " 'correct the record to reflect a prior ruling made in fact but defectively recorded,' " and it did not " 'merely recite[] court actions previously taken, but not properly or adequately recorded.' " *Walton v. N.C. State Treasurer*, 176 N.C. App. 273, 276-77, 625 S.E.2d 883, 885 (2006) (quoting 46 Am. Jur. 2d *Judgments* § 156 (2004)). Instead, the written order essentially created an order with findings of fact and conclusions of law that had not previously existed. Yet, it is well established that " 'a *nunc pro tunc* entry may not be used to accomplish something which ought to

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have been done but was not done.’” *Id.* at 277, 625 S.E.2d at 885 (quoting 46 Am. Jur. 2d *Judgments* § 156).

Further, the record contains no evidence and the trial court made no finding regarding why no written order was signed in 2007. It appears from Mr. Vannoy’s testimony that he simply never got around to submitting the order to the trial judge for her signature. Window World has, therefore, failed to demonstrate that the 12 August 2010 order was properly entered *nunc pro tunc*.

Further, the trial court had no jurisdiction to enter an order on 12 August 2010 allowing the motion to intervene because the action had been concluded. As a general principle, “a court retains jurisdiction of a case until final disposition, but jurisdiction ceases with rendition of final judgment or decree except as to certain matters.” 21 C.J.S. *Courts* § 99, at 103 (2006). Consequently, “after final judgment or decree has been rendered, and postjudgment motions have been resolved, . . . the jurisdiction of the court is exhausted, and it cannot take any further proceedings in the case.” *Id.* See also *Lowe v. Bryant*, 55 N.C. App. 608, 612, 286 S.E.2d 652, 654 (1982) (“After the case was closed, the trial court had no authority to rule on the merits of the case.”); *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E.2d 282, 286 (1973) (holding that after a voluntary dismissal terminating a divorce action, “no valid order could be made thereafter in that cause”).

Final disposition of a case is defined as “[s]uch a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.” *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993) (quoting *Black’s Law Dictionary* 630 (6th ed. 1990)). Our courts have further noted that “[i]t is also true that while a court loses jurisdiction over a cause after it renders a final decree, it retains jurisdiction to correct or enforce its judgment.” *Wildcatt v. Smith*, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984).

Here, the final disposition occurred on 24 January 2008 with the entry of the final equitable distribution consent order/judgment. That judgment specifically stated that it “settles and resolves all claims raised by the pleadings.” No post-judgment motions were filed pursuant to Rule 59 or Rule 60, and no appeal occurred. The trial court was not enforcing the judgment or correcting a clerical mistake pursuant to Rule 60(a). In short, no jurisdictional basis existed for the trial court to enter the 12 August 2010 order granting the motion to

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intervene. While Window World argues that a trial court may sign and enter a written order out of term under Rule 58 of the Rules of Civil Procedure, Window World cites no authority—and we have found none—that allows a court to enter an order allowing a motion to intervene two and a half years after the action was finally disposed of.

The legislature has, in some instances, authorized the exercise of “continuing jurisdiction,” which is generally defined as “ ‘[a] court’s power to retain jurisdiction over a matter after entering a judgment, allowing the court to modify its previous rulings or orders.’ ” *Burgess v. Burgess*, 205 N.C. App. 325, 328, 698 S.E.2d 666, 669 (2010) (quoting *In re H.L.A.D.*, 184 N.C. App. 381, 387, 646 S.E.2d 425, 430 (2007), *aff’d per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008)). We have been unable to identify any authorization for “continuing jurisdiction” that would apply in this case. *See, e.g.*, N.C. Gen. Stat. § 6-19.1 (2011) (providing jurisdiction to trial court to grant attorney’s fees for 30 days after final disposition); N.C. Gen. Stat. § 48A-14 (2011) (providing for continuing jurisdiction over trusts established in connection with contracts with minors); N.C. Gen. Stat. § 50A-202 (2011) (continuing jurisdiction in child custody cases).

In sum, we conclude that the trial court had no jurisdiction to enter the 12 August 2010 order. That order was, therefore, void and the trial court should have granted Marie’s motion pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure. Because we have concluded the order was void, we do not express any opinion on Marie’s remaining arguments as to why the order should be set aside. We are, however, concerned about how the 12 August 2010 order came to be entered without prior notice to either Marie or Leon and without even service of the order after its signature.

Reversed and vacated.

Judges ELMORE and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 SEPTEMBER 2012)

IN RE A.S.R. No. 12-334	Greene (10JT28)	Reversed
IN RE C.B.B. No. 12-319	Mecklenburg (11JA583)	Affirmed
IN RE D.D.C. No. 12-495	Guilford (10JT335)	Affirmed
IN RE H.Z.C. No. 12-462	Surry (10JT62)	Affirmed
IN RE J.L.C. No. 12-274	Buncombe (08JA394)	Affirmed
IN RE K.T. No. 12-124	Ashe (11JA27-28)	Affirmed
IN RE L.M. No. 12-333	Stanly (07JA30)	Affirmed
IN RE R.H. No. 12-372	Pitt (09J12) (09JA12)	Affirmed
IN RE S.D.L.K. No. 12-352	Burke (08J9-10)	Reversed
RITCHIE v. RITCHIE No. 12-157	Stanly (04CVD927)	Affirmed in part; Remanded in part.
STATE v. BOLIEK No. 12-140	Cleveland (09CRS56684) (09CRS56685)	Dismissed in Part, Affirmed in Part.
STATE v. EASON No. 12-7	Johnston (10CRS57477-81) (11CRS1782)	No Error
STATE v. FLIPPEN No. 12-125	Rockingham (10CRS52208)	No Error
STATE v. GIBSON No. 12-74	Scotland (10CRS53430) (11CRS129)	No prejudicial error

STATE v. HERNANDEZ No. 12-5	Johnston (08CRS54280)	No Error
STATE v. LAMBERT No. 11-1574	Mecklenburg (07CRS245994-95)	Dismissed
STATE v. PATTERSON No. 12-29	Mecklenburg (10CRS230019) (10CRS230020)	No Error
STATE v. SEGAL No. 11-1201	Lincoln (06CRS53287)	No Error
STATE v. SINGLEY No. 11-1556	Henderson (10CRS447)	No Error
STATE v. THOMPSON No. 11-1582	Mecklenburg (09CRS227276)	No Error
THORNTON v. CITY OF RALEIGH No. 11-1503	Indust. Comm. (216738)	Affirmed in part and remanded in part.
WHITE v. BALD HEAD ISLAND YACHT CLUB No. 12-210	Brunswick (10CVS2426)	Affirmed
WHITWORTH v. WHITWORTH No. 11-989	Wilkes (10CVS831)	Affirmed in part; reversed in part

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SONIA RAPAPORT PELTZER, PLAINTIFF v. DAVID ERIC PELTZER, DEFENDANT

No. COA12-41

(Filed 18 September 2012)

1. Divorce—equitable distribution—unequal division—findings—postseparation payment—distributional factor

The trial court did not abuse its discretion in an equitable distribution case by making an unequal division of marital property. Defendant retained an unequal distribution of 55% to 45% in his favor rather than the 80% to 20% division in plaintiff's favor as defendant contended. Further, the trial court considered the factors in N.C.G.S. § 50-20(c). Finally, the trial court's findings showed that it considered defendant's postseparation payment as a distributional factor.

2. Divorce—equitable distribution—distributive award—liquid assets

The trial court did not abuse its discretion in an equitable distribution case by concluding that defendant had sufficient liquid assets to satisfy the distributive award. The trial court's order of an 18 month period of \$2,000 payments was reasonable, as defendant's monthly disposable income of \$8,500 would be sufficient to cover this portion of the distributive award. Also, the marital residence could be refinanced or sold to cover the remaining amount to be paid in 18 months, giving defendant sufficient time to sell or refinance the property.

3. Divorce—equitable distribution—postseparation payments—maintenance and preservation of marital residence

The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider postseparation payments made by defendant for the benefit of the marital estate. The trial court gave proper consideration of defendant's contributions to maintain and preserve the marital residence pursuant to N.C.G.S. § 50-20(c)(11a).

4. Divorce—equitable distribution—valuation—medical practice—invited error—tax consequences—discount

The trial court did not err by allegedly adopting a false value of defendant's interest in his medical practice or by failing to consider the tax consequences with respect to its valuation. Any

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error in the trial court's reliance on defendant's expert witness in its finding on valuation or methodology was invited error. Further, the trial court was not required to make a finding regarding speculative or hypothetical tax consequences of the sale of defendant's medical practice since the trial court did not order defendant's medical practice to be sold to satisfy the distributive award. However, the case was remanded to the trial court for clarification of finding of fact 91 regarding the "discount" in the valuation of the medical practice.

Appeal by defendant from order entered 4 May 2011 by Judge C. Thomas Edwards in District Court, Catawba County. Heard in the Court of Appeals 16 August 2012.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

STROUD, Judge.

David Eric Peltzer ("defendant") appeals from the trial court's equitable distribution order. For the following reasons, we affirm in part the trial court's order and remand for clarification of a finding of fact.

I. Background

On 1 March 2006, Sonia Rapaport Peltzer ("plaintiff") filed a complaint alleging claims for *inter alia* divorce from bed and board and equitable distribution. On 2 May 2006, defendant filed his answer to plaintiff's complaint raising a counterclaim for *inter alia* equitable distribution, which was subsequently amended on 8 May 2006. On 17 May 2006, plaintiff filed an equitable distribution affidavit, disclosing "all marital and separate property known to [her][,]" which was subsequently amended on 1 June 2006 and 5 June 2007. The parties were granted a divorce by judgment entered 7 December 2006. On 27 February 2007, defendant filed an equitable distribution affidavit, disclosing "all marital and separate property." On 14 May 2009, the trial court entered an equitable distribution pretrial order, stating the parties' stipulations and limiting the issues for trial. On 10 July 2009, defendant filed a motion regarding the equitable distribution trial, requesting that plaintiff have a ring appraised, the deed for the timeshare be returned to defendant, the pretrial order be amended to per-

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mit defendant to present expert testimony regarding values of the marital residence, and to allow defendant to “call Mark Snell, CPA as an expert witness.” On 3 August 2009, the trial court entered an order, requiring plaintiff to submit the ring for appraisal and defendant to submit his contentions as to the date of separation value of his medical practice, as he had failed to state a value in his Equitable Distribution Affidavit. On 14 August 2009, defendant submitted his list of expert witnesses he planned to call at trial, including Mark A. Snell, CPA. Following a trial from 12 to 16 October 2009, the trial court on 4 May 2011, entered an equitable distribution order. Defendant filed notice of appeal from the trial court’s equitable distribution order on 2 June 2011. On appeal, defendant argues that (1) “the trial court erred in making an unequal division of martial property[;]” (2) the equitable distribution order “does not contain any provision indicating [he] has sufficient liquid assets to satisfy the distributive award[;]” (3) “the trial court committed reversible error by failing to consider post[-]separation payments made by the spouse for the benefit of the marital estate[;]” (4) “the trial court reversibly erred by adopting a false value of the defendant’s interest in Newton Family Practice and did not consider the tax consequences with respect to its valuation[;]” and (5) “Because of the multitude of errors in classification, valuation, and distribution” defendant is entitled to a new equitable distribution trial.

II. Standard of review

We have stated that

[t]he standard of review on appeal from a judgment entered after 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. The trial court’s findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.

Pegg v. Jones, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (citations and quotation marks omitted), *aff’d per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). “The trial court’s findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (citations and quotation marks omitted).

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As to the actual distribution ordered by the trial court, “[w]hen reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *Petty v. Petty*, N.C. App. , , 680 S.E.2d 894, 898 (2009) (citations and quotation marks omitted), *disc. review denied and appeal dismissed*, 363 N.C. 806, 691 S.E.2d 16 (2010).

Stovall v. Stovall, 205 N.C. App. 405, 407-08, 698 S.E.2d 680, 683 (2010). The trial court’s unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Best v. Gallup*, _____ N.C. App. _____, _____, 715 S.E.2d 597, 598 (2011) (citation omitted), *appeal dismissed and disc. review denied*, _____ N.C. _____, 724 S.E.2d 505 (2012).

III. Unequal Division

[1] Defendant argues that the trial court abused its discretion in making an unequal division of marital property. Defendant argues that the marital property was unequally divided, with plaintiff receiving 80% and him receiving only 20% of the marital property and that the trial court failed to make findings explaining why an equal division would not be equitable. In illustrating his point, defendant states that plaintiff received \$85,000 of his separate property, in a Fidelity account, as stated in findings of fact 68 and 69, but no credit was given to him for this receipt of his separate property. Defendant further argues that the trial court made no specific findings as to the factors contained in N.C. Gen. Stat. § 50-20(c) in its unequal division but only “broad statements” in findings 90-92 and 99. Defendant concludes that because of these errors the case should be remanded for further findings.

Plaintiff counters that defendant actually received an “unequal distribution [of] 45% to 55% in favor of Defendant.” (emphasis in original). Plaintiff argues that the trial court “specifically considered a number of distributional factors [from N.C. Gen. Stat. § 50-20(c)] in awarding Defendant an unequal distribution” in its findings of fact, which supported the trial court’s “determination [that] an unequal distribution was equitable[.]” Plaintiff argues that defendant’s argument that he is entitled to a dollar-for-dollar credit for the \$85,000 fails because (1) the trial court properly considered this post-separation payment of separate property from investment accounts as a distributive factor in lieu of giving defendant a dollar-for-dollar

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credit and since there was a 55% distribution in his favor this did not result in any prejudice to him and (2) defendant was not entitled to distribution of the post-separation use of his separate property because separate property is not subject to equitable distribution.

N.C. Gen. Stat. § 50-20(c) provides that

[t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection[.]

N.C. Gen. Stat. § 50-20(c) (2007). The statute goes on to list distributive factors (1) through (12). *See id.* Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citation omitted). We have further stated that “[t]he trial court must . . . make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50-20(c) (2001) on which the parties offered evidence.” *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003) (citing *Rosario v. Rosario*, 139 N.C. App. 258, 260-61, 533 S.E.2d 274, 275-76 (2000)). A blanket statement that the trial court considered or gave “due regard” to the distributional factors listed in N.C. Gen. Stat. § 50-20(c) is insufficient as a matter of law. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

First, we note that it appears that defendant has miscalculated the percentages of the marital estate awarded to each party. The trial court found the net marital estate to be \$886,234.00, which is not challenged by defendant. *See Best*, ____ N.C. App. at ____, 715 S.E.2d at 598. Of this amount, defendant received property and debts with a net value of \$708,161.00. Defendant was also ordered to pay a distributive award of \$220,732.00, secured by the marital residence located in Newton, North Carolina. Therefore, defendant retained \$487,429.00 of the marital estate, amounting to an unequal distribution of 55% to 45% in defendant’s favor, rather than the 80% to 20% division in plaintiff’s favor, as defendant contends. We also note that it would have been helpful for the order to be more specific as to the distributional percentages; as noted in more detail below, the equitable distribution order is disorganized and quite difficult to understand, but by using some basic math, we can determine the distributional percentages.

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Also, contrary to defendant's arguments, the trial court concluded that "an Unequal Distribution of the Net Marital Estate is Equitable." In support of this conclusion, the trial court made several specific findings of fact related to several of the equitable distribution factors listed in N.C. Gen. Stat. § 50-20(c). We concede that picking out the findings which address the factors under N.C. Gen. Stat. § 50-20(c) is challenging, as the order does not address the identification, classification, and valuation of the property and the distributional factors in any logical or organized manner, but instead is written in a style perhaps best described as stream of consciousness. While stream of consciousness is a well-recognized literary style, it is not well suited to court orders.¹ Yet after sifting through the findings, we find that we can match them up with the statutory distributional factors. Findings of fact 26-37, 49-50, 52, 58-60, 66-67, 73, 78, 82-83, and 93 list the parties' income, properties, and liabilities, including their current medical practices, pursuant to the first factor N.C. Gen. Stat. § 50-20(c)(1). In findings 9-10, 41-43, and 99, the trial court considered factor N.C. Gen. Stat. § 50-20(c)(3), making findings regarding the "fourteen plus" year duration of their marriage, and the parties' ages, and physical and mental health. Findings of fact 70 and 91 relate to defendant's "deferred compensation" retirement accounts and profit sharing plans, pursuant factor N.C. Gen. Stat. § 50-20(c)(5). Pursuant to factor N.C. Gen. Stat. § 50-20(c)(6), the trial court made findings 13-14, 17, 26-27, 44, and 80-81 regarding the contributions of the parties as "spouse, parent, wage earner or homemaker," including defendant's role as the wage earner for the family, plaintiff's reduction in workload and retirement to care for their children, and the very serious and long term medical needs of two of their four children. Findings 13, 26, 44, 46, 69, 81, and 94 relate to the parties' contributions to their education or development of the parties' medical practices, pursuant to factor N.C. Gen. Stat. § 50-20(c)(7). Also findings 48-50, 52-53, and 72-73 relate to defendant's non-liquid interest in his medical practice and note the difficulty in valuing this interest, pursuant to factors N.C. Gen. Stat. § 50-20(c)(9) and (10). Finding of fact 72 discusses the tax consequences of selling defendant's interest in his medical practice, pursuant to factor N.C. Gen.

1. Magistrate Judge Carlson further explains this literary device: "Like some of the works of the great Irish literary figure, James Joyce, aspects of this pleading are written in a stream-of-consciousness style, one which presumes that the reader has a unique insight into the thoughts of the writer and can thus give meaning to seemingly unconnected ideas. In the hands of a literary stylist like Joyce, this manner of expression can be challenging; in the hands of counsel it is sometimes incomprehensible." *Lease v. Fishel*, 712 F. Supp. 2d 359, 376 (M.D. Pa. 2010).

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Stat. § 50-20(c)(11). Findings of fact 61-65, 75-76, and 96 relate to defendant's efforts to maintain their marital or divisible property since separation, including lawn care services, and mortgage, insurance, and property tax payments, pursuant to factor N.C. Gen. Stat. § 50-20(c)(11a). Defendant has not identified any other potential distributional factor for which evidence was presented that the trial court failed to address. *See Embler*, 159 N.C. App. at 188, 582 S.E.2d at 630. Accordingly, we find no merit in defendant's argument that the trial court did not specifically consider the factors in N.C. Gen. Stat. § 50-20(c).

As to defendant's argument that he received "no credit . . . for the Plaintiff's receipt of over \$85,000 of the Defendant's separate property" in 2005 for her education expense and other expenses after their separation on 12 October 2004, we note that the trial court in findings of fact 68 and 69 made detailed findings regarding these payments. It was considered as a factor in equitably distributing the marital estate, as specifically stated in finding of fact 97: "The Court has also considered that the Defendant voluntarily disbursed to the Plaintiff \$85,179 from his Separate Property, in the 1986 Vanguard Investment Accounts and successor account[.]" Post-separation payments may be treated as a distributional factor or as a dollar-for-dollar credit in the division of the property. *Squires v. Squires*, 178 N.C. App. 251, 261, 631 S.E.2d 156, 162 (2006). Here, the trial court's findings show that it considered defendant's post-separation payment as a distributional factor and, accordingly, we find no abuse of discretion. Defendant's arguments are overruled.

IV. Sufficient Liquid Assets

[2] Defendant next contends that the trial court erred in making its equitable distribution order as it "does not contain any provision indicating [defendant] has sufficient liquid assets to satisfy the distributive award" of over \$220,000. Defendant argues that there is no evidence that he has liquid assets totaling the amount of the distributive award, beyond his ownership interest in his medical practice which has "no realistic market" for those shares to be sold, and, if sold, would result in negative tax consequences for him. Defendant concludes that this Court should remand to the trial court for "findings regarding the source of funds for the payment of the distributive award and the tax consequences" and if he is to take out a loan or withdraw from his investment accounts to satisfy this distributive award, to consider the negative tax consequences of withdrawal and his payment of interest on such a loan, and his payment of alimony

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and child support. Plaintiff counters that the trial court's order shows that it did not intend for defendant to liquidate his interest in his medical practice to satisfy this distributive award but intended this distributive award to be satisfied initially by defendant's disposable income, after child support, and by the sale or refinance of the marital residence which was used as security for this distributive award.

This Court stated that, "if a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." *Pellom v. Pellom*, 194 N.C. App. 57, 69, 669 S.E.2d 323, 329-30 (2008), *disc. review denied*, 363 N.C. 375, 678 S.E.2d 667 (2009). We have further held that "the money derived from refinancing the mortgage on the marital home [is] a source of liquid funds available to [a] defendant." *Allen v. Allen*, 168 N.C. App. 368, 376, 607 S.E.2d 331, 337 (2005).

Here, the trial court found that "Defendant has net available disposable income after the payment of child support in the approximate amount of \$8,500.00 per month." The trial court further found that although the parties' marital residence had a "net Date of Separation value of \$131,009.00" the net value had by the date of distribution increased to \$192,931.00. Defendant does not challenge these findings. *See Best*, ___ N.C. App. at ___, 715 S.E.2d at 598. As to the distributive award, the trial court ordered:

3. That the Defendant shall pay to the Plaintiff a Distributive Award in the amount of \$220,732.00 at the rate of \$2,000.00 per month beginning July 1, 2011, and alike in similar sum on the first day of each month thereafter through and including December 1, 2012 (18 x \$2,000 = \$36,000). The balance of the Distributive Award \$184,732.00 (\$220,732.00 - \$36,000.00 = \$184,732.00) shall be paid by the Defendant to the Plaintiff on or before January 1, 2013. That the balance of the Distributive Award \$184,732.00 shall accrue at the legal rate on and after January 1, 2013.
4. That the Distributive Award in the amount of \$220,732.00 shall be a lien against the residence at 1457 O'Brian Drive, Newton, North Carolina until paid in full.

The trial court's order of an 18 month period of \$2,000 payments was reasonable, as defendant's monthly disposable income of \$8,500 would be sufficient to cover this portion of the distributive award. Also, the marital residence, valued at the date of distribution at \$192,931.00, could be refinanced or sold, to cover the remaining \$184,732.00, to be paid in 18 months, giving defendant sufficient time

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to sell or refinance the property. *See Allen*, 168 N.C. App. at 376, 607 S.E.2d at 337. As sufficient “liquid assets can be ascertained from the record,” to pay the distributive award, we must affirm this portion of the trial court’s order. *See Pellom*, 194 N.C. App. at 69, 669 S.E.2d at 329-30. As the findings show there were sufficient funds from defendant’s monthly disposable income and equity in the marital residence to pay for the distributive award, we need not address defendant’s argument regarding the liquidation of his medical practice and the resulting tax consequences. Accordingly, we find no abuse of discretion and defendant’s arguments are overruled.

V. Post-Separation Payments

[3] Defendant next contends that the trial court erred “by failing to consider post separation payments made by the spouse for the benefit of the marital estate.” Defendant contends that although the trial court found that he had paid routine maintenance for the former marital residence and paid the mortgage on the marital residence since the date of separation, the trial court did not assign values to the maintenance nor did it total the amount of mortgage payments, which would have been in excess of \$25,000.00. Defendant argues that although the trial court “considered” these acts to preserve the parties’ marital and divisible property, these findings are too general to allow for proper appellate review and would not support the “80/20” division of property in plaintiff’s favor. Defendant concludes that the “award [to] Plaintiff [of] 80% of the marital estate should be reversed and remanded for additional findings” and to take evidence based on the existing record. Plaintiff counters that the trial court expressly valued and considered these post-separation payments as a distributional factor in making an unequal distribution of 55% to 44% in defendant’s favor.

We first note that defendant’s arguments in favor of reversing and remanding the trial court’s order are based on an incorrect calculation of the distribution of the marital estate. As determined above, the trial court’s distribution of the marital estate was 55% to 44% in defendant’s favor, not 80% to 20% in plaintiff’s favor. Even so, we find no merit in defendant’s arguments. As noted above, N.C. Gen. Stat. § 50-20(c) states that “If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall *consider* all of the following factors under this subsection[.]” (emphasis added). “Payment by one of the spouses, after the date of separation, on a marital home mortgage is a factor appropriately considered by the trial court pursuant

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to N.C.G.S. § 50-20(c)(11a) and (12) (1987) in determining what division of marital property is equitable.” *Miller v. Miller*, 97 N.C. App. 77, 80-81, 387 S.E.2d 181, 184 (1990).

Defendant essential contends that the trial court did not properly “consider” his contributions pursuant to factor N.C. Gen. Stat. § 50-20(c)(11a) because it did not assign a value to his payment of routine maintenance of their marital residence or list a total figure for his mortgage payments. However, the trial court’s detailed findings show that it properly considered his mortgage payments in making its equitable distribution. Even though the trial court did not give a total figure for the mortgage payments in finding of fact 64, this is easily totaled as the trial court specifically found that defendant paid \$2,000 per month from 1 November 2004 until 1 December 2005 and \$1,883.19 per month from 1 January 2006 until 1 December 2009, amounting to around \$114,500.00 in post-separation mortgage payments. The trial court specifically found that it had “considered those payments in Equitable Distribution.” As for the routine maintenance of the marital residence, defendant cites no law to support his argument that the trial court was required, in its consideration of factor N.C. Gen. Stat. § 50-20(c)(11a), to include exact money values for payment of routine maintenance, including lawn care services, extermination services, natural gas bill, and utilities from the date of separation in October 2004 until the date of trial. The trial court also found that defendant had been living at least part-time in that residence during that period of time and from January 2006 forward defendant had lived full-time in the marital residence. The fact that defendant was living in the marital residence and thus benefitting personally from his maintenance of the home is also a proper consideration pursuant to factor N.C. Gen. Stat. § 50-20(c)(11a). See *Plummer v. Plummer*, 198 N.C. App. 538, 547, 680 S.E.2d 746, 752 (2009) (stating that factor N.C. Gen. Stat. § 50-20(c)(11a) “permits the trial court to consider plaintiff’s maintenance of the property and retention of the benefits of the property[.]”) It is clear from the findings that the trial court gave proper consideration of defendant’s contributions to maintain and preserve the marital residence, pursuant to N.C. Gen. Stat. § 50-20(c)(11a). Accordingly, we find no abuse of discretion and defendant’s argument is overruled.

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VI. Valuation of Medical Practice

A. Evidence of value of practice

[4] Lastly, defendant argues that the trial court erred “by adopting a false value of the defendant’s interest in [his medical practice] and did not consider the tax consequences with respect to its valuation.” Defendant argues that the trial court did not utilize any acceptable valuation methodology in coming to its valuation of his medical practice. Defendant argues that the trial court’s findings are “based . . . upon factual inaccuracy and show how flawed this valuation and distribution was” as his expert witness Mark Snell offered no opinion with respect to the value of defendant’s medical practice but merely gave pre-tax and after-tax estimates of the value of stock in the medical practice; Mr. Snell used no established valuation methodology but used a “rule of thumb” or “common sense” method to value the practice; and neither party obtained an expert to value the medical practice at the date of separation or date of distribution. Defendant also argues that the trial court failed to consider the “adverse tax consequences on Defendant’s shares of stock” in the medical practice, even though his expert, Mr. Snell testified at length about the tax consequences of the income with respect to the liquidation of the stock. Defendant further contends that the trial court found that because of the closed nature of the medical practice any valuation should be discounted but did not make this discount in the order. Defendant concludes that “[u]nless the court can point to a non-taxable, liquid source of funds for the distributive award,” he would be forced to pay the distributive award “using after-tax dollars to pay for a pre-tax valuation number.” Plaintiff argues that any error in defendant’s expert witness’s valuation or valuation methodology amounts to invited error, as the parties had agreed in the pretrial order that the shares of defendant’s medical practice should go to defendant, leaving only the issue of the value of the shares to be decided at trial, and the trial court adopted defendant’s expert witness’s reasoning, methodology, and valuation for the medical practice in its findings. Plaintiff argues that defendant’s expert Mr. Snell used a reasonable methodology in calculating the approximate net value of the medical practice, by taking into account the collections over a two year period, averaging those by a factor of 50%, and dividing this by the number of outstanding shares to arrive at a per share price of \$14,239; defendant held 23.056 shares at the time of separation and Mr. Snell determined they were valued at \$328,294. Plaintiff lastly argues that the trial court was not required to take into account hypo-

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thetical tax consequences from the sale of the medical practice, as it found it unlikely that defendant was going to sell his shares in the medical practice.

We have recently stated that

Invited error has been defined as “a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining.” The evidentiary scholars have provided similar definitions; e.g., “the party who induces an error can’t take advantage of it on appeal”, or more colloquially, “you can’t complain about a result you caused.”

21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841 (2d ed.2005) (footnotes omitted); see also *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (“A party may not complain of action which he induced.” (citations omitted)).

Boykin v. Wilson Med. Ctr., 201 N.C. App. 559, 563, 686 S.E.2d 913, 916 (2009), *disc. review denied*, 363 N.C. 853, 694 S.E.2d 200 (2010).

Romulus v. Romulus, ____ N.C. App. ____, ____, 715 S.E.2d 308, 329 (2011). As noted by plaintiff, the parties in the pretrial order agreed that defendant’s shares in the medical practice were to be distributed to defendant, but disagreed as to the value of this marital property. Therefore, the only issue as to defendant’s medical practice at trial was the value. Defendant listed “Mark A. Snell, CPA” as an expert witness for the purpose of giving a value to the medical practice. Based upon the pretrial order and other orders entered prior to trial addressing valuation issues and expert witnesses who may be called at trial, defendant was well aware that his witness would be the only expert called to provide evidence as to valuation of his practice. At trial, defense counsel offered Mr. Snell as an expert in the valuation of medical practices, elicited during direct examination of Mr. Snell his determinations as to the value of defendant’s medical practice, including the methodology he used in coming to this value, and offered into evidence documentation supporting this valuation.² By

2. We note that the only written findings regarding the valuation of the medical practice in the order are recitations of Mark Snell’s testimony. See *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (stating that that “verbatim recitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.”). As with the dis-

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calling Mr. Snell as his expert witness specifically to testify as to the valuation of the medical practice, any error in the trial court's reliance in its finding on Mr. Snell's valuation or methodology is invited error.

We also note that the burden of proof as to the valuation of the medical practice was upon defendant, to the extent that he seeks on appeal to challenge it. This Court has held that where a party failed to present evidence as to a value of an item of marital property, he cannot claim on appeal that the trial court erred by failing to assign a value to it. "The party claiming that property is marital property must also provide evidence by which that property is to be valued by the trial court." *Young v. Gum*, 185 N.C. App. 642, 647-48, 649 S.E.2d 469, 474 (2007) (citing *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990)), *disc. review denied*, 362 N.C. 374, 662 S.E.2d 552 (2008). To the extent that there are any deficiencies in defendant's expert witness's evidence, this amounts only to defendant's failure to carry his burden of proof and not to reversible error. Accordingly, this argument is overruled.

B. Tax consequences of sale of medical practice

We next turn to address defendant's argument regarding the trial court's failure to account for the adverse tax consequences of selling his medical practice. N.C. Gen. Stat. § 50-20(c)(11) states that the trial court shall consider as a factor:

The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

The trial court correctly followed the statute in making the appropriate considerations regarding the tax consequences and whether they were "reasonably likely to occur" in its findings. Specifically, the trial

tribunational factors, the valuation of the medical practice is not so easy to find. The trial court's finding as to the actual date of separation value of defendant's medical practice, \$328,294.00, is found only in the "Schedule A," which lists the values of marital property and is incorporated by reference into the equitable distribution order. A better practice would have been to make a clear finding of fact in the order stating the trial court's finding as to the valuation of the medical practice at \$328,294.00 and how the court arrived at this value, as addressed in the next argument.

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court found that “Mr. Snell has opined that the sell [sic] of [defendant’s] shares in Newton Family Physicians, P.A. would have federal and state tax consequences, decreasing the Date of Separation value from \$328,294.00 to \$197,092.00.” The trial court also found that it had considered

the potential federal and state tax consequences should the Defendant’s interest in Newton Family Physicians be sold or liquidated on the date of valuation; the Court finding that such tax consequences are unlikely given the Defendant’s relative youth and his vested interest in continuing the protective and financially rewarding practice at Newton Family Physicians, although a discount is appropriate considering the unwritten, informal nature of the Newton Family Physician business.

This Court has further stated that the trial court is only required to consider the tax consequences pursuant to factor N.C. Gen. Stat. § 50-20(c)(11) that will result from the distribution the court actually orders, not speculative or hypothetical tax consequences. *Cochran v. Cochran*, 198 N.C. App. 224, 238, 679 S.E.2d 469, 478 (2009), *disc. review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010); *Crowder v. Crowder*, 147 N.C. App. 677, 683, 556 S.E.2d 639, 643 (2001) (stating that the “[v]aluation of marital property may include tax consequences from the sale of an asset only when the sale is imminent and inevitable, rather than hypothetical or speculative.” (emphasis in original)). Here, the trial court did not order defendant’s medical practice to be sold to satisfy the distributive award. Also, as determined above, the distributive award could be covered by defendant’s disposable income and the proceeds from the refinancing or sale of the marital residence. Therefore, the trial court found that it was unlikely that the practice would be sold. As the trial court was not required to make a finding regarding speculative or hypothetical tax consequences of the sale of defendant’s medical practice, *see Cochran*, 198 N.C. App. at 238, 679 S.E.2d at 478, we find no abuse of discretion and defendant’s argument is overruled.

C. Discount to value of medical practice

Defendant contends that the trial court found that because of the nature of his medical practice any valuation should be discounted but did not apply this discount in the order. Finding of fact 91 addresses this discount to the valuation of the practice and states, in pertinent part, as follows:

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the Court finding that such tax consequences are unlikely given the Defendant's relative youth and his vested interest in continuing the protective and financially rewarding practice at Newton Family Physicians, although *a discount is appropriate considering the unwritten, informal nature of the Newton Family Physician business.*

(Emphasis added.) At trial, Mark Snell testified regarding the closely held nature of the medical practice; the informal nature of the shareholders' noncompete and consulting agreements which were considered in the valuation of the medical practice; and the basis for his valuation, which was 50% of the gross annual receipts because he thought that this was the best method for valuing medical practices such as defendant's medical practice. From these findings, it is unclear what "discount" the trial court applied to determine the value of the practice. Finding No. 91 implies that the trial court was considering the same "discount" that Mr. Snell applied in his valuation, as Mr. Snell considered the fact that the practice was closely held and informally organized, and he used 50% of the gross annual receipts and not some higher percentage as the basis for his valuation, but we cannot say for sure. The evidence is sufficient to support such a finding, but we are not at liberty to make it. As noted above, the findings regarding Mr. Snell's testimony are largely recitations of testimony and not actual findings of fact and the ultimate valuation of \$328,294.00 is stated only in Exhibit A to the order. We cannot determine from the findings of fact what the "discount" the trial court found to be "appropriate" was or how it was calculated. It is possible also that the value as stated on Exhibit A incorporates this "discount," and if so, the trial court need only make additional findings which are sufficiently specific to permit meaningful appellate review of that valuation. Accordingly, we remand to the trial court for clarification of finding of fact 91 regarding the "discount" in the valuation of the medical practice.

Finally, defendant argues that "because of the multitude of errors in classification, valuation, and distribution committed by the trial court [he] is entitled to a new equitable distribution trial rather than a remand to correct the errors." As we have overruled all of defendant's arguments regarding the various errors he alleged, except for remanding for clarification of one of the trial court's findings of fact, defendant has not shown any basis for a new equitable distribution trial.

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For the foregoing reasons, we affirm in part the trial court's equitable distribution order and remand for clarification of the trial court's finding of fact, as discussed above.

AFFIRMED in PART; REMANDED IN PART.

Judges CALABRIA and Judge McCULLOUGH concur.

GREGORY S. SCADDEN, PLAINTIFF v. ROBERT HOLT, INDIVIDUALLY, ROBERT HOLT, IN HIS OFFICIAL CAPACITY, AND THE TOWN OF NEWPORT, DEFENDANTS

No. COA12-303

(Filed 18 September 2012)

Negligence—respondeat superior—no duty to control actions of third party

The trial court did not err by granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff's negligence claim under the theory of *respondeat superior*. The facts alleged in the complaint were inadequate to impose a legal duty on defendant Holt, an EMT, because they failed to establish both that defendant had a right to control the patient and that he had the requisite knowledge of the patient's dangerousness.

Appeal by plaintiff from order entered 2 November 2011 by Judge Arnold O. Jones, II, in Superior Court, Carteret County. Heard in the Court of Appeals 27 August 2012.

Riddle and Brantley, LLP, by Donald J. Dunn, for plaintiff-appellant.

Cranfill Sumner and Hartzog LLP, by Christopher M. Hinnant, Angela W. Dinoto, and Carolyn C. Pratt, for defendants-appellees.

STROUD, Judge.

I. Factual Background

On 29 April 2011, Gregory Scadden ("plaintiff") filed a complaint against Robert Holt, both individually and in his official capacity as an emergency medical service provider working for the Town of

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Newport, as well as against the Town of Newport itself (“defendants”). The following facts were alleged in the complaint:

On May 2, 2008, plaintiff was a deputy sheriff employed with the Carteret County Sheriff’s Department and was on duty and on patrol in his sheriff’s vehicle when he received a dispatch call to assist EMS [Emergency Medical Services] at the home of an individual[.] . . . Dispatch had advised plaintiff when making the call that the patient was combative and uncooperative. When plaintiff arrived on the scene [defendant] Holt and two EMS attendants, along with another deputy sheriff, had loaded the patient and stretcher into the Town of Newport EMS vehicle. Plaintiff walked up to the ambulance and stepped up into the back of the vehicle at the foot of the stretcher. The patient was agitated and unruly, so plaintiff advised the other deputy to handcuff the patient’s arms to allow EMS to start an IV on the patient. When plaintiff ordered the deputy to handcuff the patient, the patient attempted to kick plaintiff from the patient’s prone position on the stretcher. Plaintiff, to protect himself from the kick, extended his arms and bent over quickly to block the kick and pin patient’s legs to the stretcher. While restraining the patient’s legs, plaintiff noticed that the patient’s legs had not been strapped or restrained in any way prior to this event. After securing the patient’s legs and as plaintiff straightened up, he felt a sharp, pinching pain in his lower back. From this event plaintiff suffered a severe and permanent low back injury.

Plaintiff claims that the above facts show that defendant Holt was negligent in failing to properly restrain the patient. Plaintiff’s only claims against the Town of Newport arise through *respondeat superior* from the alleged negligence of defendant Holt. Plaintiff also raised an uninsured motorist claim in his complaint.

On 27 June 2011, defendants filed a motion to dismiss in their answer on the basis of the complaint’s alleged violation of Rule 9(j) of N.C. Gen. Stat. § 1A-1 and under Rule 12(b)(6) for failing to state a claim. The trial court granted defendants’ motion to dismiss by a written order entered 2 November 2011. Plaintiff timely filed written notice of appeal from the trial court’s order on 28 November 2011.

II. Standard of Review

Plaintiff’s only argument on appeal is that the trial court erred in granting defendants’ 12(b)(6) motion to dismiss. *See* N.C. Gen. Stat.

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§ 1A-1, Rule 12(b)(6). A 12(b)(6) motion to dismiss “tests the legal sufficiency of the complaint.” *Lambeth v. Media General, Inc.*, 167 N.C. App. 350, 352, 605 S.E.2d 165, 167 (2004) (citations and quotation marks omitted).

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (citation and quotation marks omitted).

III. 12(b)(6) Motion to Dismiss

Plaintiff appeals from the trial court’s order entered 2 November 2011 granting defendants’ motion to dismiss. Plaintiff argues that the trial court erred by dismissing his complaint because defendant Holt owed plaintiff a legal duty to control his patient and prevent him from kicking plaintiff.¹ For the following reasons, we affirm the trial court’s order.

A. Third-Party Tortfeasor Standard

For a common law negligence complaint “[t]o withstand a motion to dismiss . . . [it] 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.” *Lambeth*, 167 N.C. App. at 352, 605 S.E.2d at 167. If the facts as alleged by the plaintiff, taken as true, are insufficient to establish that the defendant owed the plaintiff a legal duty or standard of care, the complaint must be dismissed. *See id.*

1. Plaintiff does not raise the issue of his uninsured motorist claim on appeal. That issue is therefore abandoned. N.C.R. App. P. 26 (b)(6). Plaintiff’s claims against defendant Holt, in his individual capacity and in his official capacity, and against the Town of Newport all arise from the same alleged duty that defendant Holt owed plaintiff. Plaintiff’s argument that the trial court erred in determining defendant owed no duty to plaintiff therefore preserves all three remaining claims.

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In general, there is neither a duty to control the actions of a third party, nor to protect another from a third party. *King v. Durham County Mental Health Developmental Disabilities and Substance Abuse Authority*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774 (1994), *disc. rev., denied* 336 N.C. 316, 445 S.E.2d 396 (1994). However,

[a]n exception to the general rule exists where there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct; or a special relationship between the defendant and the injured party which gives the injured party a right to protection.

Hedrick v. Rains, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283-84, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996) (quotation marks omitted),

Some examples of such recognized special relationships include: (1) parent-child, (2) master-servant, (3) landowner-licensee, (4) custodian-prisoner, and (5) institution-involuntarily committed mental patient.

King, 113 N.C. App. at 346, 439 S.E.2d at 774 (citations and quotation marks omitted).² These are not the only special relationships which have been held to create a duty of protection or control. *See, e.g. Smith v. Camel Cab Co.*, 227 N.C. 572, 574, 42 S.E.2d 657, 658-59 (1947) (holding that a common carrier can be liable for a third-party assault where the injury was reasonably foreseeable and within the scope of the special relationship, i.e. in transit). Rather, where the

2. There must be some relationship between either defendant and plaintiff, or defendant and the tortfeasor to justify imposition of a duty as to third parties. The same relationship can be found in some circumstances to impose a duty to control a third party, and in others it can be found to impose a duty to protect the injured party from third parties. *Compare Pangburn*, 73 N.C. App. at 338, 326 S.E.2d at 367 (holding that a mental institution has a duty to control its involuntarily committed patients), and *Moore v. Crumpton*, 55 N.C. App. 398, 406-07, 285 S.E.2d 842, 846-47 (1982) (discussing a parent's duty to control children), with *Thornton v. F.J. Cherry Hospital*, 183 N.C. App. 177, 182, 644 S.E.2d 369, 374 (2007) (observing that a "hospital, much like the proprietor of any public facility, owes a duty to its invitees to protect the patient against foreseeable assaults by another patient." (citation and quotation marks omitted)), and *Coleman v. Cooper*, 89 N.C. App. 188, 198, 366 S.E.2d 2, 8-9 (1988) (holding that parents owe a duty to protect their children from harm), *overruled in part by Hunt By and Through Hasty v. North Carolina Dept. of Labor*, 348 N.C. 192, 198, 499 S.E.2d 747, 750 (1998) (holding that the special relationship exception does not apply to the public duty doctrine). Which duty the relationship may impose depends on whether the defendant was party to a special relationship with the tortfeasor or the injured party.

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underlying justification for imposing a duty to protect or control applies, a court may find that a special relationship exists.³

A finding that a special relationship exists and imposes a duty to control is justified where “(1) the defendant knows or should know of the third person’s violent propensities *and* (2) the defendant has the ability and opportunity to control the third person at the time of the third person’s criminal acts.” *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 330, 626 S.E.2d 263, 269 (2006) (emphasis added). The ability and opportunity to control must be more than mere physical ability to control. Rather, it must rise to the level of custody, or legal right to control. *Compare Pangburn v. Saad*, 73 N.C. App. 336, 338, 326 S.E.2d 365, 367 (1985) (holding that defendant psychiatrist owed duty not to release dangerous, *involuntarily* committed patient), *and Gregory v. Kilbride*, 150 N.C. App. 601, 606, 565 S.E.2d 685, 690 (2002) (“an independent duty arises to protect third persons from harm by the release of a mental patient who is *involuntarily* committed.” (emphasis added and citation omitted)), *disc. rev. denied*, 357 N.C. 164, 580 S.E.2d 365 (2003), *with King*, 113 N.C. App. at 347, 439 S.E.2d at 775 (finding no duty where defendant institution had “no legal right” to control third-party tortfeasor, who was in defendant’s institution not subject to any court order). Were the law otherwise, the exception would swallow the rule and any person could be held liable for the foreseeable, harmful acts of another person in physical proximity.

Plaintiff, citing *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 626 S.E.2d 263, argues that the correct test for determining legal duty in this context is whether the harm was foreseeable “under all of the circumstances.” We disagree.

In *Stein*, the plaintiffs were injured when two students at a school for “behaviorally and emotionally handicapped children” who were known to have violent tendencies opened fire at vehicles passing by an intersection in Asheville. 360 N.C. at 323-24, 626 S.E.2d at 265. The plaintiffs sued the Blue Ridge Area Authority, a governmental subdivision operating the school, for failing to prevent their injuries, alleging that a school employee overheard the students discussing their violent plans on the school bus and failed to take any

3. In the case *sub judice* the issue of a special relationship between plaintiff and defendant was never raised at the hearing on defendant’s motion or on appeal, therefore we will only discuss the duty to control a third party. *See Hedrick*, 121 N.C. App. at 469, 466 S.E.2d at 283-84 (describing the two categories of special relationships); N.C.R. App. P. 10(a).

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preventive measures. *Id.*, 626 S.E.2d at 264-65. The trial court in *Stein* granted the defendant's motion to dismiss, which a divided panel of the Court of Appeals reversed. *Id.* at 325, 626 S.E.2d at 265. The Blue Ridge Area Authority then appealed to the North Carolina Supreme Court. *Id.*

The Supreme Court reversed the Court of Appeals, holding that because the school employees could exercise no control over the students after they exited the bus, the school board could not be held liable for their actions. *Id.* at 332, 626 S.E.2d at 270. Contrary to the plaintiff's argument, the Supreme Court reasoned that the trial court properly dismissed the complaint because the plaintiffs "fail[ed] to allege the special relationship *necessary* to render defendant liable for the harm to plaintiffs by third persons." *Id.* (emphasis added).

The portion of the Court's opinion that plaintiff cites in his brief is inapposite to this case. Plaintiff quotes *Stein* for the proposition that "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Id.* at 328, 626 S.E.2d at 267. Of course, this statement is an accurate reflection of the general law on duty in a negligence action. Reasonable foreseeability would also be the correct test for proximate cause, were a special relationship found. *See, e.g., Smith*, 227 N.C. at 574, 42 S.E.2d at 658-59 (holding that a common carrier can be liable for a third-party assault where the injury was reasonably foreseeable and within the scope of the special relationship, i.e. in transit). It is not, however, the proper standard to determine whether defendant owed plaintiff a legal duty to control a third party.

As explained in *Stein*, the proper standard for whether the defendant owes a duty to control the actions of a third party is whether the relationship between the defendant and the third party is such that "(1) the defendant knows or should know of the third person's violent propensities and (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts."⁴ *Stein*, 360 N.C. at 330, 626 S.E.2d at 269; *accord Harris*, 180 N.C. App. at 556, 638 S.E.2d at 265 (observing that "the chief factors justifying imposition of liability are 1) the ability to control the person and 2) knowledge of the person's propensity for violence" (emphasis, quotation marks, and citations omitted)). *Stein* also notes

4. Although *Stein* refers to "criminal acts", this test applies equally to third-party non-criminal torts. *See, e.g., Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555-56, 638 S.E.2d 260, 265 (2006) (applying the third party duty standards to tortfeasors).

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that “[w]e have often remarked the law’s reluctance to burden individuals or organizations with a duty to prevent the criminal acts of others.” 360 N.C. at 328, 626 S.E.2d at 268 (citation omitted).

B. Analysis

Applying the above standard to the case *sub judice*, we hold that the trial court did not err in granting defendant’s 12(b)(6) motion to dismiss. The question is whether, interpreted liberally, plaintiff alleged sufficient facts in his complaint, which if taken as true could establish a *prima facie* negligence case, including a “legal duty . . . owed to the plaintiff.” *Lambeth*, 167 N.C. App. at 352, 605 S.E.2d at 167. Since it is not alleged that defendant directly caused plaintiff’s injury, but that he negligently failed to control his patient, we must consider this case under the third-party tortfeasor rules outlined above. Thus, we must decide whether, presuming the facts in the complaint are true, a special relationship existed between defendant and his patient sufficient to justify imposition of a duty to control. *See Fussel v. North Carolina Farm Bureau*, 198 N.C. App. 560, 567, 680 S.E.2d 229, 233-34 (2009), *aff’d*, 364 N.C. 222, 695 S.E.2d 437 (2010). In the absence of any allegations by plaintiff that might establish such a special relationship existed between defendant and the patient, defendant owed no legal duty to plaintiff to control the patient’s actions. *See id.*, 680 S.E.2d at 234.

Here, plaintiff failed to allege sufficient facts to establish that defendants had a legal duty to plaintiff. We find that the facts alleged in the complaint are inadequate to impose a legal duty on defendant Holt because they fail to establish both that defendant had a right to control the patient and that he had the requisite knowledge of the patient’s dangerousness. *See Stein*, 360 N.C. at 330, 626 S.E.2d at 269.

First, the facts as alleged do not show that defendant had the sort of legal right to control his patient that is required for a special relationship. *See King*, 113 N.C. App. at 347, 439 S.E.2d at 775. While defendant Holt may have had some measure of physical control over his patient, he had no legal right to control the patient’s actions. This case is quite different from the five widely-accepted categories of special relationships. *See King*, 113 N.C. App. at 346, 439 S.E.2d at 774 (listing five of the recognized special relationships). The level and nature of control that a mental hospital can exercise over those involuntarily in its care or that a parent can exercise over a child is far greater than the control exercised by an Emergency Medical Technician (EMT) over a patient. Like a psychiatric institution with a voluntarily committed patient, defendant Holt “had no legal right to

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mandate” his patient’s behavior. *King*, 113 N.C. App. at 347, 439 S.E.2d at 775. Plaintiff cites no case, and we find none, holding that an EMT has the kind of legal right to exercise control over his patient to justify imposing a duty to control his patient’s actions.⁵

Further, the facts as alleged in plaintiff’s complaint do not show that defendant knew or should have known of the patient’s violent disposition. The complaint alleges that the police dispatcher warned plaintiff that the patient was being “combative and uncooperative”, but never alleges that *defendant* had any foreknowledge of the patient’s disposition to violence.⁶ Plaintiff contends that the call to the police dispatcher supports the inference that defendant was or should have been aware that the patient was violent. However, to reach that conclusion would require one of two unsupported assumptions: (1) that defendant was the only EMT caring for the patient and thus the only one who could have informed the dispatcher of his “violent and combative” behavior—a fact which is belied by the complaint as it alleges that defendant was one of three EMS personnel caring for the patient at the time of plaintiff’s arrival; or (2) that some other person who had had contact with the patient informed defendant prior to plaintiff’s arrival of the patient’s dangerous behavior. Thus, even construed liberally, the facts as alleged are insufficient to support an inference that defendant was or should have been aware of his patient’s violent tendencies. We hold that under the facts of this case, defendant Holt was not party to any special relationship with the tortfeasor-patient. Therefore, defendant did not, as a matter of law, owe plaintiff Scadden any legal duty and the trial court did not err in granting defendants’ motion to dismiss.

AFFIRMED.

Chief Judge MARTIN and Judge GEER concur.

5. Plaintiff does claim that this Court has held that “an EMT may be held personally liable for any harm caused by his negligence,” citing *Fraleley v. Griffin*, _____ N.C. App. _____, 720 S.E.2d 694 (2011). However, *Fraleley* only holds that an EMT is in a ministerial position for purposes of public official immunity and therefore not immune from suit. *Id.* at _____, 720 S.E.2d at 697. This Court did not consider the question of to whom EMTs owe a legal duty.

6. In fact, the allegations of plaintiff’s complaint have more of a tendency to show plaintiff’s contributory negligence than the defendant’s knowledge. Plaintiff, a law enforcement officer, had been forewarned that the patient was “combative and uncooperative” but he still stood within close proximity to the patient’s feet without checking to see if they were restrained, even after he had directed another officer to restrain the patient’s arms with handcuffs.

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[222 N.C. App. 807 (2012)]

DIANE SOOD, PLAINTIFF V. AJIT BOBBY SOOD, DEFENDANT

No. COA12-369

(Filed 18 September 2012)

Appeal and Error—interlocutory order—writ of certiorari denied

The Court of Appeals denied defendant's petition for writ of *certiorari* and dismissed his appeal from an interlocutory order in a temporary child custody case. Neither of the First Amendment issues that defendant raised were properly preserved for review.

Appeal by defendant from order entered on or about 17 January 2012 by Judge Michael K. Lands in District Court, Gaston County. Heard in the Court of Appeals 27 August 2012.

Timothy T. Leach, for plaintiff-appellee.

Ajit Bobby Sood, pro se.

STROUD, Judge.

Ajit Bobby Sood (“defendant”) appeals from the trial court’s temporary custody order. For the following reasons, we deny defendant’s petition for writ of certiorari and dismiss his interlocutory appeal.

I. Background

Diane Lynn Sood (“plaintiff”) and defendant were married to each other on 7 February 2003 and have one child, born 12 September 2003. The couple separated in July 2011. Plaintiff filed a complaint in Gaston County on 15 July 2011 requesting primary custody of the minor child, a temporary custody order, equitable distribution, child support, and a psychological evaluation of defendant. On 29 November 2011, the trial court held a hearing regarding temporary custody. Defendant was represented by counsel at this hearing. The trial court entered a written order on 20 January 2012 granting the parties joint legal custody, with primary physical custody awarded to plaintiff.¹ Defendant timely filed written notice of appeal from the district court’s temporary custody order on 14 February 2012.

1. We note that on 19 December 2011, defendant filed a motion for “A New Trial” pursuant to N.C. Gen. Stat. § 1A-1 Rules 59 and 60. Following the entry of the temporary custody order, defendant filed a motion to vacate the trial court’s order and stay its judgment on 30 January 2012 pursuant to N.C. Gen. Stat. § 1A-1, Rules 60 and 62. There is no indication in the record of a ruling on these motions. *See* N.C.R. App. P. 10(a)(1).

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II. Appeal from temporary custody order

On appeal, defendant asserts fourteen distinct issues. Since we conclude that this Court lacks jurisdiction to hear defendant's appeal from an interlocutory order, we do not reach the merits of his claims and dismiss his appeal.

"An order is either 'interlocutory or the final determination of the rights of the parties.'" *Hamilton v. Mortgage Information Services, Inc.*, ____ N.C. App. ____, ____, 711 S.E.2d 185, 188 (2011) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(a)). "An interlocutory order . . . does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* (citation omitted). There is, in general, "no right of immediate appeal from interlocutory orders[.]" *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Nevertheless, an interlocutory order

is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Currin & Currin Const., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (quotation marks and citations omitted). The burden of showing that one of these exceptions applies rests on the appellant. *Hamilton*, ____ N.C. App. at ____, 711 S.E.2d at 189.

Although neither party has addressed the effect of these motions on defendant's appeal, we note that defendant's Rule 59 motion was untimely as it was filed on 19 December 2011, *before* the temporary custody order was entered. *See* N.C. Gen. Stat. § 1A-1, Rule 59(b); N.C.R. App. P. 3(c)(3). In fact, although defendant identified his motion as a motion for new trial under Rule 59, actually the motion states as its primary complaint the fact that an order had not yet been entered and continues on to address events which occurred between the parties *after* the hearing. It would probably be more appropriately treated as a motion in the cause regarding temporary custody based upon events occurring after the hearing. Defendant's Rule 60 and 62 motions would not prevent this Court from hearing defendant's appeal. *See N.C. State Bar v. Sossomon*, 197 N.C. App. 261, 271, 676 S.E.2d 910, 918 (2009) (stating that "[a]fter appeal, the trial court is without jurisdiction to grant relief under Rule 60." (citation omitted)); *Wilmington Star-News v. New Hanover Regional Medical Ctr.*, 125 N.C. App. 174, 183, 480 S.E.2d 53, 58 (stating that Rule 62(d) permits trial courts to stay orders pending appeal: "When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of [G.S. 1-289 through 1-295]." (quoting N.C. Gen. Stat. § 1A-1, Rule 62(d)), *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997).

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If the appellant fails to meet that burden, “we are required to dismiss that party’s appeal on jurisdictional grounds.” *Id.*

A temporary child custody order is normally

interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court’s ultimate disposition on the merits.

Brewer v. Brewer, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000) (citations and ellipses omitted). A trial court’s label of a custody order as “temporary” is not dispositive. *Id.* at 228, 533 S.E.2d at 546. A custody order is, in fact,

temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.

Senner v. Senner, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citations omitted).

Here, the temporary custody order was not entered without prejudice to either party and did not include a “clear and specific reconvening time.” *See id.* However, the trial court did not determine all of the issues. In its order, the trial court specifically found that it lacked sufficient information to make vital findings of fact, particularly regarding the parties’ mental conditions, as no psychological evaluation had yet been done, but there was evidence which indicated a need for this evaluation and the trial court ordered that such an evaluation be performed. In addition, the trial court explicitly left open the issue of defendant’s child support arrearage and stated that child support would be recalculated “without a showing of a substantial change in circumstances” when “Plaintiff becomes employed.” The order did specify a custodial schedule for holidays in some detail for the subsequent months (2011 Christmas and 2012 Spring Break), but it did not resolve holidays for the indefinite future. *See Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (observing that “[a] permanent custody order establishes a party’s present right to custody of a child and that party’s right to retain custody indefinitely.”). Indeed, defendant concedes in his brief that the order “is temporary as to the issue of child custody[.]” Therefore, the order is interlocutory. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (noting that an order is interlocutory if it “does not determine all the issues.”).

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We further note that the temporary custody order contains no Rule 54(b) certification. *See Currin & Currin Const., Inc.*, 158 N.C. App. at 713, 582 S.E.2d at 323. However, defendant argues that even if the order is interlocutory, it does affect a substantial right because the trial court's order violated his First Amendment rights by granting custody of his child to plaintiff based solely on the fact that he is non-Christian and the trial judge, a Christian, was biased against him.

We first note that there is no indication in either brief that the trial judge's religious affiliation was ever mentioned prior or during the temporary custody hearing, although we do not have a transcript of the hearing. Based upon the record, it appears that defendant did not raise this issue until after entry of the temporary custody order, in his "Notice and Motion To Vacate Court's Order entered January 20, 2012 and For Emergency Stay of Execution."² Defendant attached to this motion various exhibits, including printouts of information from the trial judge's campaign Facebook page. The Facebook page notes Judge Lands's "Religious views" as "Christian" and identifies his church affiliation and the fact that he is a "Sunday School teacher." Under North Carolina Rules of Appellate Procedure 9(a)(1)(j) and 10(a)(1), it was improper for this information to be included in the record on appeal, as it was not ruled on or considered by the trial court in regard to any order which we are reviewing.³ In the same motion, defendant identifies himself as Hindu, although plaintiff asserts that defendant's religious affiliation was not in evidence at the temporary custody hearing. However, as neither party has objected, and both have argued based upon defendant's claims in his motion, we will assume, at least for purposes of argument, that Judge Lands is Christian and defendant is Hindu.

Defendant is correct that this Court has found that orders "implicating a party's First Amendment rights affect[] a substantial right." *Mathis v. Daly*, 205 N.C. App. 200, 202, 695 S.E.2d 807, 810 (2010) (quotation marks and citations omitted). Generally, to preserve an issue for appeal, a party must raise the issue in the trial court. N.C.R. App. P. 10(a)(1). "A constitutional issue not raised at trial will gener-

2. As noted above, there is no indication in our record that the trial court ever ruled upon this motion. *See* N.C.R. App. P. 10(a)(1).

3. Although plaintiff's counsel notified defendant of various objections to the record on appeal by letter and by filing a "Notice of objection to Defendant's Proposed Record on Appeal," he failed to serve any proposed amendments or an alternative record, and neither party requested judicial settlement of the record on appeal. Thus, it appears that the contents of the record before us were determined entirely by defendant.

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ally not be considered for the first time on appeal.” *Anderson v. Assimios*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citations omitted). This Court will consider constitutional questions not raised at trial “in exceptional circumstances . . . *only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary.” *Id.* (citations and quotation marks omitted, emphasis in original). In this instance, the issue has been neither “squarely presented” nor is there *any* factual record, much less an “adequate factual record.” Defendant failed to file a motion for the trial judge to recuse himself for any reason. In addition, defendant failed to include a transcript in the record, so we cannot determine if defendant properly preserved this issue for appeal by raising his First Amendment argument at trial or by mentioning any concern whatsoever regarding bias of the trial court. “ ‘Appellate review is based solely upon the record on appeal,’ N.C.R. App. P. 9(a); it is the duty of the appellants to see that the record is complete.” *CRLP Durham, LP v. Durham City/County Bd. of Adjustment*, ____ N.C. App. ____, ____, 706 S.E.2d 317, 322 (2011) (citations and quotation marks omitted)). Thus, defendant’s First Amendment argument has not been properly preserved for appellate review by this Court. *See* N.C.R. App. P. 10(a)(1).

Defendant states in a conclusory manner that the trial court’s order violated his First Amendment rights because the trial court discriminated against him based on his religious beliefs and was biased against him because of those beliefs. Even though he states that he asked his trial counsel to reschedule his hearing so that he would have a different trial judge, there is, as noted above, no indication that he made a motion for recusal prior to entry of the temporary custody order.⁴ The North Carolina Code of Judicial Conduct sets forth instances in which a party’s motion for recusal of a judge should

4. Defendant violates N.C.R. App. P. 9(a) by including in his argument facts which are not contained in the record on appeal. Certainly his conversations with his own counsel are not in our record. If not for the fact that plaintiff’s counsel responds in kind, by also stating facts in her brief which are not contained in the record, we would impose a sanction upon defendant. Yet both parties deserve the same sanction in this regard. We will at least admonish both plaintiff and defendant that, should they appear before this Court again, they must heed the requirements of the North Carolina Rules of Appellate Procedure, particularly as to settlement of the record on appeal, content of the record on appeal, and confining their arguments to the facts contained in the record on appeal. We further admonish plaintiff’s counsel that it is entirely improper for him to state, in the first person, his personal recollection of events at trial or after as part of his argument in an appellate brief. We also encourage defendant to heed the wisdom of our Supreme Court that “the old adage is true: ‘A man who is his own lawyer has a fool for a client.’” *State v. Goff*, 205 N.C. 545, 552, 172 S.E. 407, 410 (1934).

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be granted. Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518-19. Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518, specifically states that

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party

...

The Code further

notes that “[n]othing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge’s own initiative.” Code of Judicial Conduct Canon 3(D), 2010 Ann. R. N.C. 519. “While this provision certainly encourages a judge to recuse himself or herself in cases where his or her ‘impartiality may reasonably be questioned’ upon their [sic] own motion, they [sic] are not required to do so in the absence of a motion by a party.” *In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456 (2007) (quoting Code of Judicial Conduct Canon 3, 2007 Ann. R. N.C. 446).

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]” N.C. R. App. P. 10(a)(1) (2009). When a party does not move for a judge’s recusal at trial, the issue is not preserved for our review. *In re Key*, 182 N.C. App. at 719, 643 S.E.2d at 456 (citing *State v. Love*, 177 N.C. App. 614, 627-28, 630 S.E.2d 234, 243 (2006)).

In re D.R.F., 204 N.C. App. 138, 144, 693 S.E.2d 235, 240 (footnote omitted), *disc. rev. denied*, 364 N.C. 616, 705 S.E.2d 358 (2010). This Court has held that an alleged failure to recuse is not considered an error automatically preserved under N.C.R. App. P. 10(a)(1). *Id.* Because defendant did not include a copy of the trial transcript in record, we cannot determine if defendant ever moved at trial to have the trial judge recuse himself. Where appellant failed to move that the trial judge recuse himself, he cannot later raise on appeal the judge’s alleged bias based on an undesired outcome. Thus, neither of the First Amendment issues that defendant raises have been properly preserved for our review. Therefore, defendant cannot meet his burden to show that his interlocutory appeal affects a substantial right. *Hamilton*, ____ N.C. App. at ____, 711 S.E.2d at 189. Accordingly, this Court has no jurisdiction to hear his appeal. *See id.*

STATE v. PERRY

[222 N.C. App. 813 (2012)]

III. Writ of Certiorari

In the alternative, defendant requests that this Court treat his appeal as a petition for writ of certiorari and exercise our discretion under N.C.R. App. P. 21(a)(1) and grant his petition. This Court has the discretion to treat an appeal as a petition for certiorari in appropriate circumstances. *In re M.L.T.H.*, 200 N.C. App. 476, 481, 685 S.E.2d 117, 121 (2009). “A writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where the right of appeal has been lost by failure to take timely action or where no right to appeal from an interlocutory order exists.” *Harbin Yinhai Technology Development Co., Ltd. v. Greentree Financial Group, Inc.*, 196 N.C. App. 615, 620, 677 S.E.2d 854, 858 (2009) (emphasis in original, quotation marks and citations removed). Here, we have found that no right to appeal from an interlocutory order exists. In addition, defendant has failed to show appropriate circumstances for a writ of certiorari and we decline to exercise our discretion in granting the writ.

IV. Conclusion

Since we have concluded that this Court lacks jurisdiction to hear defendant’s appeal from the interlocutory custody order and have declined to grant defendant a writ of certiorari, we must dismiss his appeal for want of jurisdiction.

DISMISSED.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. TERECK DANIELLE PERRY, DEFENDANT

No. COA12-322

(Filed 18 September 2012)

Firearms and Other Weapons—possession of firearm by felon—jury question—possession—plain error

The trial court committed plain error in a possession of a firearm by a felon case by failing to further inquire into and answer the jury’s questions specifically regarding possession. The error had a probable impact on the jury’s finding of guilt.

STATE v. PERRY

[222 N.C. App. 813 (2012)]

Appeal by defendant from judgment entered on or about 31 August 2011 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 27 August 2012.

M. Alexander Charns, for defendant-appellant.

Attorney General Roy A. Cooper, III, by David L. Elliot, for the State.

STROUD, Judge.

Defendant appeals his convictions for possession of a firearm by a felon and attaining the status of habitual felon. For the following reasons, we grant defendant a new trial.

I. Background

The State's evidence tended to show that on 26 June 2009, law enforcement officers from the Raleigh Police Department executed a search warrant. Once inside the apartment, the officers found numerous people along with a shotgun in a closet and a pistol in a dresser. The officers noticed defendant sitting in a car outside of the apartment; they brought defendant into the apartment where they read him his Miranda rights, strip searched him, and then questioned him. Defendant told the officers the apartment was his parents' and "he did not know where the guns came from, but he'd never seen them in here" though "he [had seen] the guns in the parking lot, and that they were all looking at them." The officers arrested defendant and took him back to the police department where he was questioned.

When asked about "the first time he saw the pistol" defendant responded "that he'd seen it a couple – he'd seen a couple people playing with it, there was a lot of people playing with the gun. And he'd seen it about a week ago[.]" Defendant stated that "Ra-Ra[.]" another man, had brought the pistol to the apartment "about a week ago[.]" The officers then questioned defendant about the shotgun, and defendant responded "the shotgun's been in there for a long time. He said that it's probably been there for two years, and the gun, that shotgun, used to be in the next apartment, apartment 10." When "specifically" asked about "handling both the pistol and the shotgun" defendant "said he was playing with them. He denied owning them, but he had touched them[.]" Defendant stated that he had touched the guns "a couple days ago" without providing "an exact date and time."

Defendant was indicted for two counts of possession of a firearm by a convicted felon, one count as to the pistol and one count as to

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the shotgun; possession of a stolen firearm as to the pistol; and attaining the status of a habitual felon. During defendant's trial by jury, at the close of the State's evidence, defendant made a "motion to dismiss for insufficiency of the evidence"[,] which the trial court allowed as to "the charge of possession of the shotgun"[,] but denied as to "the charge of possession of the pistol" and "the possession of stolen goods." The jury found defendant guilty of possession of a firearm by a convicted felon, specifically the pistol ("possession of the pistol") and attaining the status of habitual felon. Defendant was sentenced to 60 to 81 months imprisonment on both convictions. Defendant appeals.

II. Jury Instructions

Although defendant has raised issues regarding his motion to dismiss, a specific portion of the jury instructions, the admissibility of certain evidence, and a motion to suppress, we deem defendant's argument regarding the jury's question to the trial court to be dispositive. Once jury deliberations began, the jury sent a note to the trial court asking, "Can we see the definition of possession and the list of criteria?" The trial court then provided the jury with a copy of the jury instructions. After receiving the jury instructions, the jury returned the instructions and the trial court noted that the jury had

highlighted the language which reads, a person has actual possession of a firearm, and they have—and then in the next paragraph, where it says a person has constructive possession of a firearm if he does not have it on the—and they have a note, date of arrest or can previous days be considered. And it says does playing with constitute power and intent to control disposition.

The trial court then instructed the jury, without objection before or after the instructions,

[T]he bailiff has handed me back the copy of the jury instructions that I provided to you folks that you all done some marking and writing on page number three. I have reviewed what you have handed back, particularly the—I'm going to address it I guess in two parts. The first part is the highlighted language. A person has actual possession of a firearm and the highlighted language person has constructive possession of a firearm if the person does not have it on them [sic]. And then there appears to be some question or language that reads day of arrest or can previous days be considered.

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In my discretion I'm unable to determine exactly what it is that you're asking for, looking at the form of the question or the writing that you handed back.

So I'm going to charge you that you are to apply your common understandings from your everyday use of the words that are contained within the jury instructions and the law that I've charged you, and apply that to the evidence that has been presented.

With respect to the question that's on the bottom of the page, does playing with constitute power and intent to control disposition.

In my discretion, I'm going to charge you that you have heard the evidence in this case and you've heard the evidence and you've heard the law, and it is once again your duty as a jury to answer the question that's been proposed based on the evidence and the law that I've provided for you.

That is my instructions to you. I'm going to give this back to the bailiff, ask you to return to the jury room and resume your deliberations, once you're all present.

Here, the jury's confusion as to the question of possession was understandable. From a thorough review of the transcript, it appears that the State might have proceeded under two different theories of possession, both actual and constructive. Indeed, the State could have sought to prove that (1) defendant had actually possessed the guns "a couple days" before 26 June 2009 and/or (2) defendant had constructively possessed the guns on 26 June 2009. Nonetheless, the State ultimately chose to pursue only constructive possession, but the trial court instructed the jury on both actual and constructive possession without any objection from either side.

As to actual possession, defendant was indicted for possessing the guns on 26 June 2009, the day of the search of the apartment; as to this date, the record reveals no evidence of actual possession. However, defendant had admitted that he had been "playing with" the guns "a couple days" before 26 June 2009. Nevertheless, during its closing argument, the State told the jury,

And I believe that Judge Gessner will tell you that actual possession is when it's on the person. When the person is aware of its presence and either alone or together with others, has both the power and intent to control its disposition and use.

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Those aren't the facts in this case. The weapon wasn't found on the Defendant. It's not an actual possession of the weapon. It's a constructive possession. . . .

. . . .

. . . And again, there is the actual possession and there is the constructive possession. And this Defendant constructively possessed that firearm.

(Emphasis added.) Thus, despite the evidence of defendant's statements, the State repeatedly told the jury that it should not consider actual possession in determining whether defendant had wrongfully possessed the pistol because this was only a case of constructive possession. As to constructive possession, the indictment stated the date of "on or about June 26, 2009" indicating that the State was pursuing a theory of constructive possession. Also, the evidence provided by the State focused on the date of 26 June 2009; the date defendant allegedly constructively possessed the guns.

Defendant now contends that

[t]he trial court erred or committed plain error by failing to answer the jury's questions about whether the accused could be convicted for "playing with the weapon" on a day other than that charged in the indictment, creating a unanimity issue.

A. Standard of Review

In *State v. Tadeja*, this Court stated,

[b]ecause defendant failed to object to the jury instructions in this case, this . . . [issue] must be analyzed under the plain error standard of review. Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. Further, in deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt.

191 N.C. App. 439, 446, 664 S.E.2d 402, 408 (2008) (citations and quotation marks omitted).

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B. Elements of N.C. Gen. Stat. § 14-415.1(a)

N.C. Gen. Stat. § 14-415.1(a) provides, in pertinent part, that it shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm. Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.

State v. Best, ____ N.C. App. ____, ____, 713 S.E.2d 556, 561 (citation, quotation marks, and brackets omitted), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). The jury's question went to the element of possession.

Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Alston, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted).

1. Actual Possession

As to actual possession, the State's evidence showed that defendant stated that "a couple days" before 26 June 2009 he "was playing with" and "had touched" the guns. Without addressing any questions regarding the *corpus delicti* rule or the date on the indictment, we note that defendant's statement that he "was playing with" the guns likely constituted "substantial evidence" for purposes of the instruction on actual possession reaching the jury. *See State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (noting there must be substantial evidence of each element of the crime charged and of defendant being the perpetrator of the crime charged in order for the State to survive a motion to dismiss, and thus have the charge submitted to the jury)

2. Constructive Possession

As to constructive possession, where "the defendant did not have exclusive control of the location where contraband is found, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (citation and quotation

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marks omitted). Here, the State's evidence showed that the apartment where the guns were found was not defendant's apartment and had numerous people in it at the time the guns were found; although defendant was not one of the numerous people actually even present in the apartment when the guns were found. Furthermore, the State presented no evidence that defendant was staying at the apartment. Under these facts, the State would need to present evidence of "other incriminating circumstances" which might connect defendant to the guns in some way for the trial court to properly instruct the jury on constructive possession. *Id.*

The State contends that the evidence of constructive possession of the pistol was:

Defendant told police that: (1) he had played with the gun; (2) his fingerprints would be found on the gun; (3) he saw the gun in his parents' apartment because he saw it when Ra-Ra brought it in the house.

The fact that "[d]efendant told police that . . . he had played with the gun" and that "his fingerprints would be found on the gun" is evidence of actual possession at the time he "played with" the pistol and not evidence of constructive possession a few days later. *See State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) ("A person is in constructive possession of a thing when, *while not having actual possession*, he has the intent and capability to maintain control and dominion over that thing." (emphasis added)). Thus, the State's evidence of constructive possession consists of the fact that defendant "saw the gun in his parents' apartment because he saw it when Ra-Ra brought it in the house." The fact that defendant saw a third party bring a pistol into an apartment which did not belong to him does not demonstrate that defendant had "the power and intent to control [the pistol's] disposition[,]" particularly in light of the fact that defendant was not even in the apartment at the time the pistol was discovered and there was no evidence that the defendant stayed in the apartment. *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318; *see State v. Marshall*, 206 N.C. App. 580, 584, 696 S.E.2d 894, 898 (2010) ("The evidence here shows only that defendant had an opportunity to steal the Suburban from the gas station. It neither demonstrates nor implies that defendant was aware that the Suburban was parked outside his residence, that he was at home during the hour or so during which the Suburban would have arrived on his street, that he regularly utilized that location for his personal use, nor that that portion of the public street was any more likely to be under his control than the control of

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other members of the public or other residents of that street. The Suburban's location on a public street clearly was not under the exclusive control of defendant, and the additional circumstances recounted by the State do not support an inference that defendant had the intent and capability to maintain control and dominion over the Suburban parked there. We hold that the trial court erred in instructing the jury on constructive possession because the evidence did not support such an instruction." (citation and quotation marks omitted)). Accordingly, we conclude that the jury was erroneously instructed on constructive possession.

C. Analysis

When we "examine the entire record[.]" as we must, *Tadeja*, 191 N.C. App. at 446, 664 S.E.2d at 408, we understand why the jury was confused. The jury was presented with an instruction on both actual and constructive possession. The evidence could only possibly support an instruction on actual possession. However, the State specifically told the jury *not* to consider actual possession. While the State's arguments are neither evidence nor jury instructions, they still likely affected the jury's consideration of the element of possession. This left the jury to consider only constructive possession, which the evidence did not support, and thus such instruction should never have been given. In light of this odd situation, we do believe that the trial court's failure to further inquire into and answer the jury's questions specifically regarding possession "had a probable impact on the jury's finding of guilt" that constituted plain error. *Id.* Indeed, it is entirely possible that this error may have changed the outcome of the case, as we ourselves, even with the luxuries of a written record and ample time to research and consider the instructions and issues, found the instructions confusing in the context of the evidence and arguments.

III. Conclusion

We conclude that the trial court's failure to adequately address the jury's questions resulted in plain error. Accordingly, we grant defendant a new trial.

NEW TRIAL.

Chief Judge MARTIN and Judge GEER concur.

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SUNTRUST BANK, PLAINTIFF v. BRYANT/SUTPHIN PROPERTIES, LLC,
CALVERT R. BRYANT, JR. AND DONALD H. SUTPHIN, DEFENDANTS

No. COA12-131

(Filed 18 September 2012)

1. Unfair Trade Practices—breach of contract—no egregious conduct

The trial court erred by entering an award on defendant Bryant/Sutphin Properties' (BSP) N.C.G.S. § 75-1.1(a) claim. Defendants did not show any conduct upon which a Section 75-1.1(a) claim could stand except for a breach of contract claim. As the jury found that plaintiff had not breached the applicable contracts, defendants had no viable claim under Section 75-1.1(a).

2. Contracts—breach—directed verdict denied—motion for new trial denied

The trial court did not err by failing to enter a directed verdict in favor of plaintiff on the breach of contract claim and denying its motion for a new trial. A finding that one party did not breach a contract does not legally require a finding that the other party breached the same contract. Further, defendant's evidence showed that the cause of the "unpaid" note was plaintiff's own wrongdoing and/or that defendants were not actually in default.

3. Unfair Trade Practices—judgment notwithstanding verdict granted

The trial court did not err by granting judgment notwithstanding the verdict for plaintiff and setting aside the jury's verdict in favor of defendant Mr. Sutphin on the N.C.G.S. § 75-1.1(a) unfair trade practices claim.

4. Contracts—no breach of contract—breach of covenant of good faith and fair dealing inapplicable

The trial court did not err by granting judgment notwithstanding the verdict for plaintiff on defendant Mr. Sutphin's claim for breach of covenant of good faith and fair dealing. As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical to conclude that plaintiff somehow breached implied terms of the same contracts.

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5. Attorney Fees—unfair trade practices—did not prevail on claim

The trial court did not err by refusing to award attorney fees to defendants under N.C.G.S. § 75-16.1. Defendant BSP did not prevail in its Section 75-1.1(a) claim.

Appeal by plaintiff and defendants Bryant/Sutphin Properties, LLC and Donald H. Sutphin from order entered 25 July 2011, judgment entered 25 August 2011, order entered 2 September 2011, and order entered 17 October 2011 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 16 August 2012.

Bell, Davis & Pitt, P.A., by William K. Davis, Kevin G. Williams, and Andrew A. Freeman, for plaintiff-appellant/cross-appellee.

Boydoh & Hale, PLLC, by J. Scott Hale and Robert E. Boydoh, Jr., for defendants-cross-appellants/appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert A. Singer, J. Benjamin Davis, and Mary F. Pena, for amicus curiae.

STROUD, Judge.

Plaintiff and defendants Bryant/Sutphin Properties, LLC and Donald H. Sutphin appeal. For the following reasons, we reverse the trial court's entry of an award for unfair or deceptive practice to Bryant/Sutphin Properties, LLC and affirm the trial court on all other issues raised by the parties.

I. Background

Plaintiff and defendant Bryant/Sutphin Properties, LLC ("BSP") entered into a Commercial Note ("Note") whereby plaintiff would provide defendant BSP funds to finance a real estate development project; defendant Sutphin was a guarantor on the Note. Plaintiff sued defendants BSP and Sutphin¹ (collectively "defendants") for a claim it entitled as "Suit on Note" which was essentially a breach of contract claim based upon defendants' alleged failure to pay the Note in accordance with its terms. Defendants answered plaintiff's complaint and counterclaimed based upon various alleged wrongs plain-

1. Defendant Calvert R. Bryant, Jr. is not a party to this appeal, and therefore will not be discussed.

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tiff had committed; according to defendants, the allegedly wrongful conduct taken by plaintiff centered upon plaintiff's action of placing a hold on defendant Sutphin's accounts ("Sutphin Accounts") "so that no funds could be withdrawn from such Accounts." Defendants alleged that plaintiff was aware that the Accounts "constituted the primary source of funds needed to conduct the day-to-day business operations of Bryant/Sutphin Properties, including, but not limited to, the development of the Condominium Project, and to conduct day-to-day business operations of other businesses owned, either [i]n whole or in part, by Don Sutphin." Defendants sued for improper setoff, conversion, wrongful dishonor of item, breach of covenant of good faith and fair dealing, punitive damages, and unfair/deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. ("Section 75-1.1(a)").²

After the filing of the initial pleadings, the parties engaged in various legal filings which resulted in a 472 page record and a box of exhibits which includes, *inter alia*, a reply to defendants' counterclaims, a motion for summary judgment, a motion to dismiss and objections to the motion for summary judgment, a jury verdict, two motions for judgment notwithstanding the verdict, a motion for a new trial, a motion to tax costs, two notices of appeal, an undertaking to stay execution on appeal, a special motion to docket entry of the stay, an exception to undertaking to stay execution on appeal, and the various orders and judgment of the trial court ruling on the parties' aforementioned motions.

Ultimately, the jury found in favor of defendants as to the factual basis for their claims under Section 75-1.1(a) although it also found no breach of contract by either plaintiff or defendants. The trial court set aside the Section 75-1.1(a) verdict for defendant Sutphin, leaving only the Section 75-1.1(a) verdict for defendant BSP. Defendant BSP was awarded \$700,000.00 from plaintiff on its Section 75-1.1(a) claim, and these damages were trebled to \$2,100,000.00; plaintiff was also ordered to pay costs of \$5,612.90. All of the parties appealed.

II. Plaintiff's Appeal

Plaintiff argues that the trial court erred in entering an award on defendant BSP's Section 75-1.1(a) claim and in failing to enter a directed verdict on its claim for breach of contract.

2. We note that though defendants entitle their counterclaim "Unfair/Deceptive Trade Practices" the word "trade" does not actually appear in N.C. Gen. Stat. § 75-1.1. See N.C. Gen. Stat. § 75-1.1 (2009). We will therefore refer to defendants' counterclaim as a "Section 75-1.1(a)" claim.

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A. Defendant BSP's Claim for Section 75-1.1(a)

[1] The verdict sheet presented 22 issues to the jury, addressing the various claims raised by all of the parties. There is no issue raised on appeal as to the propriety of the verdict sheet or jury instructions. The issues and verdicts as to the relevant questions for purposes of defendant BSP's Section 75-1.1(a) claim read, in pertinent part:

7. Did [plaintiff] breach the Central Carolina Bank Deposit Agreement related to [defendant] Donald H. Sutphin's money market account?

Answer: NO

....

12. Did [plaintiff] breach the contract with [defendant] Bryant/Sutphin Properties, LLC for the making and repayment of the loan for the acquisition and development of the property known as Ashley Terrace?

Answer: NO

....

17. Did [plaintiff] do at least one of the following?

a) Did [plaintiff] place the hold on [defendant] Donald H. Sutphin's money market account without any prior notice?

Answer: yes

b) Did [plaintiff] fail to make written demand for payment in full of the two D.H. Sutphin Builders' demand notes before placing the hold on [defendant] Mr. Sutphin's account?

Answer: yes

c) Did [plaintiff] fail to make written demand for payment in full of the Bryant/Sutphin Properties, LLC loan before placing the hold on [defendant] Mr. Sutphin's account?

Answer: yes

d) Did [plaintiff] change the prior manner in which it had been dealing with Defendants by placing the hold on [defendant] Mr. Sutphin's account?

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Answer: yes

. . . .

18. Was [plaintiff]’s conduct as found in Issue 17 in commerce or did it affect commerce?

Answer: yes

. . . .

20. Was [plaintiff]’s conduct as found in Issue 17 a proximate cause of economic injury to [defendant] Bryant/Sutphin Properties, LLC?

Answer: yes

. . . .

22. In what amount has [defendant] Bryant/Sutphin Properties, LLC been injured by [plaintiff]’s conduct as found in Issue 17?

Answer: \$700,000

On 25 July 2011, the trial court entered an order determining that “[t]he conduct found by the jury is determined to constitute an unfair trade practice in violation of N.C.G.S. § 75-1.1, and the damages in the amount of \$700,000.00 shall be trebled pursuant to N.C.G.S. § 75-16.” On 25 August 2011, the trial court entered a judgment concluding “that the conduct found by the jury constitutes an unfair trade practice in violation of N.C. Gen. Stat. § 75-1.1. Pursuant to N.C. Gen. Stat. § 75-16, the damages that the jury found Bryant/Sutphin Properties, LLC incurred in the amount of \$700,000.00 will be trebled.” Plaintiff contends that the trial court “erred in concluding that [plaintiff] committed [a Section 75-1.1(a) violation] after the jury found that [plaintiff] did not breach its contracts with Defendants. Without a breach, the [Section 75-1.1(a)] counterclaim should have necessarily failed.”

1. Standard of Review

“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 trade practice.” *RD&J Props. v. Lauralea–Dilton Enters., LLC*, 165 N.C. App. 737, 748, 600 S.E.2d 492, 501. “Whether a commercial act or practice violates G.S. § 75-1.1 is a question of law. Moreover, whether an action is unfair or deceptive is dependent upon the facts of each case and its impact on the market-

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place.” *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998) (citations and quotation marks omitted). “For questions of law, we apply *de novo* review.” *In re G.B.R.*, _____ N.C. App. _____, _____, 725 S.E.2d 387, 389 (2012).

2. Law on Section 75-1.1(a)

N.C. Gen. Stat. § 75-1.1(a) provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” N.C. Gen. Stat. § 75-1.1(a).

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., 165 N.C. App. at 748, 600 S.E.2d at 500 (citation omitted). “Under G.S. 75-1.1, an act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. An act or practice is deceptive if it has the capacity or tendency to deceive.” *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 247, 446 S.E.2d 100, 106 (1994) (citations and quotation marks omitted). Furthermore,

actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and 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. Substantial aggravating circumstances must attend the breach in order to recover under the Act. A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties.

Mitchell v. Linville, 148 N.C. App. 71, 75, 557 S.E.2d 620, 623-24 (2001) (citations, quotation marks, ellipses, and brackets omitted).

3. Analysis

In this case, there are two ways in which defendants could have proven and prevailed on a Section 75-1.1(a) claim: (1) a Section 75-1.1(a) claim standing separate and apart from a breach of contract claim or (2) a Section 75-1.1(a) claim based upon a breach of contract accompanied by “[s]ubstantial aggravating circumstances[.]” *Id.*

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a. Section 75-1.1(a) Claim Standing Alone

The first way in which defendants could have prevailed on a Section 75-1.1(a) claim is by showing a Section 75-1.1(a) violation separate and apart from a breach of contract; indeed, this is the route defendants have chosen as they contend that “freezing of the Sutphin Account was outside the scope of both the CCB Deposit Agreement and the loan documents.” Defendants argue that “regardless of whether [plaintiff]’s conduct violated or complied with any contractual provision, [plaintiff]’s conduct was immoral, unethical, oppressive, unscrupulous, and destroyed Defendants’ business in violation of Chapter 75.” However, despite the numerous adjectives used by defendants to describe plaintiff’s alleged conduct, none of the allegations in defendants’ counterclaims support defendants’ claim that plaintiff has committed a Section 75-1.1(a) violation. Defendants make no allegations or claims for fraud, constructive fraud, misrepresentation or the like on the part of plaintiff. While we recognize that “[t]o prevail on a Chapter 75 claim, a [party] need not show fraud, bad faith, or actual deception[,]” [the party] must show “that a defendant’s acts possessed the tendency or capacity to mislead or created the likelihood of deception.” *RD&J Properties*, 165 N.C. App. at 748, 600 S.E.2d at 500-01. Beyond repeatedly stating that plaintiff did not have a right to place holds on the Sutphin Accounts, defendants have not alleged any conduct which demonstrates “the tendency or capacity to mislead or [to] create[] the likelihood of deception.” *Id.* at 748, 600 S.E.2d at 501.

Issue 17 addressed the possible bases for defendants’ Section 75-1.1(a) claim. The jury’s answers to issue 17 indicate that the jury found that plaintiff (1) placed “the hold on [defendant] Donald H. Sutphin’s money market account without any prior notice[;]” (2) failed “to make written demand for payment in full of the two D.H. Sutphin Builders’ demand notes before placing the hold on [defendant] Mr. Sutphin’s account[;]” (3) failed “to make written demand for payment in full of the Bryant/Sutphin Properties, LLC loan before placing the hold on [defendant] Mr. Sutphin’s account[;]” and (4) changed “the prior manner in which it had been dealing with Defendants by placing the hold on [defendant] Mr. Sutphin’s account[.]” Yet the fact that plaintiff committed any of these four acts will not support a Section 75-1.1(a) claim if plaintiff had the right to do these acts under the contracts between plaintiff and defendants. Defendants argue that these actions are outside of the *scope* of the contracts, including the CCB Deposit Agreement and loan docu-

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ments, but in actuality, defendants are claiming that plaintiff acted outside of its *authority* under these contracts: this *is* a breach of contract.

For example, even if we were to assume that the contracts required plaintiff “to make a written demand for payment in full of the two D.H. Sutphin Builders’ demand notes before placing the hold on [defendant] Mr. Supthin’s account[,]” the failure to make written demand for payment in full would simply be a breach of the contracts; yet the jury found that plaintiff had not breached any contract with defendants, implicitly finding that plaintiff had the contractual right to place the hold on the account without giving a prior written demand for payment in full. The same applies to the other three actions by plaintiff. There is no doubt that plaintiff’s placing a hold on the Sutphin Accounts without prior notice, failing to make written demands for payment, and acting in a different manner than plaintiff had in the past would be surprising to defendants and likely disruptive to defendants’ business(es); while we agree that this disruption may have been the straw that broke the camel’s back and caused the collapse of defendants’ business(es), this does not make plaintiff’s actions “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers” or accurately described as having “the capacity or tendency to deceive.” *Ace Chemical Corp.*, 115 N.C. App. at 247, 446 S.E.2d at 106. Thus, the unfairness or deceptiveness upon which defendants must rely, *see RD&J Properties*, 165 N.C. App. at 748, 600 S.E.2d at 500-01, is a contractual issue despite defendants’ contentions otherwise.

b. Section 75-1.1(a) Based Upon Breach of Contract

The second way in which defendants could have demonstrated a valid claim for Section 75-1.1(a) is by showing a breach of contract accompanied by “[s]ubstantial aggravating circumstances[.]” *Mitchell*, 148 N.C. App. at 75, 557 S.E.2d at 623-24. However, here, the jury concluded that plaintiff had not “breach[ed] the Central Carolina Bank Deposit Agreement related to [defendant] Donald H. Sutphin’s money market account[,]” and plaintiff had not “breach[ed] the contract with [defendant] Bryant/Sutphin Properties, LLC for the making and repayment of the loan for the acquisition and development of the property known as Ashley Terrace[.]” On appeal, none of the parties contest that the basis of plaintiff’s relationship with defendants was contractual or that the Central Carolina Bank Deposit Agreement (“CCB Agreement”) and “the loan for the acquisition and development of the property known as Ashley Terrace” (“Ashley Terrace Loan”) are the applicable contracts which were properly submitted to

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the jury on the question of breach. Thus, while the parties may disagree about whether any contractual provision within the CCB Agreement or the Ashley Terrace Loan allowed plaintiff to place the hold on defendant Sutphin's Accounts, the jury has already determined plaintiff has not breached any such provision within either of these controlling documents. Accordingly, defendants do not have a viable Section 75-1.1(a) claim via a claim for breach of contract.

c. Jury Verdict Regarding Section 75-1.1(a)

Because defendants failed to plead in their counterclaims or demonstrate during trial any facts which would allow for a Section 75-1.1(a) claim outside of the context of a breach of contract claim, the trial court was left with three possible determinations as to BSP's counterclaims for breach of contract and Section 75-1.1(a): (1) The jury could have found that plaintiff neither breached a contract nor committed any acts which would constitute a Section 75-1.1(a) violation against BSP. In this situation, the trial court would not award any damages to BSP. (2) The jury could have found that although plaintiff had breached a contract there were not facts constituting a Section 75-1.1(a) violation against BSP. In this situation, the trial court would award damages based upon breach of contract but not upon a Section 75-1.1(a) violation against BSP. (3) The jury could have found that plaintiff breached a contract and there were facts constituting a Section 75-1.1(a) violation against BSP. In this situation, the trial court would award damages based upon breach of contract and would then have "determine[d] as a matter of law whether" the jury's positive responses to issue 17 regarding the "[s]ubstantial aggravating circumstances" supported an award for a Section 75-1.1(a) violation. *Id.*; *McDonald v. Scarborough*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 684 ("Based upon the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates [Section 75-1.1(a)]."), *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). In other words, BSP would have been awarded damages based upon breach of contract and may have been awarded damages based upon the trial court's determination regarding a Section 75-1.1(a) violation. However, another scenario which should not have happened is what actually did occur.

Here, the jury found that plaintiff had *not* breached a contract but there were facts sufficient to constitute a Section 75-1.1(a) violation; hence, the jury's negative responses to issues 7 and 12 regarding breach of contract and its positive responses to issue 17 regarding other conduct on the part of plaintiff. In other words, the jury found

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that although there was not a breach of contract there were “[s]ubstantial aggravating circumstances” that took place. *Mitchell*, 148 N.C. App. at 75, 557 S.E.2d at 623-24. While this was a logical conclusion for the jury to make, as they could properly find that a breach of contract had not taken place and that plaintiff had committed the acts listed in issue 17, it was error for the trial court to determine as a matter of law that these acts constituted a Section 75-1.1(a) violation where the only acts alleged were “[s]ubstantial aggravating circumstances” to a breach of contract when there was *no* breach of contract. *Id.* Without an independent Section 75-1.1(a) claim based upon some conduct outside the scope of the contracts, an award for a Section 75-1.1(a) claim could be entered only if the jury found a breach of contract accompanied by “[s]ubstantial aggravating circumstances.” *Id.* As the jury did not find a breach of contract, the inquiry should have ended because there was no breach of contract. *Id.*

4. Conclusion

In summary, defendants have not shown any conduct upon which a Section 75-1.1(a) claim could stand except for a breach of contract claim. As the jury found that plaintiff had not breached the applicable contracts, defendants have no viable claim under Section 75-1.1(a). Accordingly, the trial court erred in entering an award on defendant BSP’s claim for Section 75-1.1(a). As we have concluded that the trial court erred in entering an award for Section 75-1.1(a) to defendant BSP, we need not address plaintiff’s other issues regarding defendant BSP’s Section 75-1.1(a) claim.

B. Plaintiff’s Claim for Breach of Contract

[2] During trial, pursuant to Rule 50, plaintiff requested a directed verdict as to its claim for breach of contract against defendants. After the jury verdict finding no breach of contract on the part of defendants, pursuant to Rule 59, plaintiff moved for a new trial. The trial court denied both of plaintiff’s requests.

1. Directed Verdict

Plaintiff contends that “[t]he [t]rial [c]ourt [e]rred in [d]enying [its] Rule 50 [m]otions on its [b]reach of [c]ontract [c]laims” arguing that “[i]t is undisputed that Defendants haven’t made the payments under the BSP Note and Sutphin/BSP Guaranty.”

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. In

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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.

Rink & Robinson v. Catawba Valley Ent., _____ N.C. App. _____, _____, 725 S.E.2d 426, 429 (2012) (citations and quotation marks omitted).

“A party to an executory contract is under a duty not to do anything to prevent the other party to the contract from performing. When he does something that prevents the other party from performing, he is liable in damages.” *Pedwell v. First Union Natl. Bank*, 51 N.C. App. 236, 238, 275 S.E.2d 565, 567 (1981). Defendant Sutphin testified that he could have continued to make loan payments with the funds in the Sutphin Accounts, but once the Sutphin Accounts were wrongfully placed on hold it took all of his “working capital.” Furthermore, defendants denied actually being in default on the Note at the time the hold was placed. Defendant's evidence, taken as true, *see Rink & Robinson*, _____ N.C. App. at _____, 725 S.E.2d at 429, tends to show that any “breach” of contract on the part of defendants was due to plaintiff's hold placed on the Sutphin Accounts.

Plaintiff claims it had a right to place the hold, so its actions in placing the hold were not wrongful. However, our standard of review requires us to take “all of the evidence which supports the non-movant's claim . . . as true” and to consider it “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.” *Id.* Therefore, though this case is rife with “contradictions, conflicts, and inconsistencies[,]” we must resolve these in defendants' favor. *Id.*

In addition, in the criminal context our Supreme Court has stated,

In North Carolina jurisprudence, a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent and contradictory. It is firmly established that when there is sufficient evidence to support a verdict, mere inconsistency will not invalidate the verdict.

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However, when a verdict is inconsistent and contradictory, a defendant is entitled to relief.

State v. Mumford, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citations and quotation marks omitted).

While the jury's verdicts on plaintiff's claim and defendants' counterclaims may be factually inconsistent, they are not "legally inconsistent and contradictory[.]" *id.*, as a finding that one party did not breach a contract does not legally require a finding that the other party breached the same contract; nor does a finding that a party breached a contract legally require a finding that the other party did not breach said contract. Legally, both parties could breach the same contract, neither could breach the contract, or either party alone could breach the contract. Accordingly, plaintiff was not entitled to a directed verdict. *See Pedwell*, 51 N.C. App. at 238, 275 S.E.2d at 567.

2. New Trial

Plaintiff argues that "the trial court erred in denying [its] motion for a new trial" as to its breach of contract claim. (Original in all caps.) Plaintiff contends that "[a]ll of the evidence showed that the BSP Note was due and unpaid[.]" and therefore it is entitled to a new trial because "[t]he jury's verdict on [its] breach of contract claims ignored the evidence[.]"

Generally . . . the trial court's decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent an abuse of discretion. . . . However, where the Rule 59 motion involves a question of law or legal inference, our standard of review is *de novo*.

Bodie Island Beach Club Ass'n, Inc. v. Wray, ____ N.C. App. ____, ____, 716 S.E.2d 67, 76-77 (2011) (citations, quotation marks, and brackets omitted). As discussed above, defendant's evidence showed that the cause of the "unpaid" Note was plaintiff's own wrongdoing and/or that defendants were not actually in default; presumably the jury believed this evidence as it concluded that defendants had not breached the contract. *See Pedwell*, 51 N.C. App. at 238, 275 S.E.2d at 567. Therefore, the trial court did not err in denying defendant's motion for a new trial.

III. Defendants' Appeal

A. Judgment Notwithstanding the Verdict

Plaintiff and defendants made motions for judgment notwithstanding the verdict ("JNOV"); the trial court granted plaintiff's

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motion as to the jury's award to defendant Sutphin on his claim for Section 75-1.1(a) and denied defendants' motion as to its claim for breach of covenant of good faith and fair dealing.

1. Defendant Sutphin's Claim for Section 75-1.1(a)

[3] Defendants first contend that "the trial court erred by granting JNOV for [plaintiff] and setting aside the jury's verdict in favor of Mr. Sutphin." (Original in all caps.) As we have already concluded, the trial court should not have entered an award for a Section 75-1.1(a) violation for defendant BSP. Based on this same reasoning, we conclude the trial court did not err in granting plaintiff's motion for JNOV as to defendant Sutphin's claim for Section 75-1.1(a). We need not address defendants' argument regarding the evidence allowed regarding damages for defendant Sutphin's Section 75-1.1(a) claim as we have already determined an award could not stand in this case without a breach of contract.

2. Defendants' Claim for Breach of Covenant of Good Faith and Fair Dealing

[4] Defendants next contend that "the trial court erred by denying defendants' motion for JNOV on their good faith claims." (Original in all caps.) As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts. *See generally Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) ("In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." (citation and quotation marks omitted)). Accordingly, the trial court did not err in denying defendants' motion for JNOV as to defendants' "good faith claims."

B. Attorneys' Fees

[5] Lastly, defendants moved for attorneys' fees; the trial court denied the request. Defendants contend that "the trial court erred by refusing to award defendants their attorneys fees pursuant to N.C.G.S. § 75-16.1." (Original in all caps.) Defendants' entire argument is contingent upon the fact that defendant BSP prevailed in its claim for Section 75-1.1(a). However, as we have concluded that the trial court erred in entering an award for Section 75-1.1(a), this argument must necessarily fail. Therefore, we conclude that the trial court did not err in "refusing to award defendants their attorneys fees[.]"

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IV. Conclusion

For the foregoing reasons, we reverse the trial court's entry of an award for defendant BSP's claim for Section 75-1.1(a). As to all of the parties other issues, we affirm.

REVERSED in part; AFFIRMED in part.

Judges CALABRIA and STEELMAN concur.

TRADEWINDS AIRLINES, INC., TRADEWINDS HOLDINGS, INC., AND COREOLIS HOLDINGS, INC., THIRD-PARTY PLAINTIFFS v. C-S AVIATION SERVICES, THIRD-PARTY DEFENDANT

No. COA11-739

(Filed 18 September 2012)

1. Process and Service—personal jurisdiction—registered agent—certified mail

The trial court had personal jurisdiction over third-party defendant C-S Aviation Services (CSA). Service of process was properly obtained upon CSA by serving its registered agent by certified mail, return receipt requested, in accordance with N.C.G.S. § 1A-1, Rule 4(j)(6)c.

2. Unfair Trade Practices—fraud—default judgment

The trial court did not err by concluding the amended third-party complaint alleged claims for fraud and unfair and deceptive trade practices, and that the default judgment should stand.

3. Unfair Trade Practices—treble damages—default judgment

The trial court did not err by concluding that the third-party complaint adequately alleged an unfair and deceptive trade practice under N.C.G.S. § 75-1.1 that supported the trebling of damages in the default judgment.

4. Unfair Trade Practices—fraudulent inducement—broad discretion awarding damages

The trial court's award of damages in a fraudulent inducement and unfair trade practices case did not violate N.C.G.S. § 1A-1, Rule 54(c). The trial court had broad discretion to award

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damages to make the third-party plaintiff whole and to prevent third-party defendant from profiting from its fraudulent conduct.

5. Damages and Remedies—fraudulent inducement—unfair trade practices—calculation of damages

The trial court's final judgment in a fraudulent inducement and unfair trade practices case did not misapply the law of North Carolina concerning the calculation of damages. The court sought to make plaintiff whole and to prevent defendant from profiting from its fraudulent conduct.

6. Damages and Remedies—additional discovery—extensive hearing

The trial court did not err in a fraudulent inducement and unfair trade practices case by awarding damages that were allegedly inequitable and unsupported by the evidence. The trial court set aside the original default judgment in favor of Airlines and subsequently allowed discovery before conducting an extensive hearing on damages.

Appeal by third-party defendant, C-S Aviation Services, Inc., from the judgment entered on 26 July 2010 and orders entered on 16 February 2011 and 4 March 2011 by Judge Ben F. Tennille in the North Carolina Business Court. Heard in the Court of Appeals 15 November 2011.

Tuggle, Duggins & Meschan, P.A., by J. Nathan Duggins III, for third-party plaintiff-appellee TradeWinds Airlines, Inc.

Smith Moore Leatherwood LLP, by Larry B. Sitton and James G. Exum, Jr., for third-party plaintiffs-appellees TradeWinds Holdings, Inc. & Coreolis Holdings, Inc.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Ellis & Winters LLP, by Paul K. Sun, Jr., for third-party defendant-appellant.

STEELMAN, Judge.

The trial court had personal jurisdiction over C-S Aviation Services (CSA). The third-party complaint stated a claim for fraud and unfair and deceptive trade practices. The trial court's conclusions do not justify setting aside the default judgment. The trial court did not abuse its discretion in declining to set aside the default judgment.

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I. Factual and Procedural History

TradeWinds Airlines, Inc. (Airlines) is an air freight carrier. TradeWinds Holdings, Inc. (Holdings) was the sole shareholder of Airlines when this litigation began. CSA initially leased aircraft to Airlines. However, the aircraft leases were amended and restated so that Deutsche Bank Trust Company was the administrative agent for a syndicate of lenders that owned the aircraft leased to Airlines. CSA became the aircraft manager for the lessors of the aircraft.

In December 2001, Coreolis Holdings, Inc. (Coreolis) purchased the outstanding stock of Holdings. In September 2003, Deutsche notified Airlines that it was in default under the terms of the lease and threatened to seize the aircraft.

Deutsche filed this action against Airlines, Holdings, and Coreolis, (collectively TradeWinds Group) seeking possession of the aircraft and damages on 14 November 2003. TradeWinds Group filed a third-party complaint against CSA alleging fraudulent inducement, breach of contract, and unfair and deceptive trade practices on 4 February 2004. TradeWinds Group served CSA by sending copies of the summons and the third-party complaint to CSA's registered agent, Corporation Trust Company.

On 19 August 2004, the trial court entered default against CSA for failing to respond to TradeWinds Group's summons and third-party complaint. This entry of default was as to the claims asserted by the entire TradeWinds Group against CSA. Deutsche and TradeWinds Group subsequently reached a settlement, which resulted in the trial court dismissing the remaining claims between those parties on 29 December 2006. Excluded from the dismissal was TradeWinds Group's third-party complaint against CSA. On 27 February 2007, the trial court made a second entry of default against CSA.

The trial court closed its file on 17 April 2007. In the spring of 2008, Airlines became aware of the possibility of piercing the corporate veil to reach the principals of CSA.¹ Acting alone, Airlines moved for default judgment against CSA on 14 April 2008. CSA failed to appear at a hearing on the motion for default judgment on 19 June 2008. On 20 June 2008, Airlines filed an action in the United States

1. On 9 August 2006, the United States District Court for the Southern District of New York denied the individual defendants' motion for summary judgment on piercing the corporate veil claims in the case of *Jet Star Enterprises, Ltd. v. Soros*, 2006 WL 2270375 (S.D.N.Y. Aug. 9, 2006).

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District Court for the Southern District of New York, seeking to pierce the corporate veil to reach CSA's principals. *TradeWinds Airlines, Inc. v. Soros*, 2009 WL 435298 (S.D.N.Y. Feb. 23, 2009).²

On 7 July 2008, the trial court entered default judgment against CSA, awarding Airlines damages in the amount of \$16,326,528.94. The trial court then trebled the damages pursuant to Chapter 75 and added interest, making the total judgment \$54,867,872.49. On 25 July 2008, Airlines filed a petition for bankruptcy in the Southern District of Florida. On 31 July 2008, the trial court again closed its file in this matter.

On 27 August 2008, CSA moved to set aside the entry of default and the default judgment. On 7 January 2009, Coreolis and Holdings also filed a motion to set aside Airlines' default judgment. Coreolis and Holdings subsequently filed motions for entry of default judgment against CSA on 6 March 2009. On 20 May 2009, the trial court entered an order staying all pending motions until the stay arising out of Airlines' pending bankruptcy in Florida was lifted. Following the lifting of the bankruptcy stay, on 21 September 2009, the trial court set aside the 7 July 2008 default judgment in favor of Airlines, but declined to set aside the underlying entry of default against CSA.³ The trial court gave the parties 140 days to conduct discovery on damages and directed that a hearing on damages be held on 10 May 2010.

On 26 July 2010, the trial court entered judgment awarding Coreolis and Holdings damages in the amount of \$11,544,000.00, subject to trebling and interest against CSA. The judgment also awarded Airlines damages in the amount of \$16,111,403.00, subject to trebling and interest against CSA. A separate order was entered on 28 July 2010, denying TradeWinds Groups' motion for attorneys' fees. On 16 February 2011, the trial court denied CSA's motion to amend the judg-

2. *TradeWinds Airlines, Inc. v. Soros*, 2009 U.S. Dist. LEXIS 40689; *TradeWinds Airlines, Inc. v. Soros*, 2009 U.S. Dist. LEXIS 42854; *TradeWinds Airlines, Inc. v. Soros*, 2011 U.S. Dist. LEXIS 9432; *TradeWinds Airlines, Inc. v. Soros*, 2011 U.S. Dist. LEXIS 25543; *TradeWinds Airlines, Inc. v. Soros*, 2011 U.S. Dist. LEXIS 120173; *TradeWinds Airlines, Inc. v. Soros*, 2012 U.S. Dist. LEXIS 39459.

3. In setting aside the default judgment, it appears that the trial court was particularly concerned with the fact that the default judgment only ran in favor of Airlines, did not run in favor of the entire TradeWinds Group, and created the problems in moving forward with the case. The trial court found that CSA had actual notice of TradeWinds Group's third-party complaint and that CSA's "failure to respond to the summons appears to be intentional. It may have have relied on the belief that any judgment against it would be worthless."

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ment and to set aside the judgment and the underlying default. On 4 March 2011, the trial court issued an order clarifying its 16 February 2011 order.

CSA appeals from the judgment of 26 July 2010 and the orders entered on 16 February 2011 and 4 March 2011. On 12 July 2011, this Court granted appellant's motion to extend the word count for appellant's brief to 12,500 words.

II. Personal Jurisdiction

[1] In its first argument, CSA contends that the trial court lacked personal jurisdiction over CSA because it was not properly served with the third-party summons and complaint. CSA further argues that there was no evidence that CSA had actual notice of the third-party action. We disagree.

To obtain personal jurisdiction over a defendant, the issuance of the summons and service of process must comply with a statutorily specified method. *Bentley v. Watauga Bldg. Supply Inc.*, 145 N.C. App. 460, 461, 549 S.E.2d 924, 925 (2001). "In any action commenced in a court of this State[.]" N.C.R. Civ. P. 4(j) provides that "the manner of service of process *within or without* the State shall be as follows[.]" N.C.R. Civ. P. 4(j) (2011) (emphasis added).⁴ N.C.R. Civ. P. 4(j)(6)c authorizes service upon a corporation by "mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served[.]" N.C.R. Civ. P. 4(j)(6)c.

CSA contends that its registered agent, Corporation Trust Company, was not authorized by appointment or by law to accept process by certified mail on its behalf. CSA further argues that the authority of a Delaware corporation's registered agent is governed by Delaware law.

CSA contends that out-of-state service of process is controlled "by the laws of the state where the service will occur[.]" quoting *B. Kelley Enterprises, Inc. v. Vitacost.com*, _____ N.C. App. _____, _____ 710 S.E.2d 334, 338 (2011). In that case, the plaintiff filed an action in the Superior Court of Forsyth County, seeking to collect monies under a rental agreement. The defendant pled a judgment previously entered in the court of Palm Beach County, Florida as *res judicata*

4. N.C.R. Civ. P. 4 was amended in 2005, 2008, and 2011. 2005 N.C. Sess. Laws ch. 221, §§ 1, 2; 2008 N.C. Sess. Laws, ch. 36, §§ 1-3; 2011 N.C. Sess. Laws, ch. 332, § 3.1. Subsection 4(j)(6)c was not modified.

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and moved for judgment on the pleadings. The plaintiff in the North Carolina action contended that the Florida judgment was not valid, based upon a lack of proper service upon it in the Florida case. To determine whether the courts of North Carolina were bound by the Florida judgment, this Court examined whether the Florida court had personal jurisdiction over the plaintiff. This required the Court to apply Florida law concerning service of process to determine whether the plaintiff had been properly served.

CSA selectively quoted from our decision in *Kelley*. The entire sentence reads: “Therefore, it appears that Florida’s statutes governing service of process require out-of-state service to be carried out by persons authorized to conduct such service by the laws of the state where the service will occur.” *Kelley*, ____ N.C. App. at ____, 710 S.E.2d at 338.

In *Kelley*, this Court was construing Florida law to determine whether proper service had been made upon the plaintiff. We were not construing North Carolina law or N.C.R. Civ. P. 4(j)(6)c. Thus, *Kelley* is not controlling in this case.

The trial court found that TradeWinds Group sent copies of the third-party summons and complaint to CSA’s registered agent by certified mail, return receipt requested. Corporation Trust Company received these documents on 22 March 2004. These findings are supported by competent evidence in the record: the affidavit of service, the third-party summons addressed to CSA showing Corporation Trust Company as its registered agent, and the executed return receipt. CSA does not challenge proof of service under N.C. Gen. Stat. § 1-75.10.

Under North Carolina law, service can be effected through a registered agent by means of certified mail, return receipt requested, addressed to the agent to be served. N.C.R. Civ. P. 4(j)(6)c. CSA does not dispute that Corporation Trust Company was its registered agent.

CSA argues that under Delaware law, Corporation Trust Company was not authorized by appointment or by law to accept process by certified mail on its behalf, citing Del. Code Ann., tit. 8, § 321(a) (requiring personal service upon the officer, director or registered agent of the corporation). However, the manner of service of process is a matter of procedural law, not substantive law, and is controlled by the law of the forum state, North Carolina. *Kelley*, ____ N.C. App. ____, 710 S.E.2d at 337; *Freeman v. Pacific Life Ins. Co.*, 156 N.C. App. 583, 587, 577 S.E.2d 184, 187 (2003). In this case, service of

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process was properly obtained upon CSA by serving its registered agent by certified mail, return receipt requested, in accordance with N.C.R. Civ. P. 4(j)(6)c.

Since we have held that service of process upon CSA was proper, we do not reach CSA's argument that it did not have actual notice of the third-party complaint.

These arguments are without merit.

III. Law of Fraudulent Inducement**A. Judgment of Trial Court**

The trial court held that the Amended Third-Party Complaint adequately alleged claims for fraudulent inducement and unfair and deceptive trade practices. Based upon these claims, the trial court awarded Coreolis and Holdings the sum of \$11,544,000.00 which represented the amount of money lost by those two entities as a result of the fraudulent inducement by CSA. The trial court rejected the damages sought by Coreolis and Holdings for loss of value of their investment in Airlines. The trial court also awarded Airlines the sum of \$16,111,403.00. This sum was composed of the following: (1) repair cost for engines, \$2,693,403.00; (2) lease payment differential, \$6,216,000.00; and (3) other damages from engine failures, \$7,202,000.00. The trial court held that Airlines failed to prove that its losses attributable to the lease of Canadian aircraft were caused by the fraudulent conduct of CSA. Both awards were held to be subject to trebling and the addition of interest, according to law.

B. Elements of Fraud in the Inducement

"The essential elements of fraud [in the inducement] are: (1) False 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." *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 453, 678 S.E.2d 671, 684 (2009) (alteration in original).

C. Relationship Between Claims for Fraud in the Inducement and Unfair and Deceptive Trade Practices

"Proof of fraud in the inducement necessarily constitutes a violation of Chapter 75 and shifts the burden of proof from the plaintiff to the defendant, which must then prove that it is exempt from Chapter 75's provisions." *Id.*

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D. Measure of Damages for Fraud in the Inducement and Unfair and Deceptive Trade Practices1. Fraud in the Inducement

“The measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised, *Horne v. Cloninger*, 256 N.C. 102, 123 S.E.2d 112 (1961), and is potentially trebled by N.C.G.S. § 75-16.” *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 556 (1990). In *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 598 S.E.2d 396 (2004), this Court approved a jury instruction in a fraud case that stated: “Damages are compensation in money, in an amount so far as is possible, to restore a respective plaintiff to his or her original condition or position[.]” *Godfrey*, 165 N.C. App. at 78-79, 598 S.E.2d at 404. We held that “[i]t is elementary that a plaintiff in a fraud suit has a right to recover an amount in damages which will put him in the same position as if the fraud had not been practiced on him.” *Godfrey*, 165 N.C. App. at 79, 598 S.E.2d at 404 (internal quotation marks omitted). “In appropriate cases upon appropriate proof, benefit-of-bargain and consequential damages should be allowed. When fraud is proved, the courts are astute to give plaintiff a complete remedy and are careful to avoid situations in which the defendant may benefit from his fraud.” Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 27.36 (2nd ed. 1999).

2. Unfair and Deceptive Trade Practices

An action for unfair or deceptive acts or practices is “the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor wholly contractual in nature” *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975). While fraudulent behavior may evoke the action, it is not an action for fraud. *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

Bernard v. Central Carolina Truck Sales, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (1984) (alterations in original).

“The measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.” *Bernard*, 68 N.C. App. at 233, 314 S.E.2d at 585 (internal quotation marks omitted). “Unfair and deceptive

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trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions.” *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 61, 620 S.E.2d 222, 231 (2005).

The trebling of damages is automatic and is not in the discretion of the trial court. *Pinehurst, Inc. v. O’Leary Bros. Realty*, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924-25 (1986).

3. Conclusion on Damages

The measure of damages applicable to claims for fraud in the inducement and claims for unfair and deceptive trade practices is broad and remedial. Both encompass the concept of awarding such damages as will restore the plaintiff to his, her, or its original condition.

E. Effect of Claim of Fraud in the Inducement of a Contract upon Contractual Defenses

Where there is a claim for fraud in the inducement, defenses based upon the fraudulently induced contract will not bar the claim. In *Laundry Machinery Co. v. Skinner*, 225 N.C. 285, 34 S.E.2d 190 (1945), our Supreme Court held that parol evidence could be introduced in contravention of an integration clause in a contract, where there was fraud in the inducement, which “vitiates the contract.” *Laundry Machinery Co.*, 225 N.C. at 288-89, 34 S.E.2d at 192-93; *accord Godfrey*, 165 N.C. App. 68, 598 S.E.2d 396.

IV. Sufficiency of Allegations Contained in Third-Party Complaint

[2] In its second argument, CSA contends that the allegations of the Amended Third-Party Complaint fail to allege a claim for fraud or for unfair and deceptive trade practices and that the default judgment cannot stand. We disagree.

A. Effect of Entry of Default

A default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff’s recovery. *Lowe’s of Raleigh, Inc. v. Worlds*, 4 N.C. App. 293, 295, 166 S.E.2d 517, 518 (1969); *accord, West, Inc. v. G. C. Investment Associates*, 630 F.Supp. 1138, 1141 (E.D.N.C. 1986), *aff’d*, 822 F.2d 56 (4th Cir. 1987) (default not treated as absolute confession by defendant of plaintiff’s right to recover and court must con-

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sider whether plaintiff's allegations are sufficient to state claim for relief).

Hunter v. Spaulding, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990).

"[W]here an entry of default has not been set aside and the complaint is sufficient to state a claim, the defendant in default may not defend its merits by asserting affirmative defenses in a motion for summary judgment." *Hartwell v. Mahan*, 153 N.C. App. 788, 792, 571 S.E.2d 252, 254 (2002).

B. Trial Court's Consideration of Allegations of Complaint

CSA contends that TradeWinds Group failed to plead their fraud claim with particularity; that they failed to allege reliance; and that certain damages were not alleged to have arisen from the fraud claims. CSA further argues that the trial court "assumed liability and proceeded directly to assessment of damages" without making a determination as to the sufficiency of the allegations contained in the complaint. In its final judgment, the trial court highlighted certain allegations contained in the Amended Third-Party Complaint, as follows:

78. In negotiating the Initial Leases and Restructured Leases, C-S Aviation, as agent for the third-party defendants, made numerous false statements to the TradeWinds Group. Among others [sic] things, C-S Aviation represented that: (1) the engines installed on the airplanes had been recently overhauled so that they could be utilized for a minimum of 1700 cycles before it was necessary to overhaul the engines again; and (2) the engines had been maintained properly, with routine service and proper replacement of all parts.

79. The TradeWinds Group reasonably relied on these representations when made. Had the TradeWinds Group known that it was receiving engines that would fail to meet guaranteed performance objectives, it never would have entered into any of the leases at issue. Moreover, had Coreolis known of the misrepresentations, it never would have purchased TradeWinds Holdings in December 2001.

80. C-S Aviation knew these representations were false when made. In fact, C-S Aviation, knowingly used inferior and standard parts in its overhaul of the engines and C-S Aviation knew, as a result, that the engines could not possibly perform as promised.

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38. When the engines began to fail, TradeWinds commenced an investigation into the possible reasons for the failures. During this investigation, TradeWinds discovered that C-S Aviation knew before the Aircraft were leased to TradeWinds that it was delivering inferior engines with the Aircraft. In particular, TradeWinds learned, contrary to explicit representations, that C-S Aviation had failed to properly overhaul the engines. Specifically, TradeWinds learned that C-S Aviation had used substandard and inferior parts during the purported overhaul, resulting in engines that would need significant maintenance well short of the 1700 cycles promised.

98. Among other things, C-S Aviation failed to pay interest on amounts deposited by TradeWinds for maintenance reserves, failed to release reserves to TradeWinds for eligible maintenance events, failed to provide engines that had been maintained to a level so they would perform for 1700 cycles before requiring an overhaul, and failed to provide TradeWinds with lease rates in accordance with TradeWinds' "most favored nation" status.

102. C-S Aviation, as agent for and the third-party defendants, has engaged in unfair and/or deceptive acts and practices as defined by the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 et seq. Among other things C-S Aviation engaged in the fraudulent inducement of the leases at issue.

The inclusion of these provisions from the Amended Third-Party Complaint in the final judgment demonstrate that the trial court did consider the bases of TradeWinds Group's claims for relief prior to making an award of damages. We further note that the trial court stated in its final judgment that it was awarding damages based upon the claims for fraudulent inducement and unfair and deceptive trade practice. In its order of 16 February 2011, the trial court made the following rulings: "3. The Third-Party Complaint adequately alleges an unfair and deceptive trade practice under N.C.G.S. § 75-1.1. 4. The Third-Party Complaint adequately alleges a claim for fraudulent inducement."

These rulings show that the trial court did consider the sufficiency of the allegations contained in the Amended Third-Party Complaint.

C. Sufficiency of Fraud Allegations

After reviewing all of the allegations contained in the Amended Third-Party Complaint, we hold that the allegations contained therein, while perhaps not a model of clarity, allege the claims for

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fraud in the inducement with sufficient particularity to satisfy the requirements of N.C.R. Civ. P. 9(b). *Hunter*, 97 N.C. App. at 377, 388 S.E.2d at 634-35.

CSA further argues that TradeWinds Group failed as a matter of law to plead reliance, an essential element of fraud. It is clear that in Paragraph 79 of the Amended Third-Party Complaint (set forth above), TradeWinds Group expressly pled reliance. However, CSA contends that there was specific language contained in the leases attached to and incorporated into the Amended Third-Party Complaint where Airlines waived reliance upon any representations or warranties with respect to the leased aircraft. "When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009).

The issue is whether the lease provisions, treated as a portion of the complaint, serve to negate TradeWinds Group's assertion of reliance as contained in the Amended Third-Party Complaint. For several reasons, we hold that they do not negate or bar the assertion of reliance. First, as discussed in Section III E of this opinion, defenses based upon provisions contained in the fraudulently induced contract will not bar the fraud claim. Second, the assertion of the lease provisions in bar of the fraud in the inducement claims is the assertion of an affirmative defense by CSA, rather than an attack on the sufficiency of the Amended Third-Party Complaint. In *Schlieper*, the agreement attached to the complaint was between plaintiffs and defendants. In the instant case, the lease agreements attached to the Amended Third-Party Complaint were between Wells Fargo Bank, NorthWest, National Association and TradeWinds Airlines, Inc. While CSA was involved in the original leases that were fraudulently induced, it was neither a party to nor a signatory of the leases attached to the Amended Third-Party Complaint. CSA contends that it is entitled to the benefit of the disclaimers contained in the lease documents. However this would require a showing by CSA that it was an intended beneficiary of these provisions. This makes CSA's assertion of the lease provisions an affirmative defense that was required to be pled under N.C.R. Civ. P. 8(c), falling under the waiver, estoppel, or any other matter constituting an avoidance or affirmative defense. N.C.R. Civ. P. 8(c) (2011). Since CSA failed to answer the Amended Third-Party Complaint, it is barred from raising affirmative defenses. *See Hartwell, supra*.

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D. Sufficiency of Damages Allegations

Following the entry of the trial court's final judgment on 26 July 2010, CSA filed a motion to amend the final judgment on 6 August 2010. This motion attacked the bases for the trial court's award of damages. In response to this motion, the trial court entered a second order, dated 16 February 2011. This order held that the Amended Third-Party Complaint adequately alleged claims for fraudulent inducement and unfair and deceptive trade practices; that the "lease payment differential" damages were the natural and logical result of CSA's actions and were not required to be pled as special damages under N.C.R. Civ. P. 9(g); and that all damages asserted by TradeWinds Group were properly pled.

CSA first contends that the Amended Third-Party Complaint failed to allege that the lease pricing dispute arose from any fraudulent inducement by CSA. The Amended Third-Party Complaint contained detailed allegations concerning whether Airlines was to receive "most favored nation" pricing under the aircraft leases in accordance with representations by and agreements with CSA. These allegations were incorporated into TradeWinds Group's claims for fraudulent inducement and unfair and deceptive trade practices. CSA further contends that these claims were not pled with sufficient particularity. We hold that the claims for damages arising out of the lease pricing dispute were pled with sufficient particularity to give CSA notice of them under N.C.R. Civ. P. 9(g). Further, as discussed in Section III D of this opinion, as to damages, the finder of fact in fraud in the inducement and unfair and deceptive trade practices cases is vested with broad authority to award damages sufficient to restore a plaintiff to its original condition. In the instant case, the Amended Third-Party Complaint contained sufficient allegations to support the award of damages stemming from the lease pricing dispute based upon either fraudulent inducement or unfair and deceptive trade practices.

CSA next contends that the leases attached to the Amended Third-Party Complaint do not contain "most favored nation" pricing terms and therefore no claim based upon such pricing can be maintained by TradeWinds Group. In Sections III E and IV C of this opinion, we have previously discussed CSA's attempt to plead the terms of the lease agreement in bar of the claims of TradeWinds Group for fraud in the inducement and unfair and deceptive trade practices. This argument is equally unavailing here.

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Finally, CSA argues that the Amended Third-Party Complaint failed to allege that CSA fraudulently promised “most favored nation” pricing with the intent to not honor the promise. Paragraph 50 of the Amended Third-Party Complaint alleged: “Despite the promise of ‘most favored nation’ pricing, C-S Aviation knowingly leased planes to AeroUnion, one of TradeWinds’ direct competitors, at lower lease rates. This destroyed TradeWinds’ ability to compete for the routes for which the Canadian Planes were to be utilized.”

The promise of “most favored nation” pricing followed by the leasing of planes to a competitor at a lower rate was sufficient to allege an intent not to honor the promise. “[T]he inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties.” *Garrett v. Garrett*, 229 N.C. 290, 297, 49 S.E.2d 643, 647 (1948).⁵

E. Sufficiency of Allegations of Unfair and
Deceptive Trade Practices

CSA contends that the Amended Third-Party Complaint fails to state a claim upon which relief can be granted under N.C. Gen. Stat. § 75-1.1. Its first contention is that TradeWinds Group failed to allege actual reliance upon CSA’s misrepresentations. This argument has already been addressed in Section IV C of this opinion in the context of the fraud claim. That analysis is equally applicable to this portion of CSA’s argument.

CSA next argues that a plaintiff can pursue a misrepresentation claim under N.C. Gen. Stat. § 75-1.1 incident to contract-centered litigation only where the claim is identifiable and distinct from the breach of contract claim. In support of this assertion, CSA cites us to a federal case, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). This argument appears to be a variant of the legal principles set forth in the North Carolina Supreme Court case of *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978). That case held that “[o]rordinarily, a breach of contract does not

5. We note that the trial court held that “TradeWinds has failed to prove that its losses attributable to the lease of Canadian aircraft in connection with its ICC Agreement were proximately caused by any fraudulent conduct of C-S Aviation as alleged in the Amended Third-Party Complaint.” The fact that Airlines failed to prove this element of damages does not preclude the fraudulent conduct of CSA from supporting other damages that the trial court held were proven.

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give rise to a tort action by the promisee against the promisor.” *Ports Authority*, 294 N.C. at 81, 240 S.E.2d at 350. This legal principle is not controlling in this case for several reasons. First, an unfair trade practices action “is neither wholly tortious nor wholly contractual in nature[.]” *Bernard*, 68 N.C. App. at 230, 314 S.E.2d at 584. It is therefore not controlled by the four specific exceptions to the prohibition of bringing a tort claim in the context of a breach of contract action. *Ports Authority*, 294 N.C. at 82, 240 S.E.2d at 350-51. Second, our Courts have allowed a plaintiff to maintain a Chapter 75 action based upon fraudulent inducement of a contract. *Media Network*, 197 N.C. App. at 453, 678 S.E.2d at 684. Third, as discussed in Section III E of this opinion, where there is fraud in the inducement, defenses based upon the contract are not applicable.

Finally, CSA argues that any claim by Coreolis based upon allegations that it was fraudulently induced to purchase the stock of Holdings in December 2001 was barred since Chapter 75 does not apply to securities transactions. We hold that based upon the allegations of the Amended Third-Party Complaint, the claims of the TradeWinds Group are for fraudulent inducement and unfair trade practices, not for securities violations. As noted in Section III C of this opinion, “[p]roof of fraud in the inducement necessarily constitutes a violation of Chapter 75[.]” *Id.*

V. Conclusion of Law

[3] In its third argument, CSA contends that the trial court’s conclusion that “[t]he Third-Party Complaint adequately alleges an unfair and deceptive trade practice under N.C.G.S. § 75-1.1” is inadequate to support the trebling of damages in the default judgment. We disagree.

CSA argues that whether its conduct, as set forth in the Amended Third-Party Complaint, and admitted by virtue of the entry of default, constituted an unfair and deceptive trade practice under Chapter 75 was a legal question for the court, citing the case of *Durling v. King*, 146 N.C. App. 483, 554 S.E.2d 1 (2001). The trial court concluded that the allegations in the Amended Third-Party Complaint established a violation of Chapter 75 and that the damages awarded were subject to trebling pursuant to N.C. Gen. Stat. § 75-6.

Given that the allegations of the Amended Third-Party Complaint were deemed admitted by virtue of CSA’s failure to answer the complaint, the findings contained in the trial court’s final judgment of 26 July 2010 and the conclusions of law contained therein, as supplemented by the order of 16 February 2011, were sufficient to support

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the trebling of damages under N.C. Gen. Stat. § 75-1.1. The trial court was not required to make extensive findings of fact and conclusions of law as argued by CSA. We further note, as discussed in Section III D2 of this opinion that the trebling of damages was automatic and not in the discretion of the trial court.

This argument is without merit.

VI. Damages

[4] In its fourth argument, CSA contends that the trial court's award of damages violated N.C.R. Civ. P. 54(c). We disagree.

A. Damages Awarded by Trial Court

The trial court awarded two sets of damages in this case. First, it awarded \$11,544,000.00 to Holdings and Coreolis. This sum "represents the amount Coreolis and TradeWinds Holdings paid to settle the claims asserted against them and their wholly owned subsidiaries in the underlying Deutsche Bank litigation[.]" The trial court further held that Holdings and Coreolis lost this amount as a result of the fraudulent inducement by CSA. Second, the trial court awarded \$16,111,403 to Airlines. The judgment held that these sums were subject to trebling and assessed interest "as provided by law."

B. CSA's Argument under Rule 54(c)

CSA argues that in entering a default judgment, after a trial on damages, the trial court was limited in what damages could be awarded by the relief that was sought in the complaint, under N.C.R. Civ. P. 54(c) (2011). N.C.R. Civ. P. 54(c), in relevant part, provides that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." N.C.R. Civ. P. 54(c). Since the Amended Third-Party Complaint prayed for an amount "in excess of Ten Thousand Dollars (\$10,000) to be determined at trial" and sought treble damages pursuant to Chapter 75, the only issue before us is whether the damages awarded differed "in kind from" those sought in the Amended Third-Party Complaint.

As in its prior arguments, CSA made a number of multi-faceted and multi-layered arguments in support of its contentions. We discuss each argument.

CSA first argues that the Amended Third-Party Complaint does not allege that CSA is liable for the lease rate dispute or for the amounts paid in settlement by TradeWinds Group to Deutsche Bank. CSA contends that the only claims asserted against it arise from the

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fraudulent inducement related to premature engine failures. It further contends that nowhere in the complaint are there allegations pertaining to CSA's liability for amounts paid by TradeWinds Group to Deutsche Bank, that settlement having occurred over a year after the filing of the Amended Third-Party Complaint. As noted in Section III C of this opinion, the courts in fraudulent inducement and unfair and deceptive trade practices cases seek to make the plaintiff whole where fraud is proven and not to allow a defendant to benefit from its own fraud. The allegations of the Amended Third-Party Complaint, admitted as a result of CSA's default, establish fraud in the inducement by CSA as to the original aircraft lease and additional fraud with respect to the "most favored nation" pricing term. The damages awarded by the trial court were not different in kind from those alleged in the Amended Third-Party Complaint.

CSA next contends that the terms of the leases preclude consequential damages. As previously discussed in Section III E, where there is a claim for fraudulent inducement, defenses based upon the terms of the contract will not bar the claim.

CSA next argues that the settlement paid to Deutsche Bank constituted special, consequential damages that were not specifically pled in compliance with the provisions of N.C.R. Civ. P. 9(g). As noted in Section III D, the fact finder in fraud and unfair and deceptive trade practices claims has broad discretion in awarding damages to insure that the plaintiff is made whole and the wrongdoer does not profit from its conduct. As noted by the trial court in its order of 16 February 2011, the damages awarded "were the natural and logical result of C-S Aviation's actions and not required to be pled as special damages under N.C.R. Civ. P. 9(g)."

CSA next argues that the Amended Third-Party Complaint does not properly plead an action against CSA pursuant to N.C.R. Civ. P. 14. N.C.R. Civ. P. 14(a) (2011) provides that: "[A] defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." N.C.R. Civ. P. 14(a).

We hold that the allegations of Paragraph 83 of the Amended Third-Party Complaint are sufficient to assert a N.C.R. Civ. P. 14 third-party action against CSA for damages that TradeWinds Group may be liable for to the plaintiff. "In addition, the TradeWinds Group is entitled to damages incurred as a result of the fraudulently induced leases, including damages to cover the cost of obtaining new air-craft leases."

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Finally, CSA contends that the settlement payments by TradeWinds Group to Deutsche Bank were too remote as a matter of law to be awarded in the trial court's final judgment. CSA argues that the remoteness goes to whether this conduct of CSA proximately caused the damages awarded to TradeWinds Group by the trial court. Whether damages were proximately caused by the fraudulent conduct of a defendant is generally left to the finder of fact to determine. *Godfrey*, 165 N.C. App. at 79, 598 S.E.2d at 404. In the instant case, the trial court found that the damages awarded to TradeWinds Group resulted from the conduct of CSA. As noted in Section III D, the trial court had broad discretion to award damages to make the third-party plaintiff whole and to prevent CSA from profiting from its fraudulent conduct.

This argument is without merit.

VII. Calculation of Damages

[5] In its fifth argument, CSA contends that the trial court's final judgment misapplies the law of North Carolina concerning the calculation of damages. We disagree.

CSA first argues that damages for the engine failures should have been limited to the time period of 90 days from the date that the engines were removed. The 90 day limitation is based upon a provision contained in the lease agreements. As previously noted in Section III E of this opinion, where there is a claim for fraudulent inducement, defenses based upon the terms of the contract will not bar the claim.

CSA also contends that the damages awarded were contrary to the North Carolina law of damages, which limit damages for loss of use of a business vehicle to the cost of renting a similar vehicle for a reasonable period of time, citing *Roberts v. Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968). As noted previously in Section III D of this opinion, in cases of fraudulent inducement and unfair and deceptive trade practices, the courts seek to make the plaintiff whole and to prevent the defendant from profiting from its fraudulent conduct. This is not a case where a motor vehicle has been damaged and the plaintiff suffers loss of use as a result of the mere negligence of a defendant.

CSA next argues that damages for fraudulent inducement are measured from the date of the induced transaction and are measured as the difference between what was received and the value of what

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was promised. This argument is directed at the damage claim of Coreolis. CSA contends that its damages are limited to the difference between what Coreolis paid Holdings for the stock in 2001 and the actual value of the stock absent the fraudulent misrepresentations of CSA. Instead, the trial court awarded Coreolis the amount of the settlement payment that it paid to Deutsche Bank. We again note that the trial court specifically rejected Coreolis's claims for more extensive damages based upon value of Airlines lost by Coreolis and Holdings. As noted in Section III D of this opinion, in this type of case, the courts seek to make the plaintiff whole and prevent the defendant from profiting from its fraudulent conduct.

This argument is without merit.

VIII. Allegation of Inequitable Damages and Damages Unsupported by the Evidence

[6] In its sixth argument, CSA contends that the trial court erred in awarding damages that were both inequitable and unsupported by the evidence. We disagree.

CSA first argues that the trial court erred in failing to set aside the entry of default and in failing to set aside its July 2010 final judgment. As to the denial of the motion to set aside the entry of default, such a motion is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Bailey v. Gooding*, 60 N.C. App. 459, 463, 299 S.E.2d 267, 270 (1983). The trial court made the following finding with respect to CSA's motion to set aside the entry of default:

. . . C-S Aviation could be more than merely negligent in its failure to respond to this Court's summons. Its failure to respond to the summons appears to be intentional. It may have relied on the belief that any judgment against it would be worthless. *Howell* confirms that a party "flout[ing] . . . with impunity" its obligation to respond to pleadings does not demonstrate the "good cause" required to convince a court to revisit its own default order. Additionally, C-S Aviation holds itself out to be a "sophisticated part[y]." Sophisticated business persons who are parties to a lawsuit understand that they disregard a court summons at their peril.

In light of this finding by the trial court, we can discern no abuse of discretion on the part of the trial court in denying the motion of CSA to set aside the entry of default.

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As to the trial court's denial of CSA's motion to set aside its July 2010 final judgment, "[m]otions for relief from judgment are reviewed for an abuse of discretion." *Coastal Federal Credit Union v. Falls*, ____ N.C. App. ____, ____, 718 S.E.2d 192, 194 (2011). A motion to amend a judgment "is addressed to the sound legal discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of abuse of that discretion." *Hardy v. Floyd*, 70 N.C. App. 608, 610, 320 S.E.2d 320, 322 (1984). CSA does not argue on appeal that the trial court abused its discretion, but simply asserts that default judgments are disfavored by the law. We note that the trial court did set aside the original default judgment in favor of Airlines and subsequently allowed discovery before conducting an extensive hearing on damages. We discern no abuse of discretion by the trial court in denying CSA's motion to set aside the July 2010 judgment.

CSA further argues that the damages were uncertain and inequitable and that the settlement between TradeWinds Group and Deutsche Bank bars the claims against CSA. We hold that these arguments are also without merit.

IX. Conclusion

The trial court had personal jurisdiction over CSA. The third-party complaint stated a claim for fraud and unfair and deceptive trade practices. The trial court's conclusions do not justify setting aside the default judgment. The trial court did not abuse its discretion in declining to set aside the default judgment.

AFFIRMED.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 SEPTEMBER 2012)

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CARRINGTON v. DEPAOLI No. 11-1566	Wake (09CVS12130)	No error at trial; post trial orders AFFIRMED.
CROCKETT v. PRANTNER No. 11-1565	Wake (11CVS1725)	Affirmed
EVANS v. BRIDGES No. 11-1475	Vance (10CVD620)	Dismissed in part and affirmed in part
GINSBURG, ESQ. v. PRITCHARD, MD No. 12-304	Iredell (10CVS924)	Dismissed
IN RE C.J.L. No. 12-234	Alexander (11JB37)	Affirmed
IN RE D.G. No. 12-283	Pitt (09JT53-54)	Affirmed
IN RE M.R.G. v. DIANE No. 12-439	Wilkes (10JT92)	Affirmed
STATE v. BRADLEY No. 12-139	New Hanover (11CRS50140)	No Error
STATE v. GILLIS No. 12-260	Sampson (10CRS50622-23)	No Error
STATE v. GREEN No. 12-135	Swain (09CRS1134)	Dismissed
STATE v. JONES No. 12-98	Durham (10CRS61788) (11CRS6)	No Error
STATE v. LANGLEY No. 12-252	Mecklenburg (10CRS225357)	No Error
STATE v. LOVE No. 11-1578	Cumberland (09CRS61249)	No error in part, no prejudicial error in part.

STATE v. PITTMAN No. 12-226	Wayne (09CRS50177-78) (10CRS1981-83)	Affirmed
STATE v. RAMAN No. 11-1588	Guilford (08CRS100957-62) (08CRS100964-66)	No Error
STATE v. RILEY No. 11-1388	Pender (07CRS51658)	Reversed and remanded for resentencing.
STATE v. THORPE No. 12-229	Durham (10CRS62009)	Dismissed
STATE v. WELTON No. 12-235	Iredell (09CRS56823-24) (09CRS56831-37) (09CRS57067-68) (09CRS6484) (10CRS57172) (11CRS2721-22)	Remanded for resentencing
STATE v. WILLIAMS No. 12-257	Mecklenburg (11CRS18256-57) (11CRS7641)	No Error
THOMPSON v. CHARLOTTE- MECKLENBURG BD. OF EDUC. No. 12-93	Mecklenburg (10CVS17661)	Affirmed

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Acting in concert—jury instruction—mere presence—The trial court did not err in a robbery with a firearm case by denying defendant's request for a "mere presence" instruction to the jury. The trial court's instructions on acting in concert in the instant case required a finding by the jury that defendant joined in or shared a common plan to commit the robbery. **State v. Mason, 223.**

ACCORD AND SATISFACTION

Personal injury—no credit for payments to clerk's office—The trial court erred by declaring that the judgment entered against defendant in a personal injury case had been satisfied based on the payments of State Farm and Firemen's Insurance Company (Firemen's). Defendant was not entitled to a credit for payments made by Firemen's into the office of the clerk of superior court. On remand, the trial court may consider whether defendant was entitled to additional credits against the judgment, other than the \$30,000 paid by State Farm. **Wood v. Nunnery, 303.**

ADMINISTRATIVE LAW

Contested case—petition for judicial review—jurisdiction—payment of filing fee—The trial court erred by concluding that plaintiff state trooper's failure to pay the required filing fee on or before 11 March 2010 deprived the Office of Administrative Hearings of jurisdiction to consider plaintiff's challenge to defendant's dismissal decision. Additional proceedings were required to be conducted in the trial court in order to fully resolve the issues raised by defendant's petition for judicial review. **Scott v. N.C. Dep't of Crime Control & Pub. Safety, 125.**

Exhaustion of remedies—tortious interference with contract—doctrine not applicable—The doctrine of exhaustion of administrative remedies did not save the tortious interference claim of a doctor who lost his hospital privileges. That doctrine does not apply where a plaintiff seeks damages and the administrative remedies are non-monetary in nature. **Philips v. Pitt Cnty. Mem'l Hosp., Inc., 511.**

APPEAL AND ERROR

Appealability—mootness—prior discharge—involuntary commitment—Although defendant's term of involuntary commitment was expired, a prior discharge would not render questions challenging the involuntary commitment proceeding moot. **In re Murdock, 45.**

Appellate rules violations—sanctions not required—Plaintiff's request for sanctions based on defendant's various appellate rules violations was denied. The errors alleged by plaintiff related to nonjurisdictional requirements of the rules, those alleged errors did not impair review, and the adversarial process was not frustrated. **Plomaritis v. Plomaritis, 94.**

Argument not reached—judgment vacated—Although defendant contended that the trial court erred by instructing the jury that it could find defendant guilty of first-degree kidnapping if it determined that the victim was not released in a safe place, this argument was not reached because defendant's conviction for first-degree kidnapping was vacated. **State v. Martin, 213.**

Brief—no substantive argument—Plaintiff did not preserve for appellate review the question of whether defendants were liable to plaintiff for a shooting by their

APPEAL AND ERROR—Continued

son using their truck where plaintiff alluded to the theory in the “Issues Presented” section of the brief but did not support it with any substantive arguments. Moreover, negligent entrustment was not a cause of plaintiff’s harm. **Bridges v. Parrish, 320.**

Challenged findings—no argument advanced on appeal—abandoned—binding—The State abandoned its challenges to certain findings of fact for which no argument was advanced on appeal. Those facts were deemed binding for purposes of appellate review. **State v. Allen, 707.**

Constitutional issue—ruling not requested in trial court—dismissed—The issue of whether N.C.G.S. § 1A-1, Rule 9(j) is constitutional was not preserved for appellate review where it was raised in plaintiff’s complaint but her counsel specifically stated at the dismissal hearing that he was not requesting a ruling on the issue. **State v. Frederick, 576.**

DWI pretrial indication—appeal directly from superior to appellate court—The State correctly conceded that it did not have a statutory right of appeal to the Court of Appeals from a superior court order entered pursuant to N.C.G.S. § 20-38.7 (after a district court’s pretrial indication that granted defendant’s motion to suppress in a DWI prosecution). Although the State argued that the superior court order was final because it included language “suppressing” the evidence, the order specifically stated that the basis for the hearing was the State’s appeal of the district court indication, which meant that a remand to district court for final action was required. The order was therefore interlocutory; however, the State’s petition for *certiorari* was granted. **State v. Osterhoudt, 620.**

Decision of one panel of Court of Appeals—binding on subsequent panels—*Wal-Mart Stores East v. Hinton*, 197 N.C. App. 30, has not been overturned and remains binding on subsequent panels of the Court of Appeals, despite plaintiff’s argument that it misread N.C.G.S. § 105-130.6. **Delhaize Am., Inc. v. Lay, 336.**

Injunction against enforcement of bill—bill revised—issue dismissed—An issue on appeal concerning the trial court’s injunction against enforcement of a section of a bill involving pre-kindergarten was dismissed where that section of the bill was subsequently rewritten in another bill that was signed into law. **Hoke Cnty. Bd. of Educ. v. N.C., 406.**

Interlocutory order—failure to join necessary party—no substantial right—Defendant’s appeal from the trial court’s order denying defendant’s motion to dismiss for failure to join a necessary party was interlocutory in nature, and because defendant failed to show that a substantial right would be affected absent immediate disposition of this matter, the appeal was dismissed as premature. **Builders Mut. Ins. Co. v. Meeting St. Builders, Inc., 646.**

Interlocutory order—governmental immunity—abuse of student alleged as constitutional claim—In an action that rose from sexual abuse of a student by a teacher in which North Carolina constitutional claims were raised, the trial court order denying defendant’s motion to dismiss for failure to state a claim was interlocutory but appealable because it affected defendant’s substantial right to government immunity. The fact that plaintiff asserted that certain of her claims were constitutional did not automatically mean that she stated valid constitutional claims or that defendant was not entitled to avoid liability for those claims, properly understood, on governmental immunity grounds. **Doe v. Charlotte-Mecklenburg Bd. of Educ., 359.**

APPEAL AND ERROR—Continued

Interlocutory order—substantial right—public official immunity—While an order denying summary judgment is an interlocutory order from which there is generally no right to appeal, a public official may immediately appeal from an interlocutory order denying a summary judgment motion based on public official immunity. **Wilcox v. City of Asheville, 285.**

Interlocutory order—substantial right—denial of arbitration—An appeal from an interlocutory order denying arbitration was immediately appealable because it involved a substantial right which might be lost if appeal was delayed. **HCW Ret. & Fin. Serv., LLC v. HCW Emp. Benefit Serv., LLC, 19.**

Interlocutory order—summary judgment—remaining defendant—treated as petition for certiorari—A summary judgment for all but one of the defendants remaining in an action was an interlocutory order but the appeal was treated as a petition for *certiorari* under Rule 2 of the Rules of Appellate Procedure. Nothing in the record indicated that the remaining defendant received a final judgment or that she had been dismissed from this action, but dismissing the appeal as interlocutory would likely waste judicial resources. **Legacy Vulcan Corp. v. Garren, 445.**

Interlocutory order—writ of certiorari denied—The Court of Appeals denied defendant's petition for writ of certiorari and dismissed his appeal from an interlocutory order in a temporary child custody case. Neither of the First Amendment issues that defendant raised were properly preserved for review. **Sood v. Sood, 807.**

Jurisdiction—intervention order—appeal only from custody order—The Court of Appeals did not have jurisdiction to consider an intervention order in a child custody case where the appeal was only from the custody order. **Sides v. Ikner, 538.**

Law of the case—issues not decided—In a case involving the tax valuation of leased computer equipment, the Tax Commission's determination that findings or conclusions from prior appeals were the law of the case was incorrect. The law of the case applies only to what is actually decided; the prior appeals resulted from the Tax Commission's failure to address evidence concerning the valuation and the Court of Appeals never addressed the underlying issues. **In re Appeal of IBM Credit Corp., 418.**

Mootness—injunctive relief—object of relief obtained—The question of whether the trial court erred by granting preliminary and mandatory injunctive relief dispossessing plaintiff of a golf course was moot where plaintiff had regained control of the golf course. **NRC Golf Course, LLC v. JMR Golf, LLC, 492.**

Mootness—prior remands—misreading—In a tax valuation action that had been remanded twice previously, valuation issues were not moot where they had to be addressed after the last remand whether or not Schedule U5 was used. Portraying the valuation issues as applicable only as they related to the use of Schedule U5 was a misreading of the prior remand. The County's argument that IBM created the problem ignored the fact that the burden of proof had shifted to the County. **In re IBM Credit Corp., 418.**

New evidence while appeal pending—advisory opinion—The trial court did not abuse its discretion in an advisory opinion filed while plaintiff's appeal was pending by finding that proffered new evidence was merely cumulative and corroborative and concluding that plaintiff's Rule 60(b) motion would have been denied had it been before the court. **Morgan v. Nash Cnty., 481.**

APPEAL AND ERROR—Continued

Partial summary judgment—disputed sale of golf course—certiorari—The Court of Appeals treated an appeal from summary judgment as a petition for *certiorari* in the interest of judicial economy in a case involving the disputed sale of a golf course to plaintiff and the lease of the course to a subsidiary of the seller. Issues concerning the future possession and control of the property and the present and future compensation for use of the operating material were not resolved, so that the summary judgment was partial. **NRC Golf Course, LLC v. JMR Golf, LLC, 492.**

Preservation of issues—appeal from applicable order—The trial court correctly granted summary judgment for defendant on a claim by plaintiff for attorney fees after the Clerk of Court removed plaintiff as attorney of record in a guardianship proceeding. Plaintiff did not appeal the guardianship order and therefore did not challenge its findings, even though it was not interlocutory (a substantial right was affected). **Keyes v. Johnson, 438.**

Preservation of issues—discretionary review—An argument concerning the guilt of another was not properly preserved for appellate review but was reviewed under Appellate Rule 2. **State v. Miles, 593.**

Preservation of issues—failure to make constitutional argument at trial—Although defendant contended that the trial court erred by denying his motion to dismiss the charge of resisting, obstructing, or delaying a police officer since the conduct for which he was prosecuted was protected by the First Amendment of the United States Constitution, this constitutional argument was not preserved since it was not raised at trial. **State v. Cornell, 184.**

Preservation of issues—issue not pursued—Defendant abandoned for appellate review the issue of whether two of the victim's acquaintances could have been the perpetrators of the crime where the State's motion *in limine* was not definitively ruled upon during trial, defendant did not make an offer of proof or explanation of evidence that would have supported the conjecture offered in his brief, and defendant never again raised the issue. **State v. Miles, 593.**

Preservation of issues—procedural defect—failure to object—waiver—Defendant failed to object at a civil contempt hearing to the procedural defect when the judge indicated that she had the burden of proof at the show cause hearing. Thus, defendant waived the right to raise the issue on appeal. **Moss v. Moss, 75.**

Preservation of issues—variance between name of victim in indictment and at trial—Although defendant contended the trial court erred by denying his motion to dismiss the charges of robbery with a firearm based on the variance between the name of the victim alleged in the indictment and at trial, defendant failed to preserve this argument for appellate review. Even assuming *arguendo* that defendant preserved this issue for appeal, it would have had no merit. **State v. Mason, 223.**

Remaining arguments—agency—not addressed—harmless error—The Court of Appeals declined to address plaintiffs' remaining arguments that the trial court committed reversible error by granting defendant's motion for directed verdict and dismissing their claims against defendant based on agency. The Court of Appeals affirmed the trial court's judgment and these alleged errors would have amounted to harmless error. **Green v. Freeman, 652.**

Rule 2—not applied—evidence of identity sufficient—The Court of Appeals did not suspend the Rules of Appellate Procedure pursuant to Rule 2 in order to address defendant's argument that there was insufficient evidence that defendants were the

APPEAL AND ERROR—Continued

perpetrators of a robbery with a dangerous weapon and felonious conspiracy to commit robbery with a firearm where there was nothing to indicate that a manifest injustice would result from not suspending the Rules. **State v. Harris, 585.**

Rule 9(j)—no written findings and conclusions—no appellate review—In a wrongful death action alleging medical malpractice, the trial court's failure to make written findings and conclusions when dismissing plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 9(j) meant that there could be no appellate review of the basis for the trial court's ruling. **Estate of Wooden v. Hillcrest Convalescent Ctr., 396.**

ARBITRATION AND MEDIATION

Arbitration clause—duty of good faith—fiduciary duties—operating agreement—The trial court erred by ruling that plaintiffs' claims which rested on allegations that defendants breached the duty of good faith and breached their duties as fiduciaries, were not subject to arbitration. These claims arose out of or were in connection with, or in relation to the operating agreement, a fact which brought those claims within the scope of the operating agreement's arbitration clause. **HCW Ret. & Fin. Serv., LLC v. HCW Employee Benefit Serv., LLC, 19.**

Waiver—utilization of discovery procedures not available in arbitration—deposition—The trial court did not err by determining that defendants had waived their right to have the relevant claims submitted to arbitration by utilizing discovery procedures (deposing plaintiff Drake concerning the facts underlying the relevant claims) that would not necessarily have been available in arbitration. **HCW Ret. & Fin. Serv., LLC v. HCW Employee Benefit Serv., LLC, 19.**

ARREST

Law of case—lack of probable cause—resist, delay, or obstruct charge—It was the law of this possession of cocaine case that the police officer lacked probable cause to arrest defendant. Thus, the portion of the order dismissing the resist, delay, or obstruct charge was affirmed. **State v. Joe, 206.**

Resisting, obstructing, or delaying—denial of requested jury instruction—defense of remonstrating—The trial court did not err in a resisting, obstructing, or delaying a police officer case by denying defendant's request for a jury instruction on the defense of remonstrating with an officer. Defendant's conduct went beyond mere remonstrating. **State v. Cornell, 184.**

Resisting, obstructing, or delaying—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of resisting, obstructing, or delaying a police officer in violation of N.C.G.S. §14-223. There was sufficient evidence for the jury to conclude that defendant obstructed and delayed the officers in the performance of their duties. Further, a jury could reasonably have found that defendant did willfully delay and obstruct the officers' investigation. **State v. Cornell, 184.**

ASSAULT

Deadly weapon inflicting serious injury—addition to pattern jury instruction—three gunshot wounds to leg a serious injury—The trial court did not commit plain error in a felony assault with a deadly weapon inflicting serious injury case when it added to the pattern jury instructions that three gunshot wounds to

ASSAULT—Continued

the leg was a serious injury. It was unlikely that reasonable minds could differ as to whether the injuries suffered by the victim were serious in nature. Further, defendant made no argument on appeal, beyond mere speculation, to support his assertion that it was likely that the jury would have reached a different conclusion absent this instruction. **State v. Anderson, 138.**

ATTORNEY FEES

Pending appeal—Rule 60(b)—standing—The trial court erred by awarding attorney fees and expenses to defendants when issuing an advisory opinion on plaintiff's Rule 60(b) motion while plaintiff's appeal was pending. The subject matter of the Rule 60(b) motion was the same issue underlying the appeal and the trial court did not have jurisdiction to make the award. **Morgan v. Nash Cnty., 481.**

Unfair trade practices—did not prevail on claim—The trial court did not err by refusing to award attorney fees to defendants under N.C.G.S. § 75-16.1. Defendant BSP did not prevail in its Section 75-1.1(a) claim. **SunTrust Bank v. Bryant/Sutphin Props., LLC, 821.**

CHILD CUSTODY AND SUPPORT

Intervention by grandmother—parent acting inconsistently with rights—failure to seek custody—adherence to prior order—The trial court erred by concluding that a child's father (plaintiff) acted inconsistently with his parental rights by allowing the intervenor (the maternal grandmother) to act as a parent without taking action to obtain custody himself. The father did not intentionally create a parental role for the grandmother, but merely followed an earlier custody order that gave the father joint legal custody and secondary physical custody. The father was involved in the child's life to the full extent allowed by the prior custody order and did not know that defendant (the mother) would be moving away from the grandmother's home permanently. He stated his objection to the child remaining with the grandmother as soon as he learned of defendant's move. **Sides v. Ikner, 538.**

CITIES AND TOWNS

Statutory discrimination claim—solid waste disposal services—multi-family complexes—The trial court erred by granting summary judgment in favor of plaintiffs on their statutory discrimination claim. The City's reimbursement policy did not treat Cedar Greene differently from other multi-family complexes in the provision of solid waste disposal services. **Cedar Greene, LLC v. City of Charlotte, 1.**

CIVIL PROCEDURE

Motion to dismiss—summary judgment—Although plaintiff contended the trial court considered defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) (6) but erroneously also utilized a summary judgment standard in making its conclusions, neither defendant's motion nor the trial court's order cited any particular rule other than N.C.G.S. § 159-28. **M Series Rebuild, LLC v. Town of Mt. Pleasant, 59.**

Rule 59—new trial—ten-day limit—The trial court erred by ordering a new trial 24 days after judgment was entered in a breach of contract case. N.C.G.S. § 1A-1, Rule 59(d) is clear and unambiguous, and has a time limit of ten days. **Jones v. Southern Gen. Ins. Co., 435.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress statements—Miranda warnings inapplicable for traffic stops—The trial court did not commit prejudicial error by denying defendant's motion to suppress the statements made by defendant and the results of his field sobriety tests performed before being advised of his *Miranda* rights. *Miranda* warnings are not required for traffic stops. **State v. Braswell, 176.**

CONSTITUTIONAL LAW

Double jeopardy—multiple punishments for same offense—The trial court violated defendant's right against double jeopardy by entering judgment for to first-degree kidnapping, first-degree sexual offense, and second-degree sexual offense. The case was remanded so that the trial court could arrest judgment on the first-degree kidnapping conviction. **State v. Martin, 213.**

Constitutional Law—North Carolina—due process—sexual harassment by teacher—Assuming that N.C. Const. art. I, § 19 entitles plaintiff to an education free from abuse or physical harm, allegations in her complaint of sexual harassment by a teacher did not state a claim upon which relief could be recovered. Due Process is not implicated by the negligent act of an official causing unintended loss or injury to life, liberty, or property. **Doe v. Charlotte-Mecklenburg Bd. of Educ., 359.**

Constitutional Law—North Carolina—educational rights—sexual harassment by teacher—Allegations that a teacher sexually harassed a student did not state a claim for relief under N. C. Const. art I, § 15 and art IX, § 1. The educational rights guaranteed by those provisions have not been extended past the nature, extent, and quality of the educational opportunities made available in the public school system. **Doe v. Charlotte-Mecklenburg Bd. of Educ., 359.**

Retroactive taxes—North Carolina—no violation—The issue of whether the Department of Revenue violated the North Carolina constitutional prohibition on retroactive taxation in deciding to combine the income of two corporations for tax purposes was controlled by *Wal-mart Stores East v. Hinton*, 197 N.C. App. 30, which concluded that there was no violation. **Delhaize Am., Inc. v. Lay, 336.**

Right to confrontation—absence from court—insufficient evidence to explain absence—waiver—The trial court did not err in a felony assault with a deadly weapon inflicting serious injury case by concluding that defendant's absence from court on the second day of trial was insufficient to sustain a motion to dismiss on constitutional grounds even though defendant contended that he was deprived of his right to confront his accusers. The evidence was insufficient to satisfy defendant's burden to explain his absence. Thus, defendant waived his right to confrontation. **State v. Anderson, 138.**

Right to confrontation—statements of unidentified interpreter—corroboration—The trial court did not violate defendant's right to confront witnesses in a robbery with a firearm case by admitting statements of an unidentified interpreter. The testimony was not admitted for the purpose of establishing the truth of the matter asserted, but rather was admitted solely for the purpose of corroboration. **State v. Mason, 223.**

Right to counsel—critical stage of proceeding—pretrial suppression hearing—In a prosecution for drug-related charges that arose from a traffic stop, defendant's pretrial hearing on a motion to suppress evidence was a critical stage in the proceedings against defendant and his Sixth Amendment right to counsel attached no later than the time of the hearing. **State v. Frederick, 576.**

CONSTITUTIONAL LAW—Continued

Right to counsel—pro se representation—possible maximum punishment—The trial court erred by allowing defendant to proceed *pro se* at a critical stage (a pretrial suppression hearing) after telling him only that he could go to prison for a long, long time and that the law required an active prison sentence if defendant was convicted. This was not the specificity required by N.C.G.S. § 15A-1242(3). **State v. Frederick, 576.**

Right to trial—threat of death penalty—coercion of guilty plea—withholding critical information—The trial court erred by concluding that the State's use of the threat of the death penalty as leverage to coerce defendant into entering a guilty plea and waiving his constitutional right to trial, while simultaneously withholding critical information to which defendant was statutorily and constitutionally entitled, constituted a flagrant violation of defendant's constitutional rights. The record contained sufficient evidence to establish that the State was entitled to pursue defendant's case capitally and the results of a witness's polygraph examination were not discoverable. **State v. Allen, 707.**

Separation of powers—sentencing determination—The trial court did not violate the separation of powers doctrine by ordering the unconditional release of inmates imprisoned for life under a statute that defined "life" as 80 years where those prisoners had credits toward their release date. **Lovette v. N.C. Dep't of Corr., 452.**

Sound basic education—North Carolina—pre-kindergarten—remedy—jurisdictional basis—Although the State argued that the trial court did not have a jurisdictional basis to mandate the provision of pre-kindergarten services on a state-wide basis, that was not what the court ordered. The court rejected only the parts of proposed legislation that would deny an at-risk four-year-old an opportunity to obtain a sound basic education by denying admission to an existing program in his or her county. **Hoke Cnty. Bd. of Educ. v. N.C., 406.**

Sound basic education—North Carolina—pre-kindergarten—restricted admission—A trial court order mandating that the State not deny any eligible four-year-old admission to the North Carolina Pre-Kindergarten Program was within the court's authority and was affirmed. Pre-kindergarten is the method by which the State has decided to meet its constitutional duty to prepare all at-risk students to avail themselves of the opportunity to obtain a sound basic education; the State has not produced or developed any alternative plan or method. **Hoke Cnty. Bd. of Educ. v. N.C., 406.**

Sound basic education—remedy—not necessarily permanent—The More at Four (MAF) pre-kindergarten program was the remedy chosen in 2001 to deal with the problem of at-risk four-year-olds, but was not necessarily a permanent solution. The State should be allowed to modify or eliminate MAF by means of a motion filed with the trial court setting forth the basis and manner of any proposed modification. **Hoke Cnty. Bd. of Educ. v. N.C., 406.**

Sound basic education—remedy—pre-kindergarten statewide—The trial court acted within its authority by mandating the unrestricted acceptance of all at-risk four-year-olds seeking enrollment in existing pre-kindergarten programs across the state. The record was replete with evidence that the State's preferred and only remedial aid to at-risk prospective enrollees was a combination of early childhood and pre-kindergarten services as its means of achieving constitutional compliance. Finally, although the State argued that the trial court's authority to order unrestricted admission of at-risk four-year-olds should extend only to Hoke County, the State

CONSTITUTIONAL LAW—Continued

offered evidence of the implementation and efficacy of pre-kindergarten programs statewide. **Hoke Cnty. Bd. of Educ. v. N.C.**, 406.

State constitutional claims—summary judgment—claims against individual police officers was adequate remedy—The trial court did not err in a negligence case by granting summary judgment for defendant police officers on plaintiff's state constitutional claims. Plaintiff's claims against the individual defendants in their individual capacities served as an adequate remedy. **Wilcox v. City of Asheville**, 285.

CONSTRUCTION CLAIMS

Negligence—completed and accepted work doctrine—Where a sub-subcontractor completed its work on a construction project and the work was accepted by the general contractor, and where the condition of the work as completed by the sub-subcontractor was changed by the general contractor after the work had been accepted, the completed and accepted work doctrine applied to bar the recovery of damages in a negligence action by an employee of the general contractor against the sub-subcontractor. **Lamb v. D.S. Duggins Welding Inc.**, 52.

CONTEMPT

Civil—willful failure to comply—equitable distribution consent order—The trial court did not err by finding defendant in civil contempt for willful failure to comply with an equitable distribution consent order. The trial court's findings of fact were supported by sufficient, competent evidence presented at the show cause hearing and the findings supported the conclusions of law that the defendant's failure to pay for the Mercedes was willful. **Moss v. Moss**, 75.

CONTRACTS

Breach—motion for JNOV—modification not barred by statute of frauds—other arguments not preserved—The trial court did not err in a breach of contract case by denying defendant's motion for JNOV on the issues of whether the parties modified the completion dates contained in Schedule 4 and whether defendant waived its right to enforce plaintiff's failure to meet those deadlines. Because the arguments as to mutual assent and willing and able to perform the agreement were not properly raised at the time of the motion for directed verdict, they were not considered. Further, the trial court correctly determined that the modification alleged by plaintiff was not barred by the statute of frauds under N.C.G.S. § 22-2. **Plasma Ctr. of Am. v. Talecris Plasma Res.**, 83.

Breach—directed verdict denied—motion for new trial denied—The trial court did not err by failing to enter a directed verdict in favor of plaintiff on the breach of contract claim and denying its motion for a new trial. A finding that one party did not breach a contract does not legally require a finding that the other party breached the same contract. Further, defendant's evidence showed that the cause of the "unpaid" note was plaintiff's own wrongdoing and/or that defendants were not actually in default. **SunTrust Bank v. Bryant/Sutphin Props.**, LLC, 821.

Lease payments—modified option—no consideration—Lease payments were not sufficient consideration to support the modification of an option to purchase where plaintiff was legally obligated to make the payments. *First-Citizen's Bank &*

CONTRACTS—Continued

Trust Co. v. Frazelle, 226 N.C. 724, did not apply. **NRC Golf Course, LLC v. JMR Golf, LLC, 492.**

Loss of hospital privileges—hospital bylaws—The trial court correctly granted summary judgment for defendant hospital on plaintiff's breach of contract claim arising from the loss of his hospital privileges where he alleged that the hospital failed to comply with its bylaws in reviewing his privileges. The hospital substantially complied with its bylaws and there were no substantial issues of fact as to the alleged breaches plaintiff brought forward on appeal. **Philips v. Pitt Cnty. Mem'l Hosp., Inc., 511.**

No breach of contract—breach of covenant of good faith and fair dealing inapplicable—The trial court did not err by granting judgment notwithstanding the verdict for plaintiff on defendant's claim for breach of covenant of good faith and fair dealing. As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical to conclude that plaintiff somehow breached implied terms of the same contracts. **SunTrust Bank v. Bryant/Sutphin Properties, LLC, 821.**

Sale of real estate—communications with broker—not a binding contract—There was no material issue of fact as to whether a valid contract existed for the sale of real estate where communications between defendants' broker and plaintiff about a counteroffer did not bind defendants in contract, so that plaintiff could not maintain that defendants ratified the contract. The communications from defendants' broker did not constitute an acceptance in a manner recognized under the terms of the contract, which stated that it would become binding when it was signed or initialed by both parties. **Manecke v. Kurtz, 472.**

Tortious interference—loss of medical privileges—medical review testimony—protective order—The trial judge did not err in an action involving plaintiff's loss of hospital privileges by granting summary judgment for defendants, Doctors Whatley and Bolin, on a claim for tortious interference based upon their testimony at a medical review committee. Plaintiff did not appeal a protective order barring discovery of testimony before that committee. **Philips v. Pitt Cnty. Mem'l Hosp., Inc., 511.**

CORPORATIONS

Piercing corporate veil—sufficient evidence—The trial court did not err by denying defendant's motions for directed verdict and judgment notwithstanding the verdict as to plaintiffs' claim for piercing the corporate veil. Plaintiffs offered sufficient competent evidence to show that plaintiff and the other defendants had domination and control over the Piedmont companies; that plaintiff used her control of the companies' finances to her personal benefit; and that her actions were the proximate cause of plaintiffs' loss of their investment monies. **Green v. Freeman, 652.**

COSTS

Expert witness fees—complied with appellate court mandate—The trial court did not abuse its discretion in a negligence and negligent entrustment case by awarding costs to plaintiff. N.C.G.S. § 7A-305(d) must be read in conjunction with N.C.G.S. § 7A-314, and thus, defendants' argument about expert witness fees was without merit. Further, the trial court complied with the mandate issued by the Court of Appeals in *Springs I* and properly assessed costs. **Springs v. City of Charlotte, 132.**

CRIMINAL LAW

Instructions—identity—separate instruction not given—no plain error—There was no plain error in the trial court's failure to instruct the jury on identity in a prosecution for armed robbery and conspiracy to commit robbery with a firearm where defendants contended that the trial court's instruction on acting in concert left the jury with the impression that the State did not have to prove that defendants were among the perpetrators. In connection with the entire instruction, the trial court's jury instruction substantively included an instruction regarding identity and defendants could not show that the failure to give a separate instruction on identity caused the jury to reach a verdict that it probably would not have reached otherwise. **State v. Harris, 585.**

DAMAGES AND REMEDIES

Additional discovery—extensive hearing—The trial court did not err in a fraudulent inducement and unfair trade practices case by awarding damages that were allegedly inequitable and unsupported by the evidence. The trial court set aside the original default judgment in favor of Airlines and subsequently allowed discovery before conducting an extensive hearing on damages. **Tradewinds Airlines, Inc. v. C-S Aviation Servs., 834.**

Fraudulent inducement—unfair trade practices—calculation of damages—The trial court's final judgment in a fraudulent inducement and unfair trade practices case did not misapply the law of North Carolina concerning the calculation of damages. The court sought to make plaintiff whole and to prevent defendant from profiting from its fraudulent conduct. **Tradewinds Airlines, Inc. v. C-S Aviation Servs., 834.**

Motion for new trial—reasonable certainty—The trial court did not err by denying defendant's motion for a new trial as to damages because it was reasonably certain that the plasma center would have been open and producing plasma in time to comply with the deadlines as amended during the status update meetings. **Plasma Ctr. of Am. v. Talecris Plasma Res., 83.**

Punitive damages—motion for directed verdict—motion for JNOV—motion for new trial—The trial court did not err in a negligence and negligent entrustment case by denying defendants' motion for a directed verdict, JNOV, and a new trial on punitive damages. The evidence taken in the light most favorable to plaintiff, as the non-moving party, was sufficient as a matter of law to get the issue of punitive damages to the jury. **Springs v. City of Charlotte, 132.**

Restitution—insufficient evidence of amount—The trial court erred in a felony assault with a deadly weapon inflicting serious injury case by ordering defendant to pay restitution because the State failed to present any evidence to support the restitution order. This issue was reversed and remanded for additional proceedings. **State v. Anderson, 138.**

DECLARATORY JUDGMENTS

Ownership of bulkhead—plaintiff's lack of ownership previously decided—title documents established defendants' ownership—The trial court did not err in a declaratory judgment action by denying plaintiff's motion for summary judgment and granting defendants' on the issue of whether plaintiff owned the bulkhead which was the boundary between plaintiff and defendant's property. The Court of Appeals

DECLARATORY JUDGMENTS—Continued

had already decided, in *Inland Harbor I*, that the trial court did not err in denying plaintiff's motion for summary judgment and the title documents established as a matter of law that defendants owned the bulkhead. **Inland Harbors Homeowners Ass'n., Inc. v. St. Josephs Marina, LLC, 689.**

DEEDS

Judicial reformation—mutual mistake—The trial court did not err by granting summary judgment to defendants on plaintiff's claim for judicial reformation of a deed where plaintiff failed to meet its burden of showing a mutual mistake. **Inland Harbors Homeowners Ass'n., Inc. v. St. Josephs Marina, LLC, 689.**

Restrictive covenants—commercial or business purposes—short term vacation rentals not prohibited—The trial court did not err in a case involving the interpretation of restrictive covenants by granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment. The provisions of the restrictive covenants prohibiting the use of real property for commercial or business purposes did not prohibit short term vacation rentals. **Russell v. Donaldson, 704.**

DISCOVERY

Disclosure of evidence—impeachment value—prior to guilty plea—timely disclosure—The trial court erred in a first-degree murder, felony child abuse, and first-degree statutory sex offense case by concluding that the State flagrantly violated defendant's rights under *Brady v. Maryland*, 373 U.S. 83, both prior to the entry of his plea and prior to the hearing on defendant's dismissal motion, by failing to disclose, in a timely manner, certain evidence. Although a polygraph report and a witness's statement tended to undermine her credibility and did, for that reason, have impeachment value, the State was not constitutionally required to disclose material impeachment evidence prior to defendant's decision to enter a guilty plea. Further, as defendant's guilty pleas were subsequently vacated and the State provided the relevant information to defendant approximately six months prior to the hearing on his dismissal motion, defendant received the evidence in question at a time when he had ample opportunity to make effective use of it. **State v. Allen, 707.**

Disclosure of evidence—not required prior to guilty plea—timely disclosure—The trial court erred in a first-degree murder, felony child abuse, and first-degree statutory sex offense case by concluding that the State's failure to disclose information concerning the practices and procedures employed in the SBI laboratory constituted a violation under *Brady v. Maryland*, 373 U.S. 83. *Brady* does not require the disclosure of material impeachment evidence prior to the entry of a defendant's plea and disclosure was made in time for defendant to make effective use of the evidence at any trial that may eventually be held in this case. **State v. Allen, 707.**

Motion to compel production—insurance policy—motion to compel disclosure—waiver of subrogation rights—The trial court did not err by denying plaintiff's motion to compel production of Firemen's Insurance Company's (Firemen's) insurance policy and to compel disclosure of whether Firemen's agreed to waive its subrogation rights because it was a matter for resolution between Firemen's and defendant, and was of no concern to plaintiff. **Wood v. Nunnery, 303.**

Refusal to compel disclosure of confidential informant—failure to show necessity—The trial court did not err in a first-degree murder case by refusing to

DISCOVERY—Continued

compel disclosure of a confidential informant. Defendant did not make a sufficient showing that the particular circumstances of his case mandated disclosure of a confidential informant who merely provided defendant's phone number to law enforcement. **State v. Avent, 147.**

Violations—willful failure to provide honest lab report—material not exculpatory—The trial court erred in a first-degree murder, felony child abuse, and first-degree statutory sex offense case by concluding that the State flagrantly violated defendant's rights under *Brady v. Maryland*, 373 U.S. 83, by willfully failing to provide an accurate, honest lab report documenting the negative results of confirmatory blood testing and by providing defendant with a deceptively written report designed to obscure the fact that confirmatory blood testing was performed and yielded negative results. Certain components of the trial court's findings of fact lacked adequate record support; the undisclosed information did not constitute material exculpatory evidence for purposes of *Brady*; defendant's trial counsel could have, through independent investigation, determined what certain notations in the lab report meant; and defendant had been allowed to withdraw his guilty pleas, which meant that he occupied the position of a defendant awaiting trial rather than the position of a convicted criminal defendant. **State v. Allen, 707.**

DIVORCE

Equitable distribution—classification of benefits—line of duty disability benefits—analytic approach—The trial court erred in an equitable distribution case by awarding 37.5 percent of defendant husband's line of duty disability benefits to plaintiff wife. The trial court did not make a reasoned decision in classifying these benefits as a deferred compensation plan. The trial court's award was reversed and remanded with instructions for the trial court to make additional findings of fact using the analytic approach to justify its conclusion regarding the classification of the benefits. **Wright v. Wright, 309.**

Equitable distribution—classification—total permanent disability benefits—loss of earning capacity—separate property—The trial court erred in an equitable distribution case by awarding plaintiff wife 37.5 percent of defendant husband's total permanent disability benefits because these benefits were "disability benefits of the traditional type" and were intended to replace a loss of earning capacity. Thus, the trial court should have classified his total permanent disability benefits as separate property. **Wright v. Wright, 309.**

Equitable distribution—delayed judgment—no showing of prejudice—The trial court did not err by rendering its equitable distribution judgment twenty-one months after the last evidentiary hearing. Defendant made no showing that he was actually prejudiced by the trial court's delay. **Wright v. Wright, 309.**

Equitable distribution—distributive award—liquid assets—The trial court did not abuse its discretion in an equitable distribution case by concluding that defendant had sufficient liquid assets to satisfy the distributive award. The trial court's order of an 18 month period of \$2,000 payments was reasonable, as defendant's monthly disposable income of \$8,500 would be sufficient to cover this portion of the distributive award. Also, the marital residence could be refinanced or sold to cover the remaining amount to be paid in 18 months, giving defendant sufficient time to sell or refinance the property. **Peltzer v. Peltzer, 784.**

DIVORCE—Continued

Equitable distribution—motion to intervene—entered two years after resolution of case—void—The trial court lacked subject matter jurisdiction in an equitable distribution action to enter a 12 August 2010 *nunc pro tunc* order three years after the hearing on intervener's motion to intervene where the case itself had been over for almost two and a half years. The use of the phrase "*nunc pro tunc*" did not solve the jurisdictional problem. That order was, therefore, void and the trial court should have granted plaintiff's motion to set aside the order pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4). **Whitworth v. Whitworth, 771.**

Equitable distribution—postseparation payments—maintenance and preservation of marital residence—The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider postseparation payments made by defendant for the benefit of the marital estate. The trial court gave proper consideration of defendant's contributions to maintain and preserve the marital residence pursuant to N.C.G.S. § 50-20(c)(11a). **Peltzer v. Peltzer, 784.**

Equitable distribution—setting aside pretrial order—The trial court erred by setting aside the pretrial order prior to entry of its equitable distribution judgment. Thus, the trial court's 9 April 2008 order and 14 April 2008 judgment, the trial court's subsequent 8 May 2008, 29 June 2008, 30 April 2010, 30 November 2010, and 11 November 2011 orders were reversed and remanded to the trial court for further proceedings. **Plomaritis v. Plomaritis, 94.**

Equitable distribution—unequal division—findings—postseparation payment—distributional factor—The trial court did not abuse its discretion in an equitable distribution case by making an unequal division of marital property. Defendant retained an unequal distribution of 55% to 45% in his favor rather than the 80% to 20% division in plaintiff's favor as defendant contended. Further, the trial court considered the factors in N.C.G.S. § 50-20(c). Finally, the trial court's findings showed that it considered defendant's postseparation payment as a distributional factor. **Peltzer v. Peltzer, 784.**

Equitable distribution—valuation—medical practice—invited error—tax consequences—discount—The trial court did not err by allegedly adopting a false value of defendant's interest in his medical practice or by failing to consider the tax consequences with respect to its valuation. Any error in the trial court's reliance on defendant's expert witness in its finding on valuation or methodology was invited error. Further, the trial court was not required to make a finding regarding speculative or hypothetical tax consequences of the sale of defendant's medical practice since the trial court did not order defendant's medical practice to be sold to satisfy the distributive award. However, the case was remanded to the trial court for clarification of finding of fact 91 regarding the "discount" in the valuation of the medical practice. **Peltzer v. Peltzer, 784.**

ESTATES

Powers of executors—loan guaranty—purposes of will—The trial court did not err by granting defendants' motion for summary judgment in an action against an estate and its executor on a guaranty that was signed by previous co-executors. The language of the will clearly granted the co-executors the authority to bind the estate as guarantor of a loan to carry out the purposes of the will, which was to make specific gifts, not to keep the estate open indefinitely. An accompanying trust did not speak to the powers of the executors. **RL Regi N.C., LLC v. Estate of Moser, 528.**

ESTOPPEL

Quasi-modification of option—invalid—acceptance of payments under original contract—Quasi-estoppel did not apply and the trial court properly granted summary judgment for defendant JMR Golf, LLC where there was a lease of a golf course with an option to purchase, there was a modification of the option that was invalid for lack of consideration, and payments were accepted under the lease agreement but not under the revised option. The lease and original option were part of one transaction, but the modification was not and the payments accepted under the lease were not required under the terms of the revised option. **NRC Golf Course, LLC v. JMR Golf, LLC, 492.**

EVIDENCE

Composition book entry by defendant—dissimilar from crime—The trial court erred in a prosecution for first-degree sexual offense with a child and indecent liberties with a child by admitting evidence of a composition book entry by defendant regarding forcible anal sex. The circumstances described in the writing and in the charged crime were strikingly dissimilar in that they involved different genders, radically different ages, different relationships between the parties, and different types of force. **State v. Davis, 562.**

Confirmatory blood testing results—not material misstatement—The trial court erred by concluding that the charges of first-degree murder, felony child abuse, and first-degree statutory sex offense should be dismissed based on the presentation of false information at the time of defendant's initial plea hearing. Although the trial court's findings that Special Agent Elwell informed the prosecutor that stains on the victim's underwear gave positive indications for the presence of blood in preliminary testing but that subsequent confirmatory testing produced negative results were supported by the record, the trial court erred by concluding that the prosecutor made a material misstatement of fact at defendant's plea hearing, given that the confirmatory testing results did not constitute "material" evidence. Furthermore, given that defendant's guilty pleas were vacated, defendant had already received any relief to which he would ordinarily have been entitled as a result of any misconduct on the part of the State. **State v. Allen, 707.**

Erroneous entry of writing and expert assessment of defendant—prejudicial—Given the other evidence, there was prejudice in a prosecution for first-degree sexual offense with a child and indecent liberties with a child in the erroneous admission into evidence of a composition book entry concerning non-consensual anal intercourse and an expert assessment of psychopathic deviancy. **State v. Davis, 562.**

Expert witness testimony—not necessary—The trial court did not err in a first-degree sexual offense, second-degree sexual offense, and first-degree kidnapping case by refusing to allow defendant's witness to testify as an expert and testify in his defense. The trial court stated that it was not limiting defendant's ability to expose inconsistencies in the evidence and argue them to the jury, but expert testimony was not necessary to do so. **State v. Martin, 213.**

Guilt of another—evidence excluded—no error—Evidence implicating someone else and exonerating defendant was properly disallowed where defendant offered only conjecture as to the other person's actions and the State refuted this claim with positive and uncontradicted evidence exculpating the other person. Defendant did not meet his burden of showing a reasonable possibility of a different

EVIDENCE—Continued

result without the evidence by simply enumerating possible factual scenarios. **State v. Miles, 593.**

Hearsay—prosecutor’s trial outline—summary of defendant’s anticipated testimony—motion for DNA testing—harmless error—The trial court committed harmless error in a first-degree murder case when ruling on defendant’s motion for DNA testing by admitting into evidence and considering a prosecutor’s trial outline summarizing defendant’s anticipated testimony in a prosecution of a codefendant. The outline constituted inadmissible hearsay, but defendant did not meet his burden of showing materiality under N.C.G.S. § 15A-269(a)(1) since he was being tried as an aider and abettor. **State v. Foster, 199.**

Inadmissible expert evidence—admitted through cross-examination—The trial court erred in a prosecution for first-degree sexual offense and indecent liberties with a child by admitting inadmissible expert evidence concerning an evaluation of defendant from a child custody case through cross-examination. Although the State contended that defendant opened the door, defendant did not do so by testifying on re-direct after the State’s cross-examination on the subject or introducing visitation orders through the testimony of an assistant clerk of court which did not refer to an opinion of the expert in the custody case, and N.C.G.S. § 8C-1, Rule 608 was not applicable because none of the questions related to defendant’s truthfulness. **State v. Davis, 562.**

Photograph—staged by law enforcement—no reasonable probability verdicts affected—Defendant’s argument that the trial court abused its discretion in a prosecution for improper storage of a firearm and involuntary manslaughter by admitting into evidence a photograph staged by law enforcement which grossly misrepresented how defendant’s legally owned weapons were kept was overruled. Even assuming *arguendo* that the trial court erred in admitting the photograph, in view of the overwhelming evidence presented by the State, there was no reasonable possibility that the verdicts returned by the jury were affected by the error. **State v. Lewis, 747.**

Police testimony—green vegetable matter was marijuana—observation—training—experience—The trial court did not err in a possession of marijuana case by allowing two police officers to testify that the green vegetable matter found in defendant’s lap was marijuana based on their observation, training, and experience. **State v. Cox, 192.**

Prior crimes or bad acts—domestic violence incident—showing location and not conformity—The trial court did not commit plain error in a felony assault with a deadly weapon inflicting serious injury case by allowing an officer to testify that police searched for defendant at a particular location because he was involved in a previous domestic incident there. The testimony was not admitted to prove conformity, but instead for the sole purpose of explaining why officers searched for defendant at a particular location. **State v. Anderson, 138.**

Prior inconsistent statements—credibility—failure to show probative value outweighed unfair prejudice—The trial court did not abuse its discretion in a first-degree murder case by allowing evidence of two witnesses’ prior inconsistent statements. The trial court specifically instructed the jury not to consider the statements substantively, but only for purposes of determining their credibility. Defendant failed to demonstrate that the probative value of the statements was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. **State v. Avent, 147.**

EVIDENCE—Continued

Sending exhibits to jury room—playing back testimony—no coercion—The trial court did not err in a robbery with a firearm case by sending exhibits back to the jury room over defendant's objection, nor did it improperly coerce a verdict by playing back certain testimony. Although it was error for the trial court to send the exhibits back to the jury room without defendant's consent, there was no prejudice. Further, the trial court's actions were not coercive and did not improperly force the jury to reach a verdict. **State v. Mason, 223.**

Statute of frauds—underlying issue—no binding contract—In an action involving a failed real estate purchase, the question of whether the writings were sufficient to satisfy the statute of frauds was not considered where plaintiff did not establish that defendants entered into a binding contract. **Manecke v. Kurtz, 472.**

FIDUCIARY RELATIONSHIP

Breach of duty—company officer—minority shareholders—sufficient evidence—The trial court did not err in a breach of fiduciary duty case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Plaintiffs presented sufficient evidence that defendant was an officer or director in the Piedmont companies and a majority shareholder and therefore, owed a fiduciary duty to plaintiffs as minority shareholders; that defendant breached such duty; and that such breach was the proximate cause of plaintiffs' injury. **Green v. Freeman, 652.**

FIREARMS AND OTHER WEAPONS

Improper storage of firearm—sufficient evidence—The trial court did not err by denying defendant's motion to dismiss the charge of improper storage of a firearm. There was sufficient evidence of each element of the crime, including that defendant stored a handgun in such a manner that defendant knew or should have known that an unsupervised minor would be able to gain access to it. **State v. Lewis, 747.**

Negligent entrustment—duty to secure—The trial court did not err by dismissing plaintiff's claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff alleged that defendants were negligent in not securing their firearms from their son, who shot plaintiff after she attempted to end their relationship. *Belk v. Boyce*, 263 N.C. 24, was distinguished because it found a duty based on defendant's use of a firearm rather than its storage, and involved a defendant who caused harm directly rather than through a third party. North Carolina courts have not recognized a duty to secure firearms on common law principles. **Bridges v. Parrish, 320.**

Possession of firearm by felon—constructive possession—extrajudicial confession alone not enough—The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a felon based on insufficient evidence. The mere fact that defendant was in a car next to where a gun was found was not enough to establish constructive possession. Further, defendant's extrajudicial confession alone was not sufficient to support the charge. **State v. Cox, 192.**

Possession of firearm by felon—jury question—possession—plain error—The trial court committed plain error in a possession of a firearm by a felon case by failing to further inquire into and answer the jury's questions specifically regarding possession. The error had a probable impact on the jury's finding of guilt. **State v. Perry, 813.**

FRAUD

Upcoding hospital records—statute of limitations—Plaintiff's fraud claim against a hospital for "upcoding" medical records, so that patients were charged for treatments and procedures that were not performed, was barred by the statute of limitations. **Philips v. Pitt Cnty. Mem'l Hosp., Inc.**, 511.

GUARDIAN AND WARD

Death of ward—guardian no longer had authority to maintain action—The trial court erred when it entered its summary judgment order after decedent's death because then-named plaintiff Mr. White, in his capacity as guardian of decedent's estate, no longer had the authority to sustain the present action on behalf of decedent's estate under N.C.G.S. § 35A 1251(3). The case was remanded for the trial court's consideration of those issues, if any, presented by Mr. Bland, as collector of Mrs. Mills' estate. **White v. Mills**, 277.

HOMICIDE

First-degree murder prosecution—second-degree murder instruction refused—no error—The trial court did not err in a first-degree murder prosecution by refusing defendant's request for a charge on second-degree murder where all of the evidence supported the jury's conclusion that defendant murdered the victim with malice and after premeditation and deliberation, and defendant proffered no evidence supporting the submission of second-degree murder. **State v. Miles**, 593.

First-degree murder—defendant as perpetrator—sufficiency of evidence—The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss where defendant contended that there was insufficient evidence that he was the perpetrator. The evidence that defendant murdered the victim was circumstantial, but constituted substantial evidence from which the jury could have concluded that defendant was the perpetrator and that defendant possessed the motive, means, and opportunity to murder the victim. No singular combination of evidence, nor any finite, quantifiable amount constitutes substantial evidence. Once the court has determined that the evidence of motive and opportunity as a whole surmounts the initial benchmark of sufficiency, the task of assessing the value and weight of the evidence is for the jury. **State v. Miles**, 593.

First-degree—sufficiency of evidence—premeditation and deliberation—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. Viewing the evidence in the light most favorable to the State, there was substantial evidence to support the jury's determination that defendant had committed a premeditated and deliberate act in shooting the victim. **State v. Avent**, 147.

Involuntary manslaughter—sufficient evidence—The trial court did not err by denying defendant's motion to dismiss the charge of involuntary manslaughter. The State presented substantial evidence that defendant's improper storage of a firearm was the proximate cause of defendant's child's death. **State v. Lewis**, 747.

HOSPITALS AND OTHER MEDICAL FACILITIES

Hospital privileges—tortious interference—statute of limitations—protective order—The trial court correctly granted summary judgment for defendant on tortious interference claims against a hospital arising from plaintiff's

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

loss of privileges at that hospital. Plaintiff's claims were barred by the statute of limitations or blocked by a protective order that prevented discovery of the proceedings and records of a medical review committee. **Philips v. Pitt Cnty. Mem'l Hosp., Inc.**, 511.

Surgery center—CON application—comparative analysis—statutory criteria complied with—Petitioner WakeMed's contention that the Department of Health and Human Services, Division of Health Service Regulation's comparative analysis failed to properly consider the statutory criteria provided in N.C.G.S. § 131E-183(a) (3), (6), (13), and (18a) was overruled. There was substantial evidence to support the conclusion that the Certificate of Need Section properly approved Holly Springs Surgery Center, LLC's application. **WakeMed v. N.C. Dep't of Health & Human Servs.**, 755.

Surgery center—CON application—not impermissibly amended—The North Carolina Department of Health and Human Services, Division of Health Service Regulation did not err by approving Holly Springs Surgery Center, LLC's (HSSC) Certificate of Need (CON) application. HSSC did not impermissibly amend its application after it was submitted to the CON Section because the missing application sections and the missing letter of support filed by HSSC did not constitute material amendments to its CON application. **WakeMed v. N.C. Dep't of Health & Human Servs.**, 755.

Surgery center—CON application—statutory criteria complied with—Petitioners WakeMed's and Rex's arguments in a Certificate of Need (CON) case that respondent Holly Springs Surgery Center, LLC's CON application did not comply with all review criteria provided in N.C.G.S. § 131E-183(a) was overruled. **WakeMed v. N.C. Dep't of Health & Human Servs.**, 755.

IMMUNITY

Governmental—common law and constitutional claims—In an action against a school board arising from the sexual harassment of a student by a teacher which involved constitutional and common law claims, *Craig v. New Hanover Cty. Bd. of Ed.*, 363 N.C. 334, was misapprehended by the trial court. In denying defendant's motion to dismiss plaintiff's constitutional claims in reliance on *Craig*, the trial court appeared to have concluded that *Craig* contained two separate holdings instead of a single holding to the effect that a common law claim that is barred by the doctrine of governmental immunity is not an adequate substitute for a constitutionally based claim. **Doe v. Charlotte-Mecklenburg Bd. of Educ.**, 359.

Public official immunity—individual capacity—malice exception—summary judgment denied—The trial court did not err in a negligence case by denying summary judgment for three officers on plaintiff's claims against them in their individual capacities even though the officers claimed public official immunity. Viewed in the light most favorable to plaintiff, the evidence established that there were genuine issues of material fact regarding the applicability of the malice exception to public official immunity. However, with respect to any claims plaintiff asserted against a fourth officer, the chief, in his individual capacity, this case was remanded to the trial court for entry of summary judgment in the chief's favor. **Wilcox v. City of Asheville**, 285.

Sovereign immunity—breach of contract—unjust enrichment—The trial court did not err by granting defendant Town's motion dismissing plaintiff's breach of

IMMUNITY—Continued

contract and unjust enrichment claims. Although plaintiff raised a breach of contract claim, plaintiff conceded on appeal that an enforceable contract could not exist with defendant because there was no written agreement with a pre-audit certificate as required of all contracts with municipalities under N.C.G.S. § 159-28. Likewise, plaintiff's complaint made no allegations regarding any pre-audit certification as required by N.C.G.S. § 159-28(a). No valid contract was formed between plaintiff and defendant and defendant therefore did not waive its sovereign immunity to be sued for contract damages. The trial court did not have jurisdiction over defendant on the claim for unjust enrichment. **M Series Rebuild, LLC v. Town of Mt. Pleasant, 59.**

Sovereign immunity—notice—Even assuming for purposes of argument that defendant was required to plead a defense of sovereign immunity, contrary to plaintiff's arguments, defendant did plead sovereign immunity in its answer. Defendant's fourth defense gave plaintiff sufficient notice that defendant was asserting plaintiff's failure to comply with the requirements of N.C.G.S. § 159-28(a), and thus, the defense of sovereign immunity as it existed in the context of plaintiff's allegations. **M Series Rebuild, LLC v. Town of Mt. Pleasant, 59.**

INDECENT LIBERTIES

Bill of Particulars—supported by evidence—The trial court did not err by not dismissing indecent liberties charges where defendant contended that the Bill of Particulars indicated that the State was relying only on touching, about which there was no testimony. The Bill of Particulars referred to fellatio and anal intercourse and defendant did not dispute that there was sufficient evidence of those charges. **State v. Davis, 562.**

INDICTMENT AND INFORMATION

First-degree murder—motion to amend granted—date not an essential element of murder—The trial court did not err in a first-degree murder case by granting the State's motion to amend the date of the indictment from December 28 to December 27. The date was not an essential element of murder and defendant failed to show surprise or prejudice when he presented his alibi defense for the correct date. **State v. Avent, 147.**

INSURANCE

Exhaustion of liability limits—tender rather than payment—motion to compel arbitration—The trial court erred by denying plaintiff's motion to compel arbitration in an action arising from an automobile accident where the issue was whether Nationwide's (the insurer of the other driver) liability insurance was exhausted when plaintiff requested arbitration. Exhaustion occurs upon tender rather than payment. **Creed v. Smith, 330.**

Uninsured motorist—physical contact between vehicles required—The trial court did not err in an automobile accident, caused by the falling of a tire from a moving vehicle, by granting defendants' motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). The successful maintenance of a direct claim against an uninsured motorist carrier pursuant to N.C.G.S. § 20-279.21 is conditioned upon a showing that physical contact occurred between the insured and the vehicle operated by the hit-and-run driver, and the allegations of plaintiffs' complaint, when considered in the

INSURANCE—Continued

light most favorable to plaintiffs, showed that no physical contact between the vehicles occupied by plaintiff and the uninsured driver occurred. **Prouse v. Bituminous Cas. Corp., 111.**

JUDGES

Change by subsequent judge—sentencing determination—The trial court did not change determinations by other superior courts when it held that petitioners, sentenced to life imprisonment under N.C.G.S. § 14-2, were serving sentences statutorily set at 80 years and had unconditional release dates to which credits should be applied. **Lovette v. N.C. Dep't of Corr., 452.**

JUDGMENTS

Findings and conclusions—articulation of court's rationale—specific—A trial court order concerning pre-kindergarten programs contained sufficient findings and conclusions where the order provided a detailed summary or findings section, followed by a separate section of conclusions. The trial court's rationale was specifically articulated. **Hoke Cnty. Bd. of Educ. v. N.C., 406.**

JURISDICTION

Standing—anti-discrimination principle—public enterprise services—reimbursement policy—The trial court erred by failing to grant defendant City's motion to dismiss the claim with respect to plaintiff O'Leary for lack of standing. The anti-discrimination principle embodied in N.C.G.S. § 160A-314 protects only customers of public enterprise services, not service providers. However, the trial court did not err in failing to grant the City's motion to dismiss the statutory discrimination claim with respect to plaintiff Cedar Greene. Cedar Greene demonstrated the requisite standing based on its showing of a threatened financial injury by the City's alleged discriminatory reimbursement policy. **Cedar Greene, LLC v. City of Charlotte, 1.**

KIDNAPPING

Second-degree—improper jury instruction—no evidence of removal—The trial court committed plain error by instructing the jury on a theory of second-degree kidnapping that was not charged in the indictment or supported by the evidence. In the absence of any evidence of removal, the presence of the removal instruction provided the jury an illegitimate mode of conviction and constituted error. Defendant's kidnapping conviction was vacated and defendant was granted a new trial. **State v. Boyd, 160.**

LIBEL AND SLANDER

Defamation—loss of hospital privileges—claims against doctors—statute of limitations—medical review committee testimony—The trial court correctly granted summary judgment for defendants Whatley and Bolin on defamation claims arising from plaintiff's loss of hospital privileges. Any statements by defendants before the medical review committee were privileged and covered by a protective order, the single alleged incident of defamation that occurred outside the proceedings was barred by the one-year statute of limitations, and neither the doctrines of exhaustion of administrative remedies nor continuing wrong were applicable. **Philips v. Pitt Cnty. Mem'l Hosp., Inc., 511.**

LIBEL AND SLANDER—Continued

Defamation—reporting loss of hospital privileges—protective order—Summary judgment was properly granted for defendant hospital on a defamation claim arising from the reporting of plaintiff's loss of staff privileges to the National Practitioners' Data Bank and North Carolina Medical Board. Plaintiff argued that he demonstrated during the peer review proceedings that the claims against him were false but he was barred by a protective order from presenting any evidence of the proceedings or evidence before the medical review committees. **Philips v. Pitt Cnty. Mem'l Hosp., Inc.**, 511.

MEDICAL MALPRACTICE

Extension of time—physician's willingness to testify—In a medical malpractice case remanded on other grounds, defendants' assertion that an extension of time was void because it was requested for an improper purpose was not supported by precedent concerning an expert's willingness to testify where no affidavits were included in the record. **Estate of Wooden v. Hillcrest Convalescent Ctr.**, 396.

Extension of time—timing of expert opinion—The trial court did not abuse its discretion in a medical malpractice case by allowing defendants to amend their answers after they learned that plaintiff's expert rendered a Rule 9(j) opinion before plaintiff's request for an extension of the statute of limitations. **Estate of Wooden v. Hillcrest Convalescent Ctr.**, 396.

Required certification—res ipsa loquitur—allegations not sufficient—The trial court did not err by dismissing a medical malpractice action pursuant to N.C.G.S. § 1A-1, Rule 9(j) for failure to include the required certification or to allege facts establishing negligence under *res ipsa loquitur*. The alleged negligence arose from the prescription of a drug and a layperson would not be able to determine whether plaintiff's injury was caused by the drug or whether the doctor was negligent in prescribing it. Statements by the doctor that plaintiff's symptoms were caused by the drug and that he felt responsible were not sufficient for a layperson to infer negligence. **Smith v. Axelbank**, 555.

Rule 9(j)—area of expert expertise—In a wrongful death action arising from alleged medical malpractice that was remanded on other grounds, the inadequacy of plaintiff's expert nursing witness on claims against non-nursing healthcare professionals could not have properly served as a basis for the trial court's decision to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rule 9(j). **Estate of Wooden v. Hillcrest Convalescent Ctr.**, 396.

Rule 9(j)—partial dismissal of complaint—N.C.G.S. § 1A-1, Rule 9(j) allows for partial dismissal of a complaint alleging medical malpractice. That Rule does not provide a procedural mechanism by which a defendant may file a motion to dismiss, and each of the procedural mechanisms provided by the Rules of Civil Procedure permits judgment on less than the entire complaint. **Estate of Wooden v. Hillcrest Convalescent Ctr.**, 396.

MENTAL ILLNESS

Involuntary commitment—violent crime—fact-based analysis—resisting an officer—assault with deadly weapon—The trial court did not err in an involuntary commitment case by conducting a fact-based analysis in determining whether defendant was charged with a violent crime under N.C.G.S. § 15A-1003(a). Based

MENTAL ILLNESS—Continued

on the underlying factual scenario giving rise to defendant's charges, the trial court did not err by concluding that defendant was charged with a violent crime because the crime of resisting an officer involved an assault with a deadly weapon. **In re Murdock, 45.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure proceedings—motion to lift stay granted—compulsory counterclaim in federal action not required—The trial court did not err by granting petitioner BB&T's N.C.G.S. § 1A-1, Rule 60 motion to lift the stay of foreclosure proceedings against respondent to allow the foreclosure to proceed and by dismissing respondent's appeal to superior court. Since petitioner was not required to pursue the foreclosure action as a compulsory counterclaim in the federal action, N.C.G.S. § 1A-1, Rule 13(a) did not control and the foreclosure could not be stayed on that basis. **In re Draffen, 39.**

MOTOR VEHICLES

Crossing double-yellow line—statutory violations—The trial court erred by concluding that a DWI defendant did not violate any traffic laws in crossing a double-yellow line where defendant made a wide turn and went over the double-yellow line on a street with three lanes (two regular lanes and a turn lane). Defendant did not violate N.C.G.S. § 20-146(a) because that statute does not apply to highways divided into three marked lanes; however, defendant violated N.C.G.S. § 20-146(d) (3-4) by not obeying a traffic control device (the double-yellow line) and N.C.G.S. § 20-146(d)(1) by not staying in his lane. **State v. Osterhoudt, 620.**

Crossing halfway point in street—turn lane—There was competent evidence in a DWI suppression hearing to support the superior court's finding of fact that defendant's car did not cross the halfway point on a street in a DWI prosecution that involved a street with a turn lane (a total of three lanes). A Highway Patrol Trooper testified on direct examination that half of defendant's car went over the double-yellow line, which corresponded with the superior court's finding. Additionally, it would have been reasonable for the superior court to assume that the double-yellow line on a three-lane street would not be close enough to the middle of the street that the two lanes on one side and the one on the other would have the same total width. **State v. Osterhoudt, 620.**

Driving while impaired—jury instruction—impairment—ingestion of controlled substances—The trial court did not commit prejudicial error in a driving while impaired case by allegedly failing to properly instruct the jury on the State's duty to prove that defendant's impairment was due to ingestion of controlled substances. The record showed sufficient evidence that defendant was in fact impaired, and thus, defendant failed to carry his burden of showing that the verdict was affected by the instruction. **State v. Braswell, 176.**

Driving while impaired—motion to dismiss—sufficiency of evidence—Miranda safeguards inapplicable to traffic stop—The trial court did not commit prejudicial error by failing to grant defendant's motion to dismiss the charge of driving while impaired at the close of the State's case and at the close of all the evidence. *Miranda* safeguards did not apply to this traffic stop, and thus, the statements and field sobriety tests were a proper basis for determining whether defendant was under the influence of an impairing substance. **State v. Braswell, 176.**

MOTOR VEHICLES—Continued

Driving while impaired—speeding—driving without operator's license—suppression hearing—insufficient findings of fact—The trial court erred in a driving while impaired, speeding, and driving without an operator's license case by failing to make findings of fact resolving material conflicts in the evidence presented at the suppression hearing as required by N.C.G.S. § 15A-977. The case was remanded to the trial court for the entry of an order that contained appropriate findings and conclusions. **State v. O'Connor, 235.**

Failure to stop immediately after crash—motion to dismiss—sufficiency of evidence—The trial court did not commit prejudicial error by failing to grant defendant's motion to dismiss the charge of failure to stop immediately after a crash involving property damage in violation of N.C.G.S. § 20-166(c) at the close of the State's case and at the close of all the evidence in light of the testimony of a witness and two officers. **State v. Braswell, 176.**

NEGLIGENCE

Entrustment of firearm—no consent to use—harm not foreseeable—The trial court did not err by granting a Rule 12(b)(6) dismissal of plaintiff's negligence claim where plaintiff alleged that defendants negligently entrusted their firearm to their son, who drove to plaintiff's workplace and shot her. Plaintiff did not allege that defendants expressly or impliedly consented to their son's use of the handgun and could not have foreseen that their son's possession of the gun would cause plaintiff's harm. **Bridges v. Parrish, 320.**

Parents enabling son—former girlfriend shot—active course of conduct—claim not stated—The trial court correctly dismissed a negligence claim pursuant to N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff was shot by defendants' son after plaintiff attempted to end her relationship with him. Plaintiff alleged that defendants owed her a duty because they engaged in an active course of conduct that created a risk of harm to her by providing their son with assistance, downplaying his behavior, and not securing their firearms. Plaintiff did not allege how her harm was the reasonably foreseeable result of defendants' conduct or that defendants were in any way aware that their conduct would cause their son to act violently. **Bridges v. Parrish, 320.**

Respondeat superior—no duty to control actions of third party—The trial court did not err by granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff's negligence claim under the theory of *respondeat superior*. The facts alleged in the complaint were inadequate to impose a legal duty on defendant Holt, an EMT, because they failed to establish both that defendant had a right to control the patient and that he had the requisite knowledge of the patient's dangerousness. **Scadden v. Holt, 799.**

PENALTIES, FINES, AND FORFEITURES

Imposition of fine—remanded—clerical error—A judgment imposing a \$500 fine for involuntary manslaughter was remanded for correction of a clerical error where the trial court orally imposed a \$100 fine. **State v. Lewis, 747.**

PLEADINGS

Rule 11—medical malpractice—extension of time to find expert—Although the Court of Appeals expressly did not address the issue of whether the trial court

PLEADINGS—Continued

erred by concluding that plaintiff's motion to extend the statute of limitations in a medical practice action violated N.C.G.S. § 1A-1, Rule 11(a), the Court noted that a plaintiff may in good faith seek an extension to obtain an expert and be unable to do so, should not be penalized, and should be able to then file a claim under *res ipsa loquitur*. **State v. Frederick, 576.**

POWERS OF ATTORNEY

Competency at time of execution—question of fact—The issue of decedent's competence at the time of the execution of the 2005 power of attorney was a question of fact that should be considered and determined by a fact-finder. **White v. Mills, 277.**

PROBATION AND PAROLE

Assignment of parole officer—failure to complete intake process—Defendant's argument in a probation revocation case that he could not have violated any conditions of his probation because he was not assigned a probation officer was overruled. Because defendant left in the middle of the probation intake procedure, he could not complain that he did not receive that which he prevented the State from giving him. **State v. Brown, 738.**

Written statement of conditions—contained in judgments—Defendant's argument that the trial court erred in a probation revocation case by revoking his probation even though he never received a written statement containing the conditions of his probation, as required by N.C.G.S. § 15A-1343(c), was overruled. The judgments entered in this matter included many of the terms of defendant's probation and the record failed to show that defendant was not provided with copies of the judgments. **State v. Brown, 738.**

Written statement of conditions—failure to participate in intake process—The trial court did not err in a probation revocation case by revoking defendant's probation even though he never received a written statement containing the conditions of his probation, as required by N.C.G.S. § 15A-1343(c). Because defendant was aware that he was required to report to the probation office for processing, written confirmation of this requirement was not necessary. Had defendant reported and participated fully with the process, defendant would have received a written statement explaining all the continuing conditions of his probation. **State v. Brown, 738.**

PROCESS AND SERVICE

Personal jurisdiction—registered agent—certified mail—The trial court had personal jurisdiction over third-party defendant C-S Aviation Services (CSA). Service of process was properly obtained upon CSA by serving its registered agent by certified mail, return receipt requested, in accordance with N.C.G.S. § 1A-1, Rule 4(j)(6)c. **Tradewinds Airlines, Inc. v. C-S Aviation Servs., 834.**

REAL PROPERTY

Real Property—broker—real or apparent authority—The trial court did not err in an action over a failed real estate sale by granting summary judgment for defendants on the issue of whether defendants' broker acted with real or apparent authority. The evidence of record was that defendants' broker acknowledged that he did

REAL PROPERTY—Continued

not possess actual authority to bind defendants by contract to purchase plaintiff's property and there was no evidence that defendants held the broker out as possessing that authority or permitted him to represent himself as having that authority. The broker himself acknowledged that his responsibility was to assist in negotiating the terms of the contract and not to enter into the contract. **Manecke v. Kurtz, 472.**

Lease and option to purchase—one agreement—The trial court erred by determining that a lease and an option to purchase a golf course were separate agreements where the lease and original option agreement were executed contemporaneously and were entered into in furtherance of a common purpose, the lease agreement referenced and incorporated the original option to purchase, and the only change to the option to purchase was a modification of the price term. **NRC Golf Course, LLC v. JMR Golf, LLC, 492.**

Notice of preemptive rights—not sufficient—The trial court correctly granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment in an action against an estate and trustees for specific performance arising from an interwoven real estate transaction involving an option to purchase, an exchange of the option property for a second tract, and a right of first-refusal for a third tract that was not dependent on the exercise of the option. The issue was whether defendants had notice of plaintiff's preemptive rights: the only reasonable interpretation of a memorandum of agreement that was recorded and re-recorded was that all of plaintiff's rights expired on 31 December 1996, more than a decade before the transaction at issue here. Defendants were not required to draw inferences from the timing of the recordings, nor was language in the memorandum referring to the sequence of recording sufficient to arouse suspicion in a reasonable person performing a title search. **Legacy Vulcan Corp. v. Garren, 445.**

Purchase option modification—validity not reached—The issue of whether an option to purchase a golf course was facially valid was not reached where a modification to the option was invalid for lack of consideration and summary judgment for defendant was appropriate. **NRC Golf Course, LLC v. JMR Golf, LLC, 492.**

ROBBERY

Armed robbery—failure to instruct common law aggravated robbery—no such offense—The trial court did not err in an armed robbery prosecution by not giving an "aggravated common law robbery" instruction. Defendants admitted that a firearm was used in the robbery but argued that the victim's life was not threatened or endangered. However, the evidence fully supported armed robbery, did not support a lesser included offense, and there is no such offense as aggravated common law robbery in North Carolina. **State v. Harris, 585.**

Firearm—motion to dismiss—alleged variance between evidence and jury instructions—invited error—The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a firearm even though defendant contended there was a variance between the evidence at trial and the jury instructions. Although defendant contended the trial court should have dismissed the charge of robbery with a firearm and instructed the jury on attempted robbery with a firearm, defendant could not show prejudice. The punishment for both was identical. Further, defense counsel objected to the State's request for an instruction on attempted robbery with a firearm at trial. **State v. Mason, 223.**

ROBBERY—Continued

Firearm—motion to dismiss—sufficiency of evidence—taking—perpetrator—The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a firearm based on alleged insufficient evidence. Viewed in the light most favorable to the State, there was substantial evidence to show an actual taking of property. Further, defendant was present during the robbery and the State presented evidence that he participated in the robbery by rifling through the victim's pockets. **State v. Mason, 223.**

SEARCH AND SEIZURE

Motion to suppress cocaine—not investigatory stop—res judicata—result of arrest—The trial court erred by granting defendant's motion to suppress the cocaine found following his arrest. The evidence defendant sought to suppress was not obtained as the result of an investigatory stop, but instead was discovered following his arrest. It was *res judicata* that the police officer lacked probable cause to arrest defendant, and thus, any evidence found during a search incident to that invalid arrest must be suppressed. **State v. Joe, 206.**

Motion to suppress drugs—drug dog's positive alert to vehicle—no probable cause to search former passenger outside vehicle—The trial court did not err in a felony possession of cocaine case by granting defendant's motion to suppress the drugs seized. A drug dog's positive alert to a motor vehicle while defendant, a former passenger within the motor vehicle, was outside the vehicle did not constitute probable cause to search defendant's person without a search warrant. **State v. Smith, 253.**

Motion to suppress drugs—traffic stop—dog sniff—de minimus delay—The trial court erred by granting defendant's motion to suppress drugs seized during a traffic stop of defendant's vehicle. Following the issuance of the warning ticket, there was a delay of four minutes and thirty-seven seconds for the dog sniff which was a *de minimis* delay that did not rise to the level of a violation of defendant's constitutional rights under the Fourth Amendment to the United States Constitution. **State v. Sellars, 245.**

Motion to suppress—failure to attach supporting affidavit—trial court discretion to refrain from summarily denying motion—The trial court did not err in a driving while impaired, speeding, and driving without an operator's license case by failing to summarily dismiss defendant's suppression motion based upon his failure to attach a supporting affidavit as required by N.C.G.S. § 15A-977(a). Although the trial court has the authority to summarily deny or dismiss a suppression motion that fails to comply with the required procedural formalities, the trial court has the discretion to refrain from summarily denying such a motion that lacks an adequate supporting affidavit if it chooses to do so. **State v. O'Connor, 235.**

Traffic stop—normal driving—articulable suspicion—The trial court erred when considering a DWI stop by not looking beyond whether defendant's driving was normal in order to determine whether the trooper had reasonable, articulable suspicion for stopping defendant. The relevant inquiry is whether the officer had specific and articulable facts, as well as rational inferences from those facts, that a person was involved in criminal activity. **State v. Osterhoudt, 620.**

Traffic stop—reasonable articulable suspicion—mistaken statute—The trial court erred by finding that a Trooper did not have a reasonable, articulable suspicion for stopping a DWI defendant where the Trooper saw defendant cross a double-

SEARCH AND SEIZURE—Continued

yellow line but was mistaken about the statute violated. Defendant's driving violated other statutes and the Trooper's testimony established objective criteria justifying the stop. **State v. Osterhoudt, 620.**

SENTENCING

Life imprisonment—prior statute—In an action involving the release date for inmates sentenced to life imprisonment under a prior statute, the trial court did not err by concluding that it was bound by *Jones v. Keller*, 364 N.C. 249, but then differentiating petitioners from the limited scope of the *Jones* decision. The Supreme Court went to great lengths to distinguish the *Jones* defendants (serving life sentences for first-degree murder) from other defendants serving life terms under N.C.G.S. § 14-2. **Lovette v. N.C. Dep't of Corr., 452.**

SEXUAL OFFENSES

Denial of requested instruction—lesser-included offense of assault on female—The trial court did not err by denying defendant's request for an instruction on assault on a female as a lesser-included offense. As defendant was found not guilty of first-degree rape, defendant could not establish prejudice. Further, assault on a female is not a lesser-included offense of first-degree sexual offense. **State v. Martin, 213.**

STATUTES OF LIMITATION AND REPOSE

Grave desecration—ten-year period—action time-barred—The trial court did not err by dismissing plaintiffs' complaint for negligence and grave desecration where the action was barred by the statute of limitations. The alleged actions by defendants that gave rise to the claims did not occur within the ten-year period prior to the filing of plaintiffs' complaint. **Robinson v. Wadford, 696.**

Tortious interference with contract—hospital privileges—discovery rule—Plaintiff's claim for tortious interference with contractual relationships against defendant Dr. Whatley arising from plaintiff's loss of hospital privileges and Dr. Whatley's communication with a patient's spouse was barred by the statute of limitations. The discovery rule did not save plaintiff's tortious interference claim because it applies only to torts for personal injury or physical damage to property. **Philips v. Pitt Cnty. Mem'l Hosp., Inc., 511.**

TAXATION

Combined corporate earnings—changes in guidelines—no due process violation—The trial court did not err by concluding that defendant Secretary of Revenue did not violate plaintiff's procedural due process rights by forcing a combination of plaintiff and FL Food Lion, Inc., pursuant to N.C.G.S. § 105-130.6, for tax purposes. Plaintiff, formerly known as Food Lion, Inc., a North Carolina corporation, had restructured and formed a wholly-owned subsidiary, FLI Holding Corp., which housed a Florida corporation known as FL Food Lion, Inc. As a part of the restructuring, plaintiff formulated a strategy to reduce its North Carolina tax obligation by a circular movement of assets to Florida and the return of cash to North Carolina through fees. Defendant concluded that plaintiff's income should be combined with the income of FL Food Lion, Inc. to reflect plaintiff's true net earnings in North Carolina and plaintiff contended that its due process rights were

TAXATION—Continued

violated by defendant's failure to provide fair notice of changes in the guidelines regarding the combination of corporations for taxation. That argument is not supported by the record; furthermore, the facts of the case distinguish it from *Federal Communications Commission v. Fox Television Stations, Inc.*, 183 L.Ed. 2d 234 (2012). **Delhaize Am., Inc. v. Lay**, 336.

Corporations—restructuring—true earnings—economic substance analysis—The Business Court did not apply an economic substance analysis in its determination that the income of two corporations should be combined to determine true earnings for tax purposes. A statement by the Business Court that a corporate restructuring lacked economic substance to the contrary was not referred to in the Business Court's conclusion; moreover, any error by the Business Court in making the statement had no bearing on whether the Department of Revenue erred by combining the corporate incomes because the Department of Revenue did not apply an economic substance analysis. **Delhaize Am., Inc. v. Lay**, 336.

Penalty—notice of change in definition—The trial court erred by not granting defendant's motion for summary judgment on the issue of whether plaintiff was entitled to a refund of a tax penalty. Contrary to the statements of the trial court, the record contained documents that put plaintiff on notice of the definition of true earnings. Moreover, there was no genuine issue of material fact as to whether the penalty was due. **Delhaize Am., Inc. v. Lay**, 336.

Valuation of property—taxpayer values accepted—further remand futile—A Tax Commission decision was reversed and remanded for a decision reducing an assessment to the value listed by the taxpayer where there had been two prior remands and a further remand would be futile. There was no expert testimony as to any valuation approach other than the taxpayer's, which the county rejected; the county did not use an accepted method of valuation and misunderstood its burden of proof; and the Tax Commission twice failed to comply with the Court of Appeals' mandate. **In re IBM Credit Corp.**, 418.

TERMINATION OF PARENTAL RIGHTS

Notice—service by publication—statutorily insufficient—The trial court erred by terminating respondent father's parental rights to his minor child where petitioner's service by publication failed to comply with N.C.G.S. § 7B-1106(b)(4). The advertisement inserted into the newspaper completely omitted any reference to respondent father's right to counsel. **In re C.A.C.**, 687.

TRESPASS

Nuisance—no ownership of bulkhead—no riparian rights—The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claims for trespass by encroachment into riparian corridor, nuisance by unreasonable interference with riparian rights, and punitive damages based on the knowing and continuing encroachment into the bulkhead which plaintiff claimed was its property. Plaintiff did not own the bulkhead and had no riparian rights. **Inland Harbors Homeowners Ass'n., Inc. v. St. Josephs Marina, LLC**, 689.

TRIALS

Jurisdiction—substitute judge can reconsider order of retired judge—punitive damages—The trial court did not err in a negligence and negligent

TRIALS—Continued

entrustment case by denying defendants' motion to dismiss plaintiff's claim for punitive damages. Judge Caldwell had jurisdiction to render the Section 1D-50 opinion on remand. The language of N.C.G.S. § 1A-1, Rule 63 statutorily authorizes a substitute judge to reconsider an order entered by a judge who has since retired. **Springs v. City of Charlotte**, 132.

UNFAIR TRADE PRACTICES

Breach of contract—no egregious conduct—The trial court erred by entering an award on defendant Bryant/Sutphin Properties' (BSP) N.C.G.S. § 75-1.1(a) claim. Defendants did not show any conduct upon which a Section 75-1.1(a) claim could stand except for a breach of contract claim. As the jury found that plaintiff had not breached the applicable contracts, defendants had no viable claim under Section 75-1.1(a). **SunTrust Bank v. Bryant/Sutphin Props., LLC**, 821.

Fraudulent inducement—broad discretion awarding damages—The trial court's award of damages in a fraudulent inducement and unfair trade practices case did not violate N.C.G.S. § 1A-1, Rule 54(c). The trial court had broad discretion to award damages to make the third-party plaintiff whole and to prevent third-party defendant from profiting from its fraudulent conduct. **Tradewinds Airlines, Inc. v. C-S Aviation Servs.**, 834.

Fraud—default judgment—The trial court did not err by concluding the amended third-party complaint alleged claims for fraud and unfair and deceptive trade practices, and that the default judgment should stand. **Tradewinds Airlines, Inc. v. C-S Aviation Servs.**, 834.

Judgment notwithstanding verdict granted—The trial court did not err by granting judgment notwithstanding the verdict for plaintiff and setting aside the jury's verdict in favor of defendant Mr. Sutphin on the N.C.G.S. § 75-1.1(a) unfair trade practices claim. **SunTrust Bank v. Bryant/Sutphin Props., LLC**, 821.

Transactions in or affecting commerce—insufficient evidence—The trial court did not err in an unfair or deceptive business practices case by allowing defendant's motion for summary judgment. Plaintiffs failed to offer sufficient evidence that the transactions between plaintiffs and defendants occurring within Piedmont companies' business and based on investments or loans plaintiffs provided for defendants to start the new venture was "in or affecting commerce." **Green v. Freeman**, 652.

Treble damages—default judgment—The trial court did not err by concluding that the third-party complaint adequately alleged an unfair and deceptive trade practice under N.C.G.S. § 75-1.1 that supported the trebling of damages in the default judgment. **Tradewinds Airlines, Inc. v. C-S Aviation Servs.**, 834.

WORKERS' COMPENSATION

Attorney fees—defending without reasonable grounds—The Industrial Commission did not err by finding and concluding that defendant had defended a workers' compensation claim without reasonable grounds and awarding attorney fees where defendant contended that none of plaintiff's experts had given an opinion on whether plaintiff was disabled, but the record showed that one of plaintiff's medical experts and defendant's medical expert testified that plaintiff was disabled as a result of asbestosis. **Ensley v. FMC Corp.**, 386.

WORKERS' COMPENSATION—Continued

Disability award—beginning date—clerical error—A workers' compensation disability award for asbestosis was remanded for correction of a clerical error regarding the date from which disability benefits were awarded. **Ensley v. FMC Corp.**, 386.

Temporary partial disability—no deduction for wages earned from concurrent employer—The Industrial Commission erred in a workers' compensation case by calculating plaintiff employee's partial disability compensation pursuant to N.C.G.S. § 97-30. A defendant employer cannot deduct wages earned from a concurrent employer in calculating the defendant employer's obligation to pay partial disability compensation. The portion of the opinion and award calculating plaintiff's temporary partial disability compensation was reversed and remanded. **Tunell v. Res. MFG/Prologistix**, 271.

Unreasonable defense—attorney fee award—reduced on remand—The Industrial Commission did not err in a workers' compensation case after remand from the Court of Appeals by reducing the amount of attorney fees awarded as a sanction for defending the claim without reasonable grounds. The remand required findings and conclusions on whether defendant acted without reasonable grounds and an award of attorney fees if the Commission saw fit. The Commission made the necessary findings and then concluded in its discretion that an award of attorney fees pursuant to N.C.G.S. § 97-88.1 was appropriate. **Ensley v. FMC Corp.**, 386.

WRONGFUL DEATH

Inherently dangerous activity—contributory negligence barred claim—admiralty—The trial court did not err in a wrongful death case by granting summary judgment in favor of all defendants. While the facts presented some indicia of inherently dangerous activity including the combination of construction work, water, and electricity, the issue of defendants' duty of care was not reached based on plaintiffs' claims being barred as a matter of law under the doctrine of contributory negligence. The doctrine of contributory negligence applied regardless of whether plaintiffs could have brought their claims in federal court as an admiralty case. **Thorpe v. TJM Ocean Isle Partners, LLC**, 262.

ZONING

Special use permit condition—billboard—lease agreement—taking—§ 1983 damages—summary judgment improper—The trial court erred in a dispute over a lease agreement case by entering summary judgment in favor of plaintiff because there were genuine issues of material fact concerning whether plaintiff could have continued to operate its billboard in the absence of defendant's special use permit condition, for the takings claim, and for the § 1983 damages issue. The case was reversed and remanded. **MCC Outdoor, LLC v. Town of Wake Forest**, 70.

Special use permit—telecommunications tower—failure to make prima facie showing—substantial injury to value of adjoining properties—Respondent Town did not err in a case involving petitioner's application for a special use permit to erect a telecommunications tower by concluding that petitioner did not offer competent, material, and substantial evidence supporting required findings. Although petitioner met its burden to make out a *prima facie* case of two of the three general findings at issue in this case, the Court of Appeals was bound by its decision in *SBA v. City of Asheville City Council*, 141 N.C. App. 19, and held that petitioner failed to

ZONING—Continued

make a *prima facie* showing that the proposed use would not substantially injure the value of adjoining properties. **Am. Towers, Inc. v. Town of Morrisville, 638.**

Standing—direct effect of amendment—hypothetical injury—distance between properties—The trial court did not err by concluding that the City of Wilson did not have standing to challenge a rezoning by Nash County that would allow a poultry processing plant on a tract of land in the County. Although the City maintained that it had standing because the separate tract on which the treated wastewater from the processing plant would be dispersed was within the watershed from which the City drew about half of its water supply, the City was not directly affected by the amendment because disposal of agricultural wastewater was a permitted use on the separate tract before the rezoning of the tract on which the plant would be built, the alleged injury was hypothetical because the sprayfields would have to meet State and federal regulations, and the distance from City property to the rezoned property was too remote to support standing. **Morgan v. Nash Cnty., 481.**

