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TABLE OF CONTENTS

| | |
|--|-------|
| Judges of the Court of Appeals | v |
| Table of Cases Reported | vii |
| Table of Cases Reported Without Published Opinions | viii |
| Opinions of the Court of Appeals | 1-660 |
| Headnote Index | 661 |

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CASES REPORTED

| | PAGE | | PAGE |
|---|------|--|------|
| Austin Maint. & Constr., Inc. v. Crowder Constr. Co. | 401 | State v. Boyett | 102 |
| Baker v. Smith | 423 | State v. Burton | 120 |
| Bowman v. Cox Toyota Scion | 1 | State v. Cauty | 514 |
| Boylan v. Verizon Wireless | 436 | State v. Comeaux | 595 |
| City of Rockingham v. N.C. Dep't of Env't & Nat. Res. | 228 | State v. Corkum | 129 |
| Coderre v. Futrell | 454 | State v. Daniels | 608 |
| Cone v. Watson | 241 | State v. Elmore | 331 |
| Cornelius v. Lipscomb | 14 | State v. Franklin | 337 |
| Dallaire v. Bank of Am. | 248 | State v. Golden | 136 |
| Fatta v. M & M Props. Mgmt., Inc. . . | 18 | State v. Grainger | 623 |
| France v. France | 570 | State v. Grier | 150 |
| Garrett v. Burris | 32 | State v. Hester | 353 |
| Gregory v. Pearson | 580 | State v. Hoff | 155 |
| Grier v. Guy | 256 | State v. James | 164 |
| In re J.L.H. | 52 | State v. Mitchell | 171 |
| In re P.D.R. | 460 | State v. Oates | 634 |
| In re S.K.N. | 41 | State v. Randolph | 521 |
| In re Whatley | 267 | State v. Redman | 363 |
| Jenner v. Ecoplus, Inc. | 275 | State v. Reid | 181 |
| Johnston v. State of N.C. | 282 | State v. Rollins | 197 |
| King v. Brooks | 315 | State v. Royster | 374 |
| Lewis v. Hope | 322 | State v. Shaw | 209 |
| Minor v. Minor | 471 | TD Bank, N.A. v. Crown Leasing Partners, LLC | 649 |
| Morehead v. Wall | 588 | The Glens of Ironduff Prop. Owners Ass'n, Inc. v. Daly | 217 |
| Morgan v. Nash Cnty. | 60 | Town of Sandy Creek v. E. Coast Contr'g, Inc. | 537 |
| Pittman v. Hyatt Coin & Gun, Inc. . . . | 326 | Waterway Drive Prop. Owners' Ass'n, Inc. v. Town of Cedar Point | 544 |
| Reams v. Riggan | 78 | Young v. Young | 388 |
| S. Seeding Serv., Inc. v. W.C. English, Inc. | 90 | | |
| Smith v. DenRoss Contr'g, U.S., Inc. | 479 | | |
| Stark v. N.C. Dep't of Env't & Nat. Res. | 491 | | |

CASES REPORTED WITHOUT PUBLISHED OPINIONS

| | PAGE | | PAGE |
|---|------|--|------|
| Alcorn v. Bland | 397 | Ochoa v. Noahs Angels, LLC | 225 |
| Barr v. Goodyear Tire & Rubber Co. | 397 | Props. of S. Wake, LLC v. Fid. Bank | 398 |
| Blakeney v. Univ. of N.C. at Charlotte | 397 | Rayfield Props., LLC v. Bus. Insurers of the Carolinas, Inc. | 398 |
| Broughton v. Cnty. Comm'n of Wake Cnty. | 397 | Reed v. Olson | 225 |
| Bryant & Assocs., LLC v. Evans | 397 | Smith v. Drumm | 225 |
| Copeland v. Copeland | 397 | Sollis v. Holman | 398 |
| Cruz v. DMSI Staffing, LLC | 225 | State v. Alexander | 398 |
| Digh v. Digh | 397 | State v. Arriaga | 398 |
| Dolan v. Dickson Props., Inc. | 225 | State v. Baird | 398 |
| Evans v. Hendrick Auto. Grp. | 660 | State v. Bean | 398 |
| Hamilton v. Mortg. Info. Servs., Inc. . | 397 | State v. Brackett | 226 |
| In re Beauchemin | 397 | State v. Brink | 226 |
| In re C.C.B. | 397 | State v. Brooks | 399 |
| In re C.M.C. | 225 | State v. Brown | 399 |
| In re D.D.H. | 397 | State v. Brown | 660 |
| In re D.N.W. | 397 | State v. Bulger | 226 |
| In re J.B.L.J. | 225 | State v. Cox | 226 |
| In re K.A.M.L-P. | 225 | State v. Darden | 399 |
| In re K.C.H. | 397 | State v. Debruhl | 399 |
| In re K.L.T.G. | 398 | State v. Dodgen | 226 |
| In re L.E.M.T. | 398 | State v. Doyal | 226 |
| In re M.L.M. | 398 | State v. Fowler | 226 |
| In re N.C. Yadkin House, LLC | 398 | State v. Garvin | 660 |
| In re Novartis Vaccines and Diagnostics, Inc. | 660 | State v. Gattis | 226 |
| In re R.D. | 225 | State v. Glover | 399 |
| In re R.J.U. | 398 | State v. Green | 226 |
| In re T.L.T. | 225 | State v. Hardy | 226 |
| In re T.W.B. | 398 | State v. Harper | 226 |
| In re Y.B. | 398 | State v. Hill | 226 |
| Isabeau Dakota Inc. v. Hagler | 225 | State v. Holmes | 226 |
| Leeuwenburg v. Harmon | 225 | State v. Jackson | 226 |
| Martin v. Moreau | 225 | State v. Krieger | 399 |
| N.C. II LP v. Branch Banking & Tr. Co. | 398 | State v. Long | 227 |
| | | State v. Manson | 399 |
| | | State v. McDaris | 399 |
| | | State v. McFadden | 399 |
| | | State v. McKey | 227 |
| | | State v. McLaurin | 227 |
| | | State v. McLawhorn | 227 |
| | | State v. McSpadden | 227 |
| | | State v. Meekins | 399 |
| | | State v. Mobley | 227 |

CASES REPORTED WITHOUT PUBLISHED OPINIONS

| | PAGE | | PAGE |
|----------------------------------|------|------------------------------------|------|
| State v. Moreno | 227 | State v. Sorrell | 400 |
| State v. Nunez-Garcia | 227 | State v. Springs | 400 |
| State v. Oakley | 227 | State v. Standridge | 227 |
| State v. Owens | 399 | State v. Williams | 400 |
| State v. Parks | 399 | State v. Winchester | 227 |
| State v. Partida-Rodriguez | 399 | State v. Wright | 400 |
| State v. Patton | 399 | | |
| State v. Pettice | 227 | Tate v. Calloway | 227 |
| State v. Pittman | 400 | Turner v. Hammocks Beach Corp. . . | 400 |
| State v. Roberts | 400 | | |
| State v. Robeson | 227 | Waughtown Leasing Co., LLC | |
| State v. Sasser | 400 | v. City of Winston-Salem | 400 |
| State v. Slaughter | 400 | Woolard v. Robertson | 400 |

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

CLIFTON BOWMAN
v.
COX TOYOTA SCION, EMPLOYER, AND STONEWOOD INSURANCE CO., CARRIER

No. COA12-709

Filed 4 December 2012

1. Workers' Compensation—evidence—authentication-based objection—challenged in Form 44

Plaintiff in a Workers' Compensation case was not prevented from raising an authentication-based objection to defendants' video surveillance exhibits before the Commission. Plaintiff challenged the admissibility of Defendants' exhibits in his Industrial Commission Form 44.

2. Workers' Compensation—evidence—video surveillance exhibits—sufficient authentication

The Industrial Commission erred in a Workers' Compensation case by excluding defendants' video surveillance exhibits from the evidentiary record. Defendants sufficiently authenticated the videos.

Appeal by defendants from Opinion and Award entered 15 March 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 October 2012.

The Deuterman Law Group, by Daniel L. Deuterman and Casey S. Francis, for Plaintiff-appellee.

BOWMAN v. COX TOYOTA SCION

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

Brooks, Stevens & Pope, P.A., by Bambee B. Blake and Ginny P. Lanier, for Defendant-appellants.

ERVIN, Judge.

Defendants Cox Toyota Scion and Stonewood Insurance Company appeal from the Commission order awarding medical and disability benefits to Plaintiff Clifton Bowman. On appeal, Defendants contend that the Commission erred by declining to admit three surveillance videos marked for identification as Defendants' Exhibits 1, 2, and 3 on the grounds that (1) Plaintiff waived his right to seek Commission review of this issue by failing to object to the introduction of the videos at the hearing held before the Deputy Commissioner and (2) Defendants sufficiently authenticated the challenged exhibits. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Plaintiff was not barred from challenging the admissibility of the videos before the Commission, that the Commission erred by refusing to consider the videos, and that this case should be remanded to the Commission for further proceedings, including the entry of an order that takes the information contained in these videos into account.

I. Background

A. Substantive Facts

At the time of the hearing held before the Deputy Commissioner in this case, Plaintiff was forty-one years old and had completed the tenth grade. In 2005, Plaintiff began working for Defendant Cox Toyota as a repair technician. On 28 August 2010, Defendant Cox Toyota moved into a new car sales and repair facility which was equipped with a video surveillance system.

On 8 September 2010, Plaintiff arrived for work at 7:30 a.m. Plaintiff claims that, shortly after noon, he was been walking near the area where he kept his toolbox when he tripped over an air hose and drop cord left on the floor by Frank Apple, the man assigned to work in the adjoining repair bay. After tripping over the hose, Plaintiff fell to the concrete floor. As he landed, Plaintiff felt "something pop." Upon attempting to rise, Plaintiff experienced a "stabbing pain" in his neck and lower back which radiated down his legs. A few minutes later, Plaintiff reported the accident to his immediate supervisor, Peggy Young, and told her that he had hurt his back when he tripped over a hose and fell to the floor.

BOWMAN v. COX TOYOTA SCION

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

Plaintiff continued to experience severe pain, and left work about forty-five minutes following his fall. Before leaving, Plaintiff showed his back to two co-workers, Daniel Carter and David Valencia, both of whom testified that Plaintiff claimed to have hurt his back after tripping over an air hose and both of whom observed that Plaintiff's back was red and swollen. According to Rusty Cox, Defendant Cox Toyota's vice-president, both Mr. Carter and Mr. Valencia were known to be honest individuals.

Plaintiff was initially seen by Physician Assistant Ronald Smith at Alamance Regional Medical Center, where he was admitted at 1:36 p.m. on 8 September 2010. While examining Plaintiff, P.A. Smith noticed decreased flexion in Plaintiff's lower back and observable muscle spasms in his left paraspinals. P.A. Smith testified that a muscle spasm could not be faked and that, in his opinion, Plaintiff had been injured earlier that day.

On 9 September 2010, Plaintiff saw Dr. Kevin L. Krasinski of Burlington Orthopaedic and Hand Surgery. According to Dr. Krasinski's notes, which include the same account of the origin of Plaintiff's injury that Plaintiff had given to his co-workers, Plaintiff had "traumatic lumbar disk herniation with contusion of the right hip." After ordering an MRI for the purpose of further assessing Plaintiff's back injury and reviewing the results of that study, Dr. Krasinski referred Plaintiff for pain management.

On 20 October 2010, Plaintiff began treating with Dr. Gregory H. Crisp, a board-certified pain management specialist. Dr. Crisp noted that Plaintiff had severe muscle spasms. According to Dr. Crisp, muscle spasms, which are involuntary, provide an objective indication of a patient's condition. Dr. Crisp referred Plaintiff for a surgical evaluation.

On 24 November 2011, Plaintiff was evaluated by Dr. James C. Califf, an expert in orthopedic medicine, who concluded that Plaintiff's pain was caused by an L4-L5 disc bulge and impingement. Based upon these findings and the fact that conservative care had proven ineffective, Dr. Califf recommended surgical intervention. On 2 December 2010, Plaintiff underwent a right L4-5 microdiscectomy and partial hemilaminotomy. After the surgical procedure, Plaintiff followed up with Dr. Califf on a regular basis. On 30 March 2011, Dr. Califf approved Plaintiff for sedentary duty.

According to Mr. Cox, the Cox Toyota video surveillance system had been in operation for a week as of 8 September 2010. During that time, Defendant Cox Toyota had not experienced any problems with

BOWMAN v. COX TOYOTA SCION

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

the system. After learning that Plaintiff claimed to have suffered a work-related injury by accident on 8 September 2010, Mr. Cox reviewed the surveillance video for that morning and transferred its contents to several DVDs. In addition, Defendants offered the testimony of an expert in digital forensics, Giovanni Masucci, who stated that there was no evidence that the recordings had been tampered with or altered. Defendants acknowledged, however, that there appeared to be a three second gap in the recording which might have coincided with the time at which Plaintiff claimed to have fallen.

B. Procedural History

On 15 September 2010, Defendants filed a Form 19 in which they reported Plaintiff's alleged injury to the Commission. On 20 September 2010, Plaintiff filed a Form 18 in which he reported his accident and made a claim for workers' compensation benefits. On 30 September 2010, Defendants filed a Form 61 in which they denied Plaintiff's claim on the grounds that Plaintiff had not suffered an injury by accident. On 27 October 2010, Plaintiff filed a Form 33 requesting that his claim be set for hearing.

A hearing was held before Deputy Commissioner Phillip A. Holmes on 25 February 2011. On 12 August 2011, Deputy Commissioner Holmes issued an order denying Plaintiff's claim for workers' compensation benefits. Although Deputy Commissioner Holmes acknowledged that Plaintiff had "testified that he suffered an injury by accident," he found that Plaintiff's "testimony can neither be accepted as credible or convincing" and also discounted the testimony of medical witnesses such as P.A. Smith, Dr. Crisp, and Dr. Krasinski on the grounds that the "medical providers gave expert medical opinions based on the facts as presented to them by" Plaintiff and "that the facts presented to medical providers by plaintiff were not credible." Deputy Commissioner Holmes reached the conclusion that Plaintiff was not credible on the grounds that the "video obtained by the security system at Cox Toyota Scion on September 8, 2010 does not corroborate plaintiff's account of events." Plaintiff noted an appeal from Deputy Commissioner Holmes' order to the Commission, which heard Plaintiff's case on 10 January 2012.

On 15 March 2012, the Commission entered an order in which it reversed Deputy Commissioner Holmes' decision and awarded medical and disability benefits to Plaintiff. In making this decision, the Commission determined that:

BOWMAN v. COX TOYOTA SCION

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

Plaintiff argued both in his Brief to the Full Commission, and at oral argument . . . that Deputy Commissioner Holmes erred by admitting defendants' Exhibit #1, a DVD . . . into evidence. Defendants responded to plaintiff's argument in both their Full Commission Brief and at oral argument[.] The Full Commission concludes that the proper foundation and authentication required to admit defendants' Exhibits #1, 2, and 3, [was] not properly laid and therefore it is ORDERED that defendants' Exhibits #1, 2, and 3, DVDs . . . are inadmissible and are removed from the record. . . [and] that any and all testimony and evidence regarding the contents of defendants' Exhibits #1, 2, and 3 . . . is hereby stricken from the record.

Defendants noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. N.C. [Gen. Stat.] § 97-86 [(2011)]. Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' Therefore, on 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) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965), and citing *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998) (other citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

B. Waiver of Right to Object

[1] As an initial matter, Defendants argue that, because he did not object to the admission of Defendants' Exhibit Nos. 1, 2 and 3 at the

BOWMAN v. COX TOYOTA SCION

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

hearing conducted before Deputy Commissioner Holmes, Plaintiff “was therefore prevented from raising an authentication-based objection” before the Commission. In support of this contention, Defendants place principal reliance on N.C. R. App. P. 10 and various decisions applying the North Carolina Rules of Appellate Procedure in order to hold that a party who fails to obtain a ruling on an issue before the trial court may not raise that issue on appeal. As we understand their argument, Defendants are attempting to analogize proceedings held before the Commission on appeal from a deputy commissioner’s order to appeal from the trial courts to the appellate division. We are not persuaded by Defendants’ argument.¹

N.C. R. App. P. 10(a)(1) provides, in pertinent part, that, in order “to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make[, and must have] . . . obtain[ed] a ruling upon the party’s request, objection, or motion.” In their brief, Defendants cite numerous cases holding that N.C. R. App. P. 10 requires a party to raise an issue before the trial tribunal as a prerequisite for obtaining appellate review of that issue. We do not, however, believe the North Carolina Rules of Appellate Procedure govern the Commission’s review of an order entered by a deputy commissioner.

According to N.C. R. App. P. 1(b), the North Carolina Rules of Appellate Procedure “govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; [and] in direct appeals from administrative agencies, boards, and commissions to the appellate division[.]”

As used in these rules, the term “trial tribunal” includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

1. In his brief, Plaintiff contends that he “raised the issue of spoliation as a separate and distinct issue” and, for that reason, Defendants “were on notice before the matter went to hearing that Plaintiff was objecting to and questioning the authenticity and admissibility of the DVDs in question.” We need not decide whether Plaintiff’s decision to “raise[] the issue of spoliation” constituted an adequate objection to the admission of the videos into evidence before the Deputy Commissioner given our holding that such an objection is not, in the context of Commission proceedings, necessary to preserve such an evidentiary issue for review on appeal from an order entered by a deputy commissioner to the Commission.

BOWMAN v. COX TOYOTA SCION

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

N.C.R. App. P. 1(d). As a result, N.C. R. App. P. 1 clearly indicates that the North Carolina Rules of Appellate Procedure do not govern appeals from an order entered by a deputy commissioner to the Commission, which is not a part of the appellate division.

Not only does the language of the relevant provisions of the North Carolina Rules of Appellate Procedure justify rejection of Defendants' claim of procedural bar, but, in addition, the underlying basis for Defendants' argument has already been rejected by this Court. In *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988), the plaintiff appealed from an order entered by a deputy commissioner to the Commission, which ruled that the plaintiff was not entitled to assert a claim for future medical expenses before the Commission "because the issue of future medical expenses was not 'properly preserved' under the Commission's rules." *Joyner*, 92 N.C. App. at 470, 374 S.E.2d at 612. In addressing the validity of this determination, we stated that:

When the matter was "appealed" to the full Commission by defend-ants it was the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. . . . [I]t is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission. The Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined. Thus, the Commission's statement . . . that "the issue of payment of future medical expenses is not properly preserved" will not support the order. We point out, although it hardly need be repeated, that the "full Commission" is not an appellate court in the sense that it reviews decisions of a trial court.

Joyner at 482, 374 S.E.2d at 613. As a result, " "the full Commission has the duty and responsibility to decide all matters in controversy between the parties . . . even if those matters were not addressed by the deputy commissioner." *Perkins v. U.S. Airways*, 177 N.C. App. 205, 215, 628 S.E.2d 402, 408 (2006) (quoting *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 501, 616 S.E.2d 356, 360 (2005) (internal quotation marks omitted), *appeal dismissed*, 360 N.C. 483, 632 S.E.2d 489 (2006)), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 231 (2007). Thus, the mere fact that a particular issue was not raised before a deputy commissioner does not, standing alone, obviate the necessity for the Commission to consider that issue.

BOWMAN v. COX TOYOTA SCION

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

As a general proposition, the appellate courts have looked to the contents of an appealing party's Form 44, rather than to the record before the Deputy Commissioner, in order to identify the issues that were properly before the full Commission. In *Payne*, the Deputy Commissioner sustained the defendants' objection to consideration of the plaintiff's claim for death benefits. The plaintiff specifically assigned as error "the Deputy Commissioner's decision" not to review the plaintiff's claim for death benefits "in her Form 44, 'Application for Review.'" *Payne*, 122 N.C. App. at 501, 616 S.E.2d at 360. In response to the defendants' argument that the death benefits issue was not properly before the Commission, we held that:

[A] "plaintiff, having appealed to the full Commission pursuant to [N.C. Gen. Stat. §] 97-85 and having filed his Form 44 'Application for Review,' is entitled to have the full Commission respond to the questions directly raised by his appeal." Thus, once plaintiff included the issue of death benefits in her Form 44, defendants were on notice that the Full Commission would be required to address that issue.

Payne at 501, 616 S.E.2d at 360 (quoting *Vieregge v. N.C. State University*, 105 N.C. App. 633, 639, 414 S.E.2d 771, 774 (1992)). Likewise, in *Hurley v. Wal-Mart Stores, Inc.*, ___ N.C. App. ___, 723 S.E.2d 794 (2012), the defendants, who had appealed from a deputy commissioner's order to the Commission, identified two issues in their Form 44. The Commission failed to decide the specific issues listed in the Form 44 and addressed other issues instead. On appeal, we stated that "the full commission addressed issues other than the award of attorney's fees, although this was the only issue raised by defendants' Form 44 Application for Review" and held that "[t]he full commission did not have authority to address these additional issues under the Workers' Compensation Rules of the North Carolina Industrial Commission." *Hurley*, ___ N.C. App. at ___, 723 S.E.2d at 796. Similarly, in *Vieregge*, 105 N.C. App. at 639, 414 S.E.2d at 774-75, we held that the "plaintiff, having appealed to the full Commission pursuant to [N.C. Gen. Stat. §] 97-85 and having filed his Form 44 'Application for Review,' is entitled to have the full Commission respond to the questions directly raised by his appeal;" that the Commission "entered an order affirming the decision of the Deputy Commissioner as if it were an appellate court;" and that, "[a]s we have said previously, the North Carolina Industrial Commission is not an appellate court." (citing *Joyner*, 92 N.C. App. 478, 374 S.E.2d 610).

BOWMAN v. COX TOYOTA SCION

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

Thus, this Court has consistently utilized the issues outlined in the appealing party's Form 44 for the purpose of identifying the issues that the Commission was required to address on appeal from an order entered by a deputy commissioner.

Finally, this Court has specifically rejected a contention that an appellant must obtain a ruling from a deputy commissioner in order to properly raise an issue before the Commission. In *Clark v. ITT Grinnell Ind. Piping, Inc.*, 141 N.C. App. 417, 539 S.E.2d 369 (2000), *remanded on other grounds for reconsideration in light of Austin v. Continental Gen. Tire*, 354 N.C. 344, 553 S.E.2d 680 (2001), 354 N.C. 572, 558 S.E.2d 867 (2001), the defendants appealed to this Court from a Commission order. On appeal, the defendants argued that the Commission had utilized the wrong statute in the course of its analysis. In response, the plaintiff asserted that:

[the Court] should not reach this issue because "it was not raised until after all the evidence had been submitted, the case had been decided by the Deputy Commissioner, and was on appeal before the Full Commission." However, it is the Commission's duty to consider every aspect of the claim whether before the hearing officer or on appeal to the Commission. . . . Accordingly, the fact that this issue was not raised until it was reviewed by the Commission is of no consequence to our appellate review of the case.

Clark, 141 N.C. App. at 426, 539 S.E.2d at 374 (citing *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613). Thus, for all of these reasons,² we conclude that Plaintiff, who challenged the admissibility of Defendants' video evidence in his Form 44, was not procedurally barred from obtaining Commission review of this issue.³

2. The same logic causes us to reject Defendants' waiver-related arguments that, because Plaintiff utilized screen shots from the surveillance videos, did not object to additional testimony concerning the surveillance videos, and asked questions concerning the surveillance videos, Plaintiff was precluded from challenging the admissibility of the videos before the Commission.

3. Although it was not cited by either party, we note that, in *Maley v. Furniture Co.*, 214 N.C. 589, 200 S.E. 438 (1939), the Supreme Court held that "[t]he hearing before the full Commission is not entirely *de novo*;" that, in reviewing a decision made by a hearing commissioner, the Commission may "reconsider the evidence taken before the hearing Commissioner without hearing the witnesses again *viva voce* and give it such consideration as they may deem proper;" that "objection to [certain] evidence should have been made when it was first offered;" and that "a subsequent formal objection to the evidence filed before the full Commission, accompanied by a

BOWMAN v. COX TOYOTA SCION

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

C. Admissibility of Video Evidence

[2] Secondly, Defendants argue that they “sufficiently authenticated the videos and therefore, the Full Commission erred in removing Defendants’ Exhibits 1, 2 and 3.” We believe that this aspect of Defendant’s challenge to the trial court’s order has merit.

“According to the Workers’ Compensation Act, the ‘processes, procedure, and discovery’ used by the Industrial Commission in its hearings ‘shall be as summary and simple as reasonably may be.’ N.C. Gen. Stat. § 97-80(a) [(2011)]. ‘Strictly speaking, the rules of evidence applicable in our general courts do not govern the Commission’s own administrative fact-finding.’” *Brown v. Kroger Co.*, 169 N.C. App. 312, 320, 610 S.E.2d 447, 452 (2005) (quoting *Haponski v. Constructor’s Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987)) (citations omitted), *appeal dismissed*, 359 N.C. 850, 619 S.E.2d 403 (2005). As a result, an appellate court should avoid utilizing an overly strict interpretation of the North Carolina Rules of Evidence in reviewing Commission decisions.

According to well-established North Carolina law, “[v]ideotapes are admissible . . . for both illustrative and substantive purposes.” *State v. Gaither*, 161 N.C. App. 96, 102, 587 S.E.2d 505, 509 (2003), *disc. review denied*, 358 N.C.157, 593 S.E.2d 83 (2004). “Any party may introduce a [video tape] . . . as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements.” N.C. Gen. Stat. § 8-97. “The requirement of authentication represents a special aspect of the rule that evidence must be relevant . . . and ‘is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.’ [N.C. Gen. Stat. § 8C-1,] Rule 1002.” *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 88 N.C. App. 418, 424, 363 S.E.2d 665, 668 (1988) (internal citation omitted), *disc. review denied*, 322 N.C. 329, 369 S.E.2d 364 (1988).

The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illus-

motion to strike, comes too late.” *Maley*, 214 N.C. at 593, 200 S.E.2d at 441. However, *Maley* appears to be fundamentally inconsistent with the modern view that the Workers’ Compensation Act “places the ultimate fact-finding function with the Commission-not the hearing officer,” *Adams*, 349 N.C. at 681, 509 S.E.2d at 413, and with the decisions from this Court discussed in the text, none of which have been challenged as inconsistent with *Maley*. As a result, we conclude that *Maley* is not controlling with respect to this issue.

BOWMAN v. COX TOYOTA SCION

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

trates the events filmed; (2) “proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape[;”] (3) testimony that “the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing;” or (4) “testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area ‘photographed[.]’ ”

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (quoting *State v. Luster*, 306 N.C. 566, 569, 295 S.E. 2d 421, 423 (1982); *State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E. 2d 626, 627 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983); and *State v. Johnson*, 18 N.C. App. 606, 608, 197 S.E. 2d 592, 594 (1973)) (other citation omitted), *rev’d on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). In *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 14 (2001), we stated that there are “three significant areas of inquiry for a court reviewing the foundation for admissibility of a videotape: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody.” *Mason*, 144 N.C. App. at 26, 550 S.E.2d at 15.

At the hearing held before Deputy Commissioner Holmes, Mr. Cox testified that, when his company moved into the new building on 28 August 2010, it “had a state of the art security system installed,” including on-site surveillance video cameras which covered the area in which Plaintiff worked. Defendant Cox Toyota experienced no problems with the video surveillance system between the time that it occupied the building and the date of Plaintiff’s alleged fall. The surveillance cameras were in operation on 8 September 2010, the date upon which Plaintiff claimed to have fallen. At the time that the video surveillance system was installed, Mr. Cox received instruction concerning the manner in which one should “obtain footage from the system.” After learning of Plaintiff’s claim, Mr. Cox used the instruction that he had received to “burn” a DVD of the footage depicting the service area during the relevant time period. Mr. Cox made copies of this DVD and testified that he did not alter the DVDs in any way after making them. The present record does not reveal the existence of any genuine dispute that the surveillance videos which Defendants sought to introduce were anything other than a recording of events

BOWMAN v. COX TOYOTA SCION

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

occurring in the service area at Defendant Cox Toyota on 8 September 2010. For that reason, we conclude that Defendants laid a sufficient foundation, which consisted of evidence concerning the operation of the video camera, the chain of custody of the DVDs that were made by Mr. Cox, and “testimony that the videotape had not been edited[] and that the picture fairly and accurately recorded the actual appearance of the area ‘photographed,’ ” to support admission of the surveillance videos. *Cannon*, 92 N.C. App. at 254, 374 S.E.2d. at 609. As a result, the Commission erred by refusing to consider the surveillance videos that Defendants sought to have admitted into evidence.

In urging us to affirm the Commission’s ruling, Plaintiff points out that Defendants had failed to present any testimony to the effect that the surveillance videos accurately depicted the events which occurred in the service area at the time of Plaintiff’s alleged injury. In addition, Plaintiff argues that Defendants submitted videos of over seven hours of surveillance and that, “[a]lthough there are no observable blue screens or freeze frames during the other 7-plus hours of recording, the DVD is missing at least 3 seconds of video during the critical time period”; that the original data contained in the surveillance system was “erased completely without any way to retrieve it;” that Defendants “took absolutely no steps to insure that the DVD copy was a true and accurate copy of the data on the DVR;”⁴ that “[n]ot a single witness . . . testified that the contents on the DVD are an exact match to the original contents on the DVR;”⁵ and that no one viewed the original recording for the purpose of comparing it to the copies which Defendants sought to have admitted into evidence. Furthermore, Plaintiff asserts that:

4. The fact that the version of the surveillance videos introduced into evidence was a duplicate rather than the original is irrelevant to the admissibility determination given the absence of “a genuine question . . . as to the authenticity of the original” or “circumstances” making it “unfair to admit the duplicate instead of the original.” N.C. Gen. Stat. § 8C-1, Rule 1003.

5. Aside from the arguments discussed in the text, Plaintiff asserts that Defendants offered “no testimony concerning the checking or operation of the video camera during the day in question.” However, as we have already noted, Mr. Cox testified that Defendants had not experienced any problems with the video surveillance system between the date upon which Defendant Cox Toyota occupied the new building and the date upon which Plaintiff was allegedly injured. In addition, despite Plaintiff’s contention that Defendants had failed to present any evidence tending to show that the DVD had not been edited and that it accurately represented the area in question, Mr. Cox clearly testified that he had not altered the DVD after recording it.

BOWMAN v. COX TOYOTA SCION

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

Viewed in real-time, the DVD copy in question . . . shows Plaintiff walking toward his work station from the parts department at 12:05 p.m. on September 8, 2010. As he approaches his toolbox, the video freezes for 1.5 seconds. These frozen frames are subsequently followed by a blue screen which lasts for approximately 1.7 seconds. Even the Defendants' own expert admits that the "blue screen" lasts at least 1.5 seconds. After more than three full seconds of frozen frame and blue screen, the DVD returns to a live recording, at which time the Plaintiff is no longer on screen.

Finally, Plaintiff emphasizes that all of the medical evidence supports his claim; that Defendants did not have any evidence rebutting Plaintiff's testimony except for the fact that his fall is not depicted in the surveillance videos; and that Defendants relied "exclusively on the DVD in denying Plaintiff's claim" even though Plaintiff's expert witness testified "that there [were] over three seconds of critical time missing from the DVD." We do not find these arguments persuasive.

A careful analysis of Plaintiff's arguments in support of the Commission's evidentiary ruling reveals that each of them goes to the weight, rather than the admissibility, of the DVDs. In essence, each of Plaintiff's contentions rests on the assertion that, for various reasons, the surveillance videos have not been sufficiently validated to overcome "the substantial testimony of the Plaintiff, his co-workers, and his treating physicians." Although the Plaintiff's arguments might well justify a decision to find Plaintiff's testimony credible despite the inferences that Defendants seek to have the Commission draw from the surveillance videos, they do not suffice to justify a refusal on the part of the Commission to consider the videos at all. Similarly, we are unable, given the evident centrality of the videos to Defendants' attempt to establish that Plaintiff did not suffer a compensable injury by accident, to conclude that the Commission's erroneous failure to consider these videos in determining whether Plaintiff's claim had merit was harmless.

Although we do not wish to be understood as suggesting that the Commission should reject Plaintiff's challenges to the weight that should be given to the surveillance videos in the ultimate decision-making process, we do believe that the Commission, as the entity responsible for resolving any factual disputes that arise in connection with Plaintiff's claim for workers' compensation benefits, should have considered these videos in the course of addressing the factual

CORNELIUS v. LIPSCOMB

[224 N.C. App. 14 (2012)]

issues raised by Plaintiff's claim. As a result, for the reasons set forth above, we conclude that the Commission erred by excluding Defendants' Exhibits 1, 2, and 3 from the evidentiary record and that this case should be remanded to the Commission for further proceedings not inconsistent with this opinion, including the admission of the surveillance videos into the evidentiary record and the entry of an order that takes all of the evidence in the record, including the surveillance videos, into account.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge STEELMAN concur.

GARY L. CORNELIUS

v.

JEFFREY LIPSCOMB AND SUNSET FINANCIAL SERVICES, INC.

No. COA12-344

Filed 4 December 2012

1. Appeal and Error—interlocutory orders and appeals—arbitration

An order denying a motion to compel arbitration is immediately appealable.

2. Arbitration and Mediation—denial of motion to compel arbitration—failure to make findings of fact

The trial court erred in a fraud, breach of loyalty, breach of fiduciary duty, unfair trade practices, and violation of North Carolina securities statutes case by denying defendants' motion to compel arbitration. The trial court failed to make findings of fact to support its order, and thus, the case was reversed and remanded. In the event the trial court finds that the parties did enter into an arbitration agreement, the court must also address whether the Federal Arbitration Act or the North Carolina Revised Uniform Arbitration Act applies.

Appeal by defendants from order entered 17 November 2011 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 27 August 2012.

CORNELIUS v. LIPSCOMB

[224 N.C. App. 14 (2012)]

E. Bedford Cannon for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and Fred B. Monroe; Pope McMillan Kutteh Edwards Schieck & Taylor, P.A., by William H. McMillan and Larissa J. Erkman; and Berkowitz Oliver Williams Shaw & Eisenbrandt LLP, by John W. Shaw and Timothy W. Walner, for defendants-appellants.

GEER, Judge.

Defendants Jeffrey Lipscomb and Sunset Financial Services, Inc. appeal from the trial court's order denying their motion to compel arbitration. Because the trial court failed to make findings of fact to support its order, we reverse and remand.

Facts

Plaintiff Gary L. Cornelius filed an action against defendants on 28 February 2011. The complaint alleged that Mr. Lipscomb, "acting for himself and as agent for Defendant Sunset[.]" solicited and received investment funds from plaintiff in exchange for an ownership interest in IMH Secured Loan Fund, LLC ("IMH"). The complaint further alleged that defendants' use of the investment funds did not comply with representations defendants made to plaintiff, that defendants repeatedly and intentionally deceived plaintiff regarding various aspects of plaintiff's ownership interest in IMH and that, as a result, plaintiff's "ownership interest in IMH has become worthless." Based on these allegations, plaintiff asserted claims for fraud, breach of loyalty, breach of fiduciary duty, unfair trade practices, and violation of North Carolina securities statutes.

On 8 July 2011, defendants filed a joint motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure and a joint motion to compel arbitration and stay the court action. Defendants contended that plaintiff's claims were covered by a binding arbitration agreement entered into by plaintiff and defendants and that the action should either be dismissed or stayed pending arbitration based on that agreement. The motion to compel arbitration attached the affidavit of Sunset's Vice President and Chief Operating Officer, Susie Denney, which in turn attached as an exhibit an account document signed by plaintiff containing an arbitration agreement.

A hearing on defendants' joint motions occurred on 22 August 2011. At the hearing, defendants presented an affidavit and live testi-

CORNELIUS v. LIPSCOMB

[224 N.C. App. 14 (2012)]

mony from Mr. Lipscomb. According to Mr. Lipscomb, he was employed by Sunset as an agent and registered representative during the relevant time period. In that capacity, Mr. Lipscomb met with plaintiff, and the two men reviewed a Sunset “Account Application and attached Customer Agreement.” Mr. Lipscomb claimed that he specifically discussed the fact that the Customer Agreement contained a pre-dispute arbitration agreement, and plaintiff did not object to it. Both plaintiff and Mr. Lipscomb signed the Account Application with the attached arbitration agreement.

Following Mr. Lipscomb’s testimony, the trial court admitted into evidence a copy of the signed Account Application and attached Customer Agreement. Plaintiff did not present any evidence at the hearing. In an order entered 17 November 2011, the trial court denied defendants’ motion to compel arbitration and defendants’ motion to dismiss. Defendants timely appealed to this Court.

Discussion

[1] We first note that defendants’ appeal is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (“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.”). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). It is, however, well established that an order denying a motion to compel arbitration is immediately appealable. *Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007) (holding interlocutory order denying defendants’ motion to compel arbitration affected substantial right and, therefore, was immediately appealable).

[2] As an initial matter, defendants argue that the order denying their motion to compel arbitration is facially defective because it “contains no findings whatsoever” and does not “identify any basis for the refusal to dismiss or stay this action and compel arbitration.” We agree.

This Court has repeatedly held that “an order denying a motion to compel arbitration must include findings of fact as to ‘whether the parties had a valid agreement to arbitrate’ and, if so, ‘whether the specific dispute falls within the substantive scope of that agreement.’” *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009) (quoting *U.S. Trust Co. v. Stanford Grp. Co.*, 199 N.C. App. 287, 290, 681 S.E.2d 512, 514 (2009) (per curiam)). When a trial

CORNELIUS v. LIPSCOMB

[224 N.C. App. 14 (2012)]

court fails to include findings of fact in its order, this Court has repeatedly reversed and remanded to the trial court for a new order containing the requisite findings. *See, e.g., id.* (reversing and remanding "for entry of findings of fact" because "the trial court made no finding of fact as to the existence of a valid agreement to arbitrate"); *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006) (reversing and remanding to trial court for "a new order containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions").

In this case, the trial court's order denying defendants' motion to compel arbitration stated in relevant part only:

Prior to ruling on the motions, the Court considered all pleadings and other materials contained in the file. The Court considered the briefs submitted by the parties with regard to the motions. Further, the Court considered the materials and testimony submitted at the hearing on the motions. Finally, the Court considered the arguments of counsel with regard to the motions.

After consideration of all matters as set forth above in this Order, it appears to the Court that both Motions as to both Defendants should be denied.

NOW, THEREFORE, IT IS ORDERED:

1. The Defendants Sunset Financial Services, Inc. and Jeffrey Lipscomb's Joint Motion to Compel Arbitration and to Stay Court Action is denied as to both Defendants.

The order provides no findings and no explanation for the basis of the court's decision to deny the motion to compel arbitration. We, therefore, must reverse the trial court's order and remand for findings of fact regarding whether the parties had a valid agreement to arbitrate and, if so, whether the dispute between the parties falls within the substantive scope of that agreement.

Plaintiff argues, however, that, despite this Court's prior rulings, no findings of fact were required under Rule 52 of the Rules of Civil Procedure because no party specifically requested findings of fact. Plaintiff's precise argument was rejected in *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 566 S.E.2d 130 (2002).

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

In *Barnhouse*, this Court reversed and remanded for findings of fact over a dissenting opinion that took the position that no findings were necessary under Rule 52 because no party had requested them. *Id.* at 509-10, 566 S.E.2d at 132-33.

We note further that in the event the trial court finds that the parties did enter into an arbitration agreement, the court must also address whether the Federal Arbitration Act (“FAA”) or the North Carolina Revised Uniform Arbitration Act applies as to that agreement. *See Sillins v. Ness*, 164 N.C. App. 755, 757, 596 S.E.2d 874, 876 (2004) (explaining that determination whether FAA applies “is critical because the FAA preempts conflicting state law”). “The FAA will apply if the contract evidences a transaction involving interstate commerce.” *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005). We cannot make that determination in the first instance on appeal; it is a question to be decided by the trial court. *Sillins*, 164 N.C. App. at 758, 596 S.E.2d at 876. Because of our disposition of this appeal, we need not address the parties’ remaining arguments.

Reversed and remanded.

Chief Judge MARTIN and Judge STROUD concur.

SHANNON FATTA

v.

M & M PROPERTIES MANAGEMENT, INC.

COA12-694

Filed 4 December 2012

1. Pretrial Proceedings—motion to strike—motion for sanctions

The trial court did not err in an action relating to the Retaliatory Employee Discrimination Act and wrongful termination by granting defendant’s motion to strike and motion for sanctions against plaintiff. The trial court entered detailed and thorough findings of fact regarding the allegations made by plaintiff against defendant and against the trial judge, the facts as entered by the trial court were supported by the record, and the conclusions of law were fully supported by the findings of fact.

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

2. Pretrial Proceedings—motion for sanctions—improper purpose

The trial court did not err in an action relating to the Retaliatory Employee Discrimination Act and wrongful termination by granting sanctions against plaintiff pursuant to Rule 11(a). There was sufficient evidence to support the trial court's determination that plaintiff's motion for sanctions was filed for an improper purpose.

3. Pretrial Proceedings—Rule 11 sanction—gatekeeper provision—no abuse of discretion

The trial court did not abuse its discretion in an action relating to the Retaliatory Employee Discrimination Act and wrongful termination by entering the Rule 11 sanction of a "gatekeeper" provision against plaintiff. The trial court's order explained the court's reasons for entering the sanctions against plaintiff, the gatekeeper provision was narrowly tailored and limited in scope, and plaintiff was provided an opportunity to be heard and had notice that the trial court intended to impose a gatekeeper provision.

Appeal by plaintiff from orders entered 4 January 2012 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 23 October 2012.

Shannon Fatta pro se plaintiff-appellant.

Fisher & Phillips, LLP, by Mason G. Alexander, for defendant-appellee.

BRYANT, Judge.

Where the trial court did not err by granting defendant's Rule 12(f) motion to strike and Rule 11 motion for sanctions against plaintiff, we affirm the orders of the trial court.

Facts and Procedural History

The case before us originates from an action commenced on 6 July 2010 by plaintiff Shannon Fatta against defendant M & M Properties Management, Inc. alleging several causes of action relating to the Retaliatory Employee Discrimination Act, and wrongful termination. On 10 March 2011, the trial court entered summary judgment in favor of defendant and dismissed plaintiff's claims with prejudice. Thereafter, plaintiff filed a motion to reconsider and amend summary judgment pursuant to Rule 59(e) of the North Carolina

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

Rules of Civil Procedure which was denied on 18 April 2011 following a hearing. On 20 April 2011, plaintiff appealed to our Court, and we affirmed the trial court's summary judgment order in *Fatta v. M & M Properties Management, Inc.*, ___ N.C. App. ___, 727 S.E.2d 595 (2012) ("Fatta I").

On 13 July 2011, three months after plaintiff noted an appeal in this matter to our Court, plaintiff filed a motion for sanctions pursuant to Rules 11, 26(g), and 37(d) of the North Carolina Rules of Civil procedure against defendant and defendant's counsel, Margaret M. Kingston ("Kingston") of Fisher & Phillips LLP and a motion for relief from the 10 March 2011 summary judgment order entered in favor of defendant pursuant to Rules 60(b)(1), 60(b)(3), and 60(b)(6) ("Motion for Sanctions; Motion for Relief from Judgment"). Plaintiff alleged numerous discovery violations and other misconduct by defendant and Kingston. Plaintiff filed an amended "Motion for Sanctions; Motion for Relief from Judgment" on 26 September 2011. On 12 August 2011, defendant filed a motion to strike plaintiff's "Motion for Sanctions; Motion for Relief from Judgment" and a motion for sanctions against plaintiff.

Following a hearing held on 14 October 2011, the trial court made numerous findings of fact including the following:

Plaintiff has attempted to create a discovery dispute. Plaintiff's arguments about discovery violations are improper and lacking in a factual basis.

The parties engaged in extensive discovery in this case, including correspondence between the parties about the adequacy of objections made to certain discovery responses. Plaintiff never filed a motion to compel or any other discovery motion. He raised his discovery arguments for the first time in his "Motion for Sanctions; Motion for Relief from Judgment", after summary judgment was granted and his claims were dismissed.

This Court does not have jurisdiction to review a potential discovery dispute between the parties. The Court entered an Order granting summary judgment to Defendant and dismissing Plaintiff's claims in their entirety on March 10, 2011. Plaintiff has appealed that decision to the North Carolina Court of Appeals.

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

Although Plaintiff's discovery challenges are not proper, this Court will briefly address Plaintiff's arguments that the discovery violations amounted to fraud under Rule 60.

...

The Court finds no factual support for Plaintiff's claim of discovery violations or misconduct regarding this allegation.

...

In bringing these challenges at this late date and without legal or factual support, Plaintiff has violated Rule 11 of the North Carolina Rules of Civil Procedure. Also, Plaintiff's discovery allegations are frivolous and insufficient as a matter of law and should be stricken from the record pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure.

...

The Court finds that these allegations are frivolous. Plaintiff has no facts or evidence to support these allegations. Plaintiff has no legal authority to support these allegations. Plaintiff relies upon his own affidavit, which contains conclusory and factually inaccurate assertions about the parties' arguments at the summary judgment hearing and the undersigned's decision following the hearing.

...

Plaintiff made the unsupported assertion that two of Defendant's summary judgment affiants, Jenny Meyer and Glenn McFarland, misrepresented facts in their affidavits in an effort to mislead the Court. The Court finds that this is an outrageous assertion without any facts in support. In addition, the Court finds that Ms. Meyer and Mr. McFarland have submitted additional affidavits under oath attesting to the accuracy of their prior affidavits.

Plaintiff also made the unsupported assertion that Defendant and counsel for Defendant intentionally misrepresented facts and case law on his claims and committed fraud on the court.

...

IN THE COURT OF APPEALS

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

The Court finds no legal or factual basis for Plaintiff's allegations of fraud and Rule 11 violations in connection with this Court's summary judgment ruling and subsequent ruling on Plaintiff's Rule 59 motion. The Court finds that these are outrageous allegations by Plaintiff. In raising these allegations in Plaintiff's Motion, Plaintiff has violated Rule 11 of the North Carolina Rules of Civil Procedure.

. . .

The undersigned presided over the pretrial conference, the summary judgment hearing, the hearing on Plaintiff's Rule 59 motion, and the hearing on Defendant's Motion to Strike and Motion for Sanctions in this matter. The undersigned has observed the conduct of the parties and reviewed the documents filed and submitted to the Court by the parties. Plaintiff's suggestion that the undersigned was part of a fraudulent scheme with counsel for Defendant is outrageous.

The Court finds that Plaintiff has filed and pursued his "Motion for Sanctions; Motion for Relief from Judgment" alleging fraud and Rule 11 violations against Defendant and counsel for Defendant without any factual or legal support. The Court finds Plaintiff's Motion and the manner in which Plaintiff pursued his Motion has been intended to harass counsel for Defendant and to needlessly increase the cost of this litigation for Defendant. . . .

. . .

The Court finds that Plaintiff has made some very serious allegations against Defendant and counsel for Defendant, and that these allegations of fraud and misconduct are not supported by any facts or law. Due to Plaintiff's pursuit of this frivolous Motion, this Court finds that the sanction of a gatekeeper provision is necessary and appropriate.

. . .

The Court finds that Plaintiff has exhibited conduct in this matter showing such a disregard for the rules of law

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

and procedure which, if he were licensed as an attorney, would require and demand reporting him to the North Carolina State Bar questioning his fitness to practice. The Court finds that Plaintiff's baseless allegations, Motion, and materials in support of the Motion were filed and pursued for the improper purpose of harassing the opposing party and opposing party's counsel, and costing the opposing party unnecessary time and expense in responding to these allegations and filings. This Court has the inherent power to impose such special limitations as are reasonably necessary for the proper administration of justice, including the authority to regulate and discipline persons who appear before the Court to prevent impropriety and to provide an appropriate remedy to meet the circumstances of the case. The nature of Plaintiff's conduct and the extraordinary circumstances of this matter require that the Court place special limitations on Plaintiff's access to the Iredell County Superior Court and enter a gatekeeper order.

The trial court then made the following pertinent conclusions of law:

The Court lacks jurisdiction to hear a discovery dispute but has considered Plaintiff's discovery allegations in connection with his Rule 60 allegations of fraud and Rule 11 allegations against Defendant and [Kingston]. The Court concludes that Plaintiff has shown no discovery violations. The Court further concludes that Plaintiff's discovery allegations are frivolous and lacking in any factual and legal support.

The Court concludes that Plaintiff has shown no Rule 11 violation, misrepresentation, or other alleged misconduct amounting to fraud or fraud on the Court by Defendant or [Kingston]. The Court further concludes that there is no factual or legal support for any of the fraud, Rule 11, or other misconduct allegations against Defendant and [Kingston] and these allegations are frivolous.

The Court concludes that Plaintiff's "Motion for Sanctions; Motion for Relief from Judgment" is frivolous and insufficient as a matter of law and should be

stricken pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. The Motion is not well grounded in fact or law and appears to have been filed in order to harass Defendant and [Kingston] and to needlessly increase the costs of this litigation. In signing and filing this Motion, Plaintiff has violated Rule 11[.]

...

The Court concludes that, due to the very serious nature of the allegations in Plaintiff's Motion and which are unsupported by any facts or law, the sanction of a gatekeeper provision and the sanction of reasonable attorneys' fees and costs incurred by Defendant in defending Plaintiff's Motion are necessary and appropriate.

Accordingly, in a 4 January 2012 order, the trial court granted defendant's motion to strike and motion for sanctions against plaintiff. The trial court also entered a gatekeeping order and awarded attorney's fees and costs to defendant. From these orders, plaintiff appeals.

Plaintiff presents the following issues on appeal: (I) whether the trial court erred by allowing defendant's motion to strike and motion for sanctions against plaintiff where the motion was improper pursuant to N.C. Gen. Stat. § 1A-1, Rule 7(b)(1); (II) whether the trial court erred by granting sanctions against plaintiff pursuant to N.C. Gen. Stat. § 1A-1, Rule 11(a); and, (III) whether the trial court abused its discretion by entering the sanction of a gatekeeper provision.

I

[1] In his first argument, plaintiff contends the trial court erred by granting defendant's motion to strike and motion for sanctions against plaintiff where defendant's motions violated N.C.S.S. § 1A-1, Rule 7(b)(1).

N.C.G.S. § 1A-1, Rule 7(b)(1) (2011) states the following:

An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, *shall state with particularity the grounds therefor, and shall set forth the relief or order sought.* The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

Id. (emphasis added). The comments to Rule 7(b)(1) states:

The 2000 amendment conforms the North Carolina rule to federal Rule 7(b). The federal courts do not apply the particularity requirement as a procedural technicality to deny otherwise meritorious motions. Rather, the federal courts apply the rule to protect parties from prejudice, to assure that opposing parties can comprehend the basis for the motion and have a fair opportunity to respond.

Id. cmt.

Rule 11(a) of the North Carolina Rules of Civil Procedure reads that

[t]he signature of . . . [a] party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C.G.S. § 1A-1, Rule 11(a) (2011). Rule 12(f) states that “[u]pon motion made by a party . . . the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.” N.C.G.S. § 1A-1, Rule 12(f) (2011).

Here, defendant’s motion to strike and motion for sanctions against plaintiff stated the following:

Plaintiff’s most recent Motions (“Motion for Sanctions; Motion for Relief from Judgment”) are frivolous and insufficient as a matter of law. The Motions are not well grounded in fact or law. Also, Plaintiff’s intent in filing these Motions is to harass counsel for Defendant and to cause needless increase in the cost of litigation. In signing and filing these Motions, Plaintiff has violated Rule 11 of the North Carolina Rules of Civil Procedure. In addition, Plaintiff’s Motions contain irrelevant and outrageous assertions that should be stricken pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure.

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

Plaintiff argues that defendant's motion "does not point to what is frivolous or what is insufficient as a matter of law[.]" "does not provide how Plaintiff filing for sanctions or relief from judgment constitutes harassment or other improper purposes[.]" and that "[t]here is no indication of what is irrelevant, what is outrageous, or why something is even considered outrageous." While we disagree with plaintiff's characterizations, we note that our task is to review the trial court's decision to grant or deny a motion to strike and motion for sanctions. (Rule 12(f) motions are reviewed for abuse of discretion. *See Reese v. Brooklyn Vill., LLC*, ___ N.C. App. ___, ___, 707 S.E.2d 249, 260 (2011); Rule 11(a) motions are reviewed *de novo*. "The appropriateness of a particular sanction is reviewed for abuse of discretion." *Bledsoe v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 381-82 (2003) (citation omitted)).

Defendant's motion for sanctions cited Rule 11 and specified that plaintiff's motion for sanctions was "frivolous and insufficient as a matter of law." In its consideration of the allegations, the trial court found that plaintiff had "attempted to create a discovery dispute" and that plaintiff brought his "challenges at this late date and without legal or factual support." The trial court found that plaintiff had relied on his own affidavit "which contains conclusory and factually inaccurate assertions" surrounding the summary judgment hearing at which the trial judge (the Honorable Christopher M. Collier) had presided. Based upon the motions and other evidence of record, the trial court concluded that plaintiff's improper purpose in filing these motions was to harass the opposing party and its counsel, and to cause the opposing party unnecessary time and expense in responding to plaintiff's allegations, a needless increase in the cost of litigation.

Defendant's motion to strike cited Rule 12(f) and specified that plaintiff's motions "contain[ed] irrelevant and outrageous assertions[.]" The trial court found that plaintiff's allegations were "baseless" and concluded that plaintiff's conduct demonstrated a "disregard for the rules of law and procedure[.]" In addition, defendant's motion for sanctions and motion to strike specifically stated the relief requested: "[t]hat the Court strike from the record Plaintiff's 'Motion for Sanctions; Motion for Relief from Judgment' "; "[t]hat the Court enter an Order determining that Plaintiff's Motions are not well grounded in law or in fact and are intended to harass Defendant and counsel for Defendant;" and "[t]hat Defendant recover all costs and reasonable attorneys' fees incurred in the defense of Plaintiff's frivolous Motions[.]" *See Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App.

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

180, 609 S.E.2d 456 (2005) (holding that the defendant's Rule 12(b)(4) and 12(b)(5) motion to dismiss was stated with sufficient particularity as to the grounds alleged and sufficiently set forth the relief sought, as required by Rule 7(b)(1)).

The trial court entered detailed and thorough findings of fact regarding the very serious and troubling allegations made by plaintiff against defendant and against the trial judge. The facts as entered by the trial court are supported by the record. Further, the conclusions of law are fully supported by the findings of fact. Accordingly, we hold that the trial court did not err in granting defendant's motions. Plaintiff's argument is overruled.

II

[2] Next, plaintiff argues that the trial court erred in granting sanctions against plaintiff pursuant to Rule 11(a).

"This Court exercises de novo review of the question of whether to impose Rule 11 sanctions." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994). "There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of *any one* of these requirements mandates the imposition of sanctions under Rule 11." *Battle v. Sabates*, 198 N.C. App. 407, 425, 681 S.E.2d 788, 800 (2009) (citation omitted) (emphasis added). "When reviewing the decision of a trial court to impose sanctions under Rule 11, an appellate court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment." *Johns v. Johns*, 195 N.C. App. 201, 206, 672 S.E.2d 34, 38 (2009) (citation omitted).

Because we hold that the record supports that plaintiff violated the improper purpose prong, we find it unnecessary to address the other prongs. *See Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) ("Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11.").

Under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. Because an objective standard is employed, an improper purpose may be

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

inferred from the alleged offender's objective behavior. In assessing that behavior, we look at the totality of the circumstances.

Johns, 195 N.C. at 212, 672 S.E.2d at 42 (citations and quotations omitted). "An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.'" *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation omitted). "In other words, a party 'will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay.'" *Brown*, 124 N.C. App. at 382, 477 S.E. 2d at 238 (citation omitted).

In the instant case, plaintiff challenges the following finding of fact which was made in support of the improper purpose prong:

The Court finds Plaintiff's Motion and the manner in which Plaintiff pursued his Motion has been intended to harass counsel for Defendant and to needlessly increase the cost of this litigation for Defendant. In filing and pursuing Plaintiff's Motion, Plaintiff has violated Rule 11 of the North Carolina Rules of Civil Procedure.

A thorough review of the record indicates there was sufficient evidence to support the trial court's determination that plaintiff's motion for sanctions was filed for an improper purpose. On 10 March 2011, the trial court granted summary judgment in favor of defendant and dismissed all of plaintiff's claims. Plaintiff filed a Rule 59(e) motion which was denied on 18 April 2011 following a hearing. On 20 April 2011, plaintiff appealed to our Court, and we affirmed the trial court's summary judgment order in *Fatta I*.

Thereafter, plaintiff filed his motion for sanctions and motion for relief from judgment. Although plaintiff's motion alleged numerous discovery violations and other alleged misconduct by defendant and defense counsel, there was no evidence that plaintiff ever filed a motion to compel or any discovery related motion prior to filing the motion at hand, until *after* summary judgment was granted in favor of defendant, his claims were dismissed, and the case was appealed to our Court. It is undisputed that although plaintiff challenged defendant's motion for a protective order regarding his Rule 30(b)(6) Notice of Deposition, defendant's motion for a protective order properly challenged plaintiff's improper notice of deposition on the basis that it sought testimony on topics beyond the scope of Rule 26 and that it was so overly broad that defendant could not designate nor prepare a

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

witness. The unchallenged findings by the trial court—that plaintiff “attempted to create a discovery dispute” and that his “arguments about discovery violations [were] improper”—support the finding that plaintiff’s motion was filed for the improper purpose of harassing defendant and defendant’s counsel.

In regard to the trial court’s finding that plaintiff’s motion was filed for the improper purpose of “costing the opposing party unnecessary time and expense in responding to these allegations and filings[,]” we find sufficient evidence to support this finding. Defendant and defendant’s counsel filed a motion to strike and motion for sanctions against plaintiff on 12 August 2011 and a response on 14 September 2011—both made directly in response to plaintiff’s motion for sanctions. Therefore, defendant and defendant’s counsel necessarily spent time and thereby increased the cost of litigation by defending plaintiff’s “frivolous” discovery allegations—an uncontested finding by the trial court.

Based on the foregoing, the trial court’s findings of fact support the following unchallenged conclusion of law:

The Court concludes that Plaintiff’s baseless allegations, Motion, and materials in support of the Motion were filed and pursued for the improper purpose of harassing the opposing party and opposing party’s counsel, and costing the opposing party unnecessary time and expense in responding to these allegations and filings.

Because the findings of fact are supported by sufficient evidence, and the findings of fact support the conclusion of law, we hold that the trial court did not err by concluding that plaintiff violated the improper purpose prong by the filing of his motion for sanctions, thereby warranting the imposition of Rule 11 sanctions against plaintiff.

III

[3] In his last argument, plaintiff contends the trial court abused its discretion by entering the Rule 11 sanction of a “gatekeeper” provision against plaintiff.

In reviewing the particular sanction imposed, we use an abuse of discretion standard. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

The trial court concluded the following: “[t]he nature of Plaintiff’s

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

conduct and the extraordinary circumstances of this matter require that the Court place special limitations on Plaintiff's access to the Iredell County Superior Court and enter a gatekeeping order." The trial court also ordered that "Plaintiff is prohibited from filing or submitting to the Iredell County Superior Court any further motion, pleading, or other document unless the document is signed by an attorney licensed to practice in the State of North Carolina.

Plaintiff first relies on *Davis v. Wrenn*, 121 N.C. App. 156, 464 S.E.2d 708 (1995) (overruled on other grounds), for the contention that the trial court erred when it failed to "explain why the chosen sanction is appropriate[.]" In *Davis*, our Court held that the trial court's findings and conclusions were insufficient to support an award for Rule 11 sanctions. *Id.* at 160, 464 S.E.2d at 711. The *Davis* order merely recited that "sanctions are imposed against plaintiff for violation of the legal provision and improper purpose provision" of Rule 11, without any findings or conclusions regarding "how plaintiff's conduct violated these provisions." *Id.* Further, our Court held that "there [was] nothing in the order to explain the appropriateness of the sanction imposed." *Id.*

However, in the case *sub judice*, the trial court's order included the following finding of fact, explaining the trial court's reasons for entering Rule 11 sanctions against plaintiff:

The Court finds that Plaintiff has exhibited conduct in this matter showing such a disregard for the rules of law and procedure which, if he were licensed as an attorney, would require and demand reporting him to the North Carolina State Bar questioning his fitness to practice. . . . This Court has the inherent power to impose special limitations as are reasonably necessary for the proper administration of justice, including the authority to regulate and discipline persons who appear before the Court to prevent impropriety and to provide an appropriate remedy to meet the circumstances of the case. The nature of Plaintiff's conduct and the extraordinary circumstances of this matter require that the Court place special limitations on Plaintiff's access to the Iredell County Superior Court and enter a gatekeeper order.

The trial court also made the following conclusions of law regarding the appropriateness of Rule 11 sanctions: "[D]ue to the very serious nature of the allegations in Plaintiff's Motion and which are unsp-

FATTA v. M & M PROPERTIES MGMT., INC.

[224 N.C. App. 18 (2012)]

ported by any facts or law, the sanction of a gatekeeper provision . . . are necessary and appropriate[;]" "The nature of Plaintiff's conduct and the extraordinary circumstances of this matter require that the Court place special limitations on Plaintiff's access to the Iredell County Superior Court and enter a gatekeeping order."

Next, plaintiff relies on *Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812 (4th Cir. 2004), for the assertion that the gatekeeper provision was too broad. In *Cromer*, the trial court imposed a pre-filing injunction enjoining the plaintiff from making "'any and all filings in this case' and 'any filing in any other, unrelated case [in the United States District Court for the Western District of North Carolina] unless he first . . . obtained permission to so file' from the magistrate judge." *Id.* at 816. The United States Court of Appeals for the Fourth Circuit held that the injunction was "not narrowly tailored to fit the particular circumstances of the case" because "nothing in the record justified infringing upon his right to bring suit in *unrelated* cases." *Id.* at 818. Therefore, it held that "imposing a categorical ban on future filings in this case leaves no room for potentially meritorious filings, even ones so regarded by a district court." *Id.*

The circumstances of the case before us are vastly different. Here, the gatekeeper provision was much more narrowly tailored and limited in scope than the injunction imposed in *Cromer*. The gatekeeper provision limited plaintiff from filing or submitting to the Iredell County Superior Court any further motion, pleading, or other document unless the document was signed by a North Carolina licensed attorney. In *Cromer*, the plaintiff was prohibited from filing "any and all" filings related to the case and even prohibited from filing anything in an unrelated matter without permission. Further, the gatekeeper provision provided room for potentially meritorious filings without imposing a type of categorical ban on future filings like those referenced in *Cromer*.

Lastly, plaintiff argues the trial court erred because plaintiff was not provided an opportunity to be heard and did not have notice that the trial court intended to impose a gatekeeper provision. However, the evidence indicates that prior to the 14 October 2011 hearing, plaintiff had notice of defendant's 12 August 2011 motion to strike and motion for Rule 11 sanctions against plaintiff and that plaintiff had ample opportunity to be heard at the hearing on defendant's Rule 11 motion.

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

Based on the foregoing, the trial court did not abuse its discretion by entering the Rule 11 sanction of a gatekeeper provision against plaintiff.

Affirmed.

Judges MCGEE and THIGPEN concur.



HULYA GARRETT
v.
CHARLES W. BURRIS

No. COA12-451

Filed 4 December 2012

Marriage—common law marriage—under Texas law—no agreement between the parties

The trial court did not err by concluding that there was no common law marriage between plaintiff and defendant under Texas law and denying plaintiff's claim for absolute divorce. Plaintiff failed to prove beyond a preponderance of the evidence that there was an agreement between the parties to enter into an informal marriage.

Judge BEASLEY dissenting.

Appeal by Plaintiff from order entered 6 May 2009 by Judge Edward L. Hedrick, IV, in Iredell County District Court. Heard in the Court of Appeals 25 September 2012.

Hunt Law, PLLC, by Gregory Hunt, for plaintiff.

M. Clark Parker, P.A., by M. Clark Parker, for defendant.

THIGPEN, Judge.

Hulya Garrett ("Plaintiff") appeals from the trial court's order denying her claim for absolute divorce from Charles W. Burris ("Defendant"). After careful review, we affirm.

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

I. Factual & Procedural Background

In 1990, (then) thirty-year-old Plaintiff emigrated from Turkey to the United States, where she settled in Texas and eventually married Brett Garrett. Plaintiff divorced Mr. Garrett in August 2000 and began living with Defendant in September or October 2000. Plaintiff was initially apprehensive about living with Defendant as an unmarried couple, but she relented when Defendant informed her that common law marriage in Texas was equivalent to being married. Although Plaintiff and Defendant never had a formal wedding ceremony, they often introduced themselves socially as “husband and wife” and even bought rings to memorialize their “marriage.” The parties moved to North Carolina in 2003 and continued to refer to one another in public as husband and wife.

On 6 May 2008, Plaintiff filed a complaint in Iredell County District Court alleging that “Plaintiff and Defendant became common law husband and wife in Texas in September 2000 and separated on August 15, 2007” and asserting claims for post-separation support, alimony, an equitable distribution of marital property, and absolute divorce. Defendant filed an answer and counterclaim on 29 May 2008 asserting, *inter alia*, that Plaintiff’s complaint be dismissed for failure to state a claim “as the parties . . . are not now, nor have they ever been married in any state, be it common law or otherwise.” The parties waived their right to a jury trial, and the matter came on to be heard in Iredell County District Court on 23 April 2009. By order entered 6 May 2009, the trial court denied Plaintiff’s claim for absolute divorce, concluding that Plaintiff had failed to meet her burden in proving that the parties had entered into a common law marriage while living in Texas. Plaintiff’s initial appeal from that order was dismissed by this Court as interlocutory in light of Defendant’s counterclaims, which remained pending before the trial court. *See Garrett v. Burris*, No. COA09-1662 (N.C. App. Nov. 2, 2010). The record reveals that those counterclaims have since been resolved and that Plaintiff’s appeal from the trial court’s order denying her claim for absolute divorce is now properly before us. We accordingly exercise jurisdiction over this matter pursuant to N.C. Gen. Stat. § 7A-27(c) (2011) (providing for an appeal as a matter of right from any final judgment of the district court), and we proceed to address the merits of Plaintiff’s appeal.

II. Analysis

Plaintiff contends the trial court erred in concluding that there was no common law marriage between Plaintiff and Defendant under

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

Texas law. Our standard of review where, as here, the trial court sits without a jury is well established:

In a bench trial in which the [trial] court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citations and quotation marks omitted) (second alteration in original).

Plaintiff does not challenge any of the trial court's findings of fact as unsupported by the evidence. These findings, therefore, are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Plaintiff contends only that the trial court erred as a matter of law in concluding that no common law marriage existed between Plaintiff and Defendant. Specifically, Plaintiff insists that this conclusion is not supported by the findings of fact and that there was "overwhelming un-rebutted evidence supporting the finding of a valid common-law marriage."

At the outset, we note that common law marriages cannot be created in North Carolina. *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897); *State v. Samuel*, 19 N.C. 177 (1836). North Carolina courts, "however, will recognize as valid a common law marriage 'if the acts alleged to have created it took place in a state in which such a marriage is valid.'" *State v. Alford*, 298 N.C. 465, 473, 259 S.E.2d 242, 247 (1979) (citation omitted). Texas recognizes common law marriages. *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex. 1993).¹ Under Texas law, "[a] valid informal, or common-law, marriage consists of three elements: (1) agreement of the parties to be married; (2) after the agreement, their living together in Texas as husband and wife; and (3) their representing to others in Texas that they are married." *Nguyen v. Nguyen*, 355 S.W.3d 82, 88 (Tex. App. 2011) (citing Tex. Fam. Code. Ann. § 2.401(a)(2) (2006)). All three elements must exist concurrently

1. We take judicial notice of and apply the substantive law of Texas in reviewing the issue of Plaintiff and Defendant's alleged common law marriage. N.C. Gen. Stat. § 8-4 (2011); *Thames v. Nello L. Teer Co.*, 267 N.C. 565, 148 S.E.2d 527 (1966). North Carolina law applies with respect to procedural matters. *Young v. Railroad*, 266 N.C. 458, 146 S.E.2d 441 (1966).

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

for an informal marriage to exist. *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. App. 1987). “The existence of an informal marriage is a fact question, and the party seeking to establish existence of the marriage bears the burden of proving the three elements by a preponderance of the evidence.” *Nguyen*, 355 S.W.3d at 88.

The trial court determined that Plaintiff failed to carry her burden in establishing the existence of a common law marriage between the parties under Texas law. Specifically, the court cited Plaintiff’s failure to establish the first element of her claim, concluding that “Plaintiff ha[d] failed to prove by the preponderance of the evidence that while in the State of Texas, both parties had a present agreement to be Husband and Wife.” The court entered the following, pertinent, findings of fact in reaching this conclusion:

11. Plaintiff and Defendant began dating in approximately October of 1999, and Defendant moved into plaintiff’s home in September or October of 2000, after Plaintiff’s divorce from Brett Garrett.

12. Plaintiff told Defendant it would not be honorable to live together unless married. Defendant told Plaintiff that a common law marriage in Texas was the same as marriage so that it would be appropriate to live together. Each bought a ring to show that they were married. The parties lived together in Texas in the home of the plaintiff until they moved to North Carolina in 2003.

13. In Texas, the parties introduced themselves socially as Husband and Wife and referred to each other in public as Husband and Wife. The parties continued this behavior in North Carolina. The defendant’s testimony otherwise is not credible. However, even according to the plaintiff, when “legal” documents were being generated, the parties would tell the preparers that the parties were unmarried.

14. The relevance of the actions of the parties in North Carolina is limited to informing the court of the intent of the parties while in Texas.

15. The remaining element of an informal marriage under the laws of Texas concerns whether the actions of the parties outlined above were pursuant to a mutual agreement between the parties presently to be husband

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

and wife at the time of the agreement. In addition to the actions of the parties outlined above, the court finds [the] following facts which are conflicting with respect to this issue:

- a. The parties never had a formal or informal ceremony. The parties never exchanged vows. They did not have joint bank accounts or joint checking accounts.
- b. Plaintiff never officially assumed the surname of the Defendant, although she used his surname in public and on unofficial documents.
- c. On May 2, 2003 a Release of Lien was executed with respect to a note dated December 22, 2000. The maker of the note was Hulya Garrett, “an unmarried woman.”
- d. The parties filed a federal tax return due April 2002 as “married filing joint return.”
- e. In Texas, Plaintiff kept her real property in her sole name until she sold the property in 2003. With the proceeds, she purchased property in North Carolina in her sole name as reflected in a deed recorded 2/20/04 in Iredell County Book 1526 Page 1604 in which Plaintiff is listed as the Grantee: “Hulya Garrett, unmarried.”
- f. After moving to North Carolina, Plaintiff told Kay Webster, a friend of the Defendant, that Plaintiff and Defendant had no intention to marry because there were too many issues between them.
- g. On 12 August 2005, Plaintiff conveyed to Defendant real estate in North Carolina. The deed which plaintiff signed lists Plaintiff as “unmarried.” This deed was recorded in Book 1672 Page 407, Iredell County Registry.
- h. On April 10 2007, Defendant signed an official wood-destroying insect information report in which the buyers were listed as Chuck and Hulya Burris.
- i. On 27 April 2007, Plaintiff and Defendant caused to be recorded a deed in Book 22172 Page 709 Mecklenburg County Registry listing both parties as

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

“unmarried” and acquiring the property as “tenants-in-common.”

Plaintiff cites the trial court’s finding of fact 15 and its subparts and takes issue with the trial court’s statement that its findings on the issue of a present agreement between the parties are “conflicting.” Plaintiff specifically challenges each “sub-finding” under finding of fact 15 as “inapposite,” or, in fact, supportive of Plaintiff’s claim. While it is true that some of the trial court’s findings tend to support the existence of a present agreement between the parties, it is likewise true that others tend to undermine such an agreement. For instance, the parties filed a joint tax return in 2002 (finding of fact 15(d)), but Plaintiff executed other legal documents, including a promissory note dated 22 December 2000, as “unmarried” (findings of fact 11 and 15(c)); Plaintiff sometimes used Defendant’s surname in public (finding of fact 15(b)), but Plaintiff did not assume Defendant’s surname as her own legal name (finding of fact 15(b)); the parties lived together and referred to each other as husband and wife in public (findings of fact 12 and 13), but Plaintiff owned and maintained property in her own name and even acquired property with Defendant in 2007 as tenants-in-common (findings of fact 15(e) and 15(i)). Furthermore, while we agree with Plaintiff that participation in a wedding ceremony (formal or informal), assuming Defendant’s surname as her legal surname, and sharing her real property with Defendant are not *requirements* for a valid common law marriage under Texas law, these facts are nonetheless *probative* in discerning the parties’ intent to form an agreement. The trial court’s findings, indeed, are in conflict on the issue of the parties’ intent to enter an informal agreement to marry, and we accordingly turn to the relevant Texas law in resolving this issue.

In examining whether a common law marriage exists, the Texas Court of Appeals has previously stated that where the evidence is conflicting as to the “agreement” element,

the effect of all the testimony is left to the sound discretion of the trial court which encounters the parties and the witnesses, observes their demeanor and personalities, judges the credibility of the witnesses, interprets the truth and reality, and finally draws upon its storehouse of human living and experience before endeavoring to judicially decree its judgment.

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

Rosales v. Rosales, 377 S.W.2d 661, 664 (Tex. App. 1964). The *Rosales* court further stated that “[i]f there is any evidence from which the judgment can be upheld it is our duty to do so and every issue raised by the testimony will be resolved in favor of the judgment. *Id.*”

We also find instructive the Texas Court of Appeals’ decision in *In re Estate of Giessel*, 734 S.W.2d 27 (Tex. App. 1987). There, the appellants, who were cousins of the decedent, attempted to disprove the validity of a common law marriage between the decedent and the appellee by showing that the appellee, who stood to recover as the sole heir of the decedent’s estate, had represented that she was not married on legal documents such as tax returns, social security, her driver’s license, and bank records. *Id.* at 31. The court rejected the appellants’ contention and held that the appellee’s statements on her tax returns and other legal documents “go to the *weight* of the evidence[,]” a question for the jury, and because “[t]here was substantial evidence before the jury to support either an affirmative or negative answer to the sole special issue[,]” the court would “not substitute [its] judgment for the jury’s.” *Id.* at 31-32 (emphasis added).

More recently, the Texas Court of Appeals addressed the issue of common law marriage in *Romano v. Newell Recycling of San Antonio, LP*, No. 04-07-00084-CV (Tex. App. 2008). There, the parties offered conflicting evidence as to the “agreement” element: testimony was introduced indicating that the parties had “both agreed . . . to live like husband and wife” . . . [and] be a married couple[;]” however, there was also evidence introduced that the alleged wife had executed documents indicating that the parties were unmarried. *Id.* at 4 (quotation marks omitted) (ellipses in original). Citing *Giessel, supra*, the court stated that the representations in the legal documents “go to the weight to be afforded the evidence[,]” and, further, that “[a]s the trier of fact, it was the trial court’s province to weigh the evidence and resolve any conflicts, and we must assume it resolved all evidentiary conflicts in accordance with its decision if a reasonable human being could have done so.” *Id.*

Analogous to *Rosales, Giessel*, and *Romano*, the parties in the instant case introduced conflicting evidence on the “agreement” element, as recited and discussed above. The trial court performed its duty of weighing and resolving the conflicts in the evidence and determined that Plaintiff had not proven beyond a preponderance of the evidence that there was an agreement between the parties to enter into an informal marriage. It is not the function of this Court to reweigh the evidence on appeal. The trial court’s findings were suffi-

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

cient to support its conclusion that Plaintiff failed to meet her burden in proving an element of her claim, and, in turn, that no common law marriage existed between the parties.

III. Conclusion

For the foregoing reasons, the trial court's order denying Plaintiff's claim for absolute divorce is hereby

AFFIRMED.

Judge McGEE concurs. Judge BEASLEY dissents by separate opinion.

BEASLEY, Judge dissenting.

Because I believe that the trial court's own findings establish that a marriage occurred under Texas law, I would find its conclusion is unsupported and therefore respectfully dissent.

As the majority opinion correctly states above, the findings of the trial court are binding on this Court due to the Appellant's failure to challenge them. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Both the trial court and the majority of this Court rely on several findings of fact regarding events that occurred after the parties moved in together. However, this reliance ignores that the findings of fact regarding events prior to the parties moving in together satisfy **all** of the requirements for common law marriage under Texas law. Consequently, these later findings of fact have no bearing on the issue before us.

The majority opinion correctly lays out the law affecting the outcome of this case. The trial court found that the parties lived together and held themselves out to others as married, thereby satisfying two of the three requirements of common law marriage under Texas law. *See Nguyen v. Nguyen*, 355 S.W.3d 82, 88 (Tex. App. 2011)(citing Tex. Fam. Code Ann. § 2.401(a)(2)(2006)). The court only took issue with the element of agreement to be married. *See id.* As both the trial court and the majority opinion observe, Texas case law has found that these three elements must occur concurrently for a marriage to exist. *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. App. 1987). In addition, and not in contrast, the Texas Code states that the agreement should precede the cohabitation and representations of marriage. Tex. Fam. Code Ann. § 2.401 (West 2011)("[T]he man and woman agreed to be married

GARRETT v. BURRIS

[224 N.C. App. 32 (2012)]

and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.”).

In Finding of Fact Number 12, the trial court found

Plaintiff told Defendant it would not be honorable to live together unless married. Defendant told Plaintiff that a common law marriage in Texas was the same as marriage so that it would be appropriate to live together. Each bought a ring to show that they were married. The parties lived together in Texas in the home of the plaintiff until they moved to North Carolina in 2003.

These findings demonstrate that the parties intended to be married. The trial court explicitly found that the parties conditioned their living together on obtaining the status of “married” when it found Plaintiff refused to live with Defendant without being married and Defendant assured her that common law marriage was the same as “getting married.” This is an express agreement and the trial court explicitly found that the parties, after this conversation, took all of the steps necessary to satisfy common law marriage requirements when they moved in together and bought the rings. *See Eris v. Phares*, 39 S.W.3d 708, 714 (Tex. App. 2001)(finding direct legal evidence of an agreement where one party stated it was not necessary “to be married to be married” and factual sufficiency where this statement led to “cohabitation and representations [of marriage,]” thereby creating an inferred agreement to be married). It is inapposite to conclude that the parties did not agree to be married by common law in light of Finding of Fact Number 12.

Both the majority opinion and the trial court draw their conclusion in reliance on acts and omissions that occurred **after** the events in Finding of Fact Number 12. The majority opinion stresses the importance of these later findings as “*probative* in discerning the parties’ intent to form an agreement” and cites Texas law to show that where there is any evidence supporting the lower court’s decision, it must be upheld. While I agree that Texas law places great deference with the trial courts in the event of conflicting evidence, *see Rosales v. Rosales*, 377 S.W.2d 661, 664 (Tex. App. 1964), I see no conflicting evidence in this case.

In Texas, the instant that all three requirements of common law marriage are satisfied and concurrent, a marriage forms. *See Bolash*, 733 S.W.2d at 699 (requiring concurrence). Once a common law marriage forms under the laws of Texas, it is treated in the same regard

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

as any formal marriage and may only be dissolved by an act of the court or death. *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981). “Once the marriage exists, the spouses’ subsequent denials of the marriage, if disbelieved, do not undo the marriage.” *Id.* (citing *De Beque v. Ligon*, 292 S.W. 157 (Tex. Comm’n App. 1927).

The later findings relied on by the trial court and the majority opinion does not conflict with this finding. They instead point to changes in behavior or intent, but are necessarily irrelevant because the marriage was already formed based on the express finding by the trial court. *See, e.g., Reilly v. Jacobs*, 536 S.W.2d 406, 408 (Tex. Civ. App. 1976)(finding evidence that husband opened bank accounts in his sole name, thus not shared, and that wife did not change her name did not nullify the existence of a common law marriage). Any act or behavior that followed the events recounted in Finding of Fact Number 12 is irrelevant to the issue before us because the marriage could not be terminated by a mere change of heart or regret. Because the events as found in Finding of Fact Number 12 occurred in Texas and satisfy the requirements of common law marriage under Texas law, this Court is bound to recognize the existence of the marriage. *State v. Alford*, 298 N.C. 465, 473, 259 S.E.2d 242, 247 (1979).

IN THE MATTER OF THE ADOPTION OF
S.K.N., A MINOR CHILD

No. COA12-275

Filed 4 December 2012

Adoption—statutory requirements—consent of biological father required

The trial court did not err by concluding that respondent biological father’s consent was required for the adoption of his minor child. Respondent satisfied the requirements of N.C.G.S. § 48-3-601, thereby necessitating his consent for the adoption of his son.

Appeal by petitioners from order entered 29 September 2011 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 12 September 2012.

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for petitioners-appellants.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for respondent-appellee.

Catawba County Department of Social Services, by Lauren Vaughan, amicus curiae.

HUNTER, Robert C., Judge.

Petitioners-appellants Nolan and Melissa Nance (“petitioners”) appeal from the trial court’s order concluding that the consent of respondent-appellee Herbert Wiley Sigmon, IV (“respondent”) is required for the adoption of his minor child, Steven¹. After careful review, we affirm.

Background

The majority of the facts of this case are not in dispute and establish the following²: Before the birth of their child Steven, respondent and Carrie Godwin (“Ms. Godwin”) had cohabitated for more than nine years and produced two other children, but they never married. From November 2008 until Steven’s birth in July 2009, respondent and Ms. Godwin occupied separate bedrooms of their shared residence. Their relationship was described by the trial court as being “punctuated by chronic episodes of domestic violence, substance abuse, and ‘out of relationship’ affairs.”

When Ms. Godwin learned that she was pregnant with Steven, she was afraid to tell respondent; she planned on keeping the pregnancy a secret and giving the child up for adoption. As her weight gain from the pregnancy became obvious, Ms. Godwin continued to deny that she was pregnant, insisted that she was simply “‘gaining weight,’” and expressed “outrage” when questioned about it. Instead of admitting that she was pregnant, Ms. Godwin eventually resorted to telling people that she had been diagnosed with a tumor and that she was receiving treatment for it.

1. “Steven” is a pseudonym used to protect the identity of the minor, S.K.N.

2. We take judicial notice of the record on appeal in the first appeal of this matter, *In re Adoption of S.K.N.*, ___ N.C. App. ___, 714 S.E.2d 274 (2011) (No. COA10-1515) (unpublished). See, e.g., *Four Seasons Homeowners Ass’n, Inc. v. Sellers*, 72 N.C. App. 189, 190, 323 S.E.2d 735, 737 (1984) (“[O]ur appellate courts may take judicial notice of their own records. . .”).

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

Meanwhile, Ms. Godwin sought assistance from Catawba County Department of Social Services (“DSS”) to which she reported that respondent was *not* the biological father of the child and that she was fearful of the effects on her family life if respondent learned that she had been impregnated by another man. Ms. Godwin was also concerned that some of respondent’s family members worked at the Catawba County hospitals, and DSS assisted Ms. Godwin with locating medical services outside of the county. On 11 July 2009, Ms. Godwin traveled to Iredell County, gave birth to Steven, and returned home that same day without the child.

On 18 August 2009, respondent discovered photographs of Steven and the relinquishment for adoption that Ms. Godwin had signed on 13 July 2009. Upon viewing the photographs, respondent believed that Steven was his child as Steven looked similar to respondent’s two daughters. Respondent called his mother and his stepmother, told them he believed Steven was his child, and sought their advice on how to get custody of his child. Respondent’s mother testified that, because respondent was too emotional to call DSS, she called DSS on respondent’s behalf on 19 August 2009, the day after respondent discovered the photographs. Respondent’s mother informed DSS that respondent believed he was Steven’s father and that respondent did not want Steven to be adopted. DSS informed respondent’s mother that they could not discuss the matter unless respondent retained an attorney.

On 20 August 2009, petitioners filed a petition with the Catawba County Clerk of District Court seeking to adopt Steven. In December 2009, DNA testing confirmed that respondent is Steven’s biological father. Respondent filed a motion to dismiss the adoption petition arguing that his consent was required for petitioners’ adoption of Steven. A hearing on the motion was held in Catawba County District Court before Judge C. Thomas Edwards. Judge Edwards entered an order on 21 July 2010 concluding that respondent’s consent was required for the adoption of Steven as he had acknowledged paternity of the child, provided reasonable and consistent support for the mother, and regularly visited or communicated with the mother in accordance with N.C. Gen. Stat. § 48–3–601. Petitioners appealed the order to this Court, and that appeal was the subject of *In re Adoption of S.K.N.*, ___ N.C. App. ___, 714 S.E.2d 274 (2011) (No. COA10-1515) (unpublished) (hereinafter “*S.K.N. I*”).

In *S.K.N. I*, we concluded the record lacked any evidence to support the trial court’s conclusion that respondent had retained an

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

attorney *before* petitioners filed their petition for adoption. *Id.* at ____, 714 S.E.2d at *4. We held that while “respondent’s two separate declarations to his mother and his stepmother, combined with his mother’s call to DSS on his behalf, [were] sufficient to establish an acknowledgement under N.C. Gen. Stat. § 48–3–601(2)[,]” it was not possible to determine if the trial court would have found in favor of respondent had it not considered the unsupported finding of fact that respondent had retained an attorney before the filing of the adoption petition. *Id.* We therefore vacated the trial court’s order and remanded the matter for a determination of whether the trial court would have held that the declarations and phone call were sufficient to constitute an acknowledgement of paternity. *Id.*

On remand and without hearing additional evidence or arguments, the trial court concluded that respondent’s declarations to his mother and stepmother and his mother’s phone call to DSS were sufficient to establish his acknowledgment of paternity under N.C. Gen. Stat. § 48–3–601(2). Additionally, the trial court concluded that respondent satisfied the financial support and visitation or communication requirements of N.C. Gen. Stat. § 48–3–601(2) and thereby established that his consent to the adoption of Steven was required. From this order, petitioners appeal.

Discussion

As required by N.C. Gen. Stat. § 48–3–601 (2011), before a petition for adoption of a minor can be granted certain individuals must provide consent to the adoption. In a direct placement adoption, the statute requires the consent of “[a]ny man who may or may not be the biological father of the minor but who:”

4. *Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and*

...

II. *Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during*

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48–3–601(2)(b)(4)(II) (emphasis added). Thus, for respondent’s consent to be necessary for the granting of a petition for a direct placement adoption of Steven, respondent must have, before the filing of the adoption petition: (1) acknowledged paternity of the child; (2) provided reasonable and consistent financial support for the mother or the child, during or after the pregnancy; and (3) regularly visited or communicated with the mother, during or after the pregnancy, or with the child, or attempted to do so. *Id.*; *In re Adoption of Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001).

Pursuant to N.C. Gen. Stat. § 48-2-202 (2011), adoption proceedings are heard by the trial court without a jury. Accordingly, in our review of a trial court’s order resulting from an adoption proceeding we must “ ‘determine whether there was competent evidence to support [the trial court’s] findings of fact and whether its conclusions of law were proper in light of such facts.’ ” *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (quoting *In re Adoption of Cunningham*, 151 N.C. App. 410, 413, 567 S.E.2d 153, 155 (2002)). We are bound by the trial court’s findings of fact if the findings are supported by competent evidence, “even if there is evidence to the contrary.” *Id.* In our review of the evidence, “we defer to the trial court’s determination of witnesses’ credibility and the weight to be given their testimony.” *Id.* at 331, 590 S.E.2d at 460. Although the trial court’s order at issue here is interlocutory, we have previously recognized that where a trial court has determined whether a putative father’s consent was necessary for the granting of an adoption petition the trial court’s order affects a substantial right and is immediately appealable. *Id.* at 330, 590 S.E.2d at 460.

Petitioners first argue that the trial court erred in concluding that respondent acknowledged his paternity of Steven before the filing of the petition for adoption, as is required by N.C. Gen. Stat. § 48–3–601(2)(b)(4). Specifically, petitioners argue that: (1) respondent cannot rely on the actions of third parties to demonstrate compliance with section 48-3-601; and (2) respondent’s request for a blood test to determine paternity “legally voids” any acknowledgement of paternity he may have made. We disagree.

A. Benefit of Third-Party Actions

In concluding that respondent acknowledged paternity of Steven, the trial court relied, in part, on the finding that respondent’s mother

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

made a phone call to DSS in which she informed DSS that her son believed he was Steven's father. Petitioners argue that our Supreme Court has expressly rejected a putative father's reliance on third-party efforts to meet the requirements of N.C. Gen. Stat. § 48-3-601 and cite the Supreme Court of North Carolina's decision in *Byrd*, 354 N.C. at 197, 552 S.E.2d at 148. We conclude petitioners' reliance on *Byrd* is misplaced.

In *Byrd*, our Supreme Court expressly rejected reliance on "attempts or offers of support, made by the putative father or another on his behalf," for meeting the support requirements of N.C. Gen. Stat. § 48-3-601. *Id.* (emphasis added). The Court prefaced this conclusion by noting that while "attempted" communications satisfy the requirements of section 48-3-601(2)(b)(4)(II), *attempts of support* do not. *Id.* at 196, 552 S.E.2d at 148. Acknowledgement of paternity, support, and visitation or communication are distinct requirements under N.C. Gen. Stat. § 48-3-601. *Byrd* did not prohibit reliance on a third-party's statements as evidence of whether a putative father acknowledged paternity. Indeed, the Court noted that the biological father bought clothing for the child and a money order for the biological mother and requested that a third party forward the gifts to the biological mother. 354 N.C. at 197, 552 S.E.2d at 149. The Court rejected reliance on these gifts as evidence of the putative father's support because they were mailed to the mother *after* the petition for adoption was filed; the clothing and money order "arrived too late." *Id.*

As to a biological father's acknowledgement of paternity, the *Byrd* Court concluded that acknowledgment "may be made orally or in writing, or may be demonstrated by the conduct of the putative father." *Id.* at 195, 552 S.E.2d at 147. Thus, *Byrd* does not prohibit consideration of a third party's statements as evidence of a putative father's acknowledgement of paternity. We conclude the trial court properly considered the phone call placed by respondent's mother to DSS, made on respondent's behalf, as evidence of respondent's acknowledgement of paternity under N.C. Gen. Stat. § 48-3-601(2)(b)(4). Petitioners' argument is overruled.

B. Request for Blood Test

Next, petitioners argue that respondent's request for a blood test to determine his paternity "legally voids" any acknowledgement of paternity he may have made. Petitioners contend that a putative father does not request blood testing unless parentage is at issue, and

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

parentage is not at issue if the putative father has acknowledged paternity. The text of N.C. Gen. Stat. § 48–3–601 demonstrates the fallacy of this argument. Section 48–3–601(2)(b) provides that a petition for adoption may not be granted unless consent has been provided by “[a]ny man who may *or may not be the biological father*” but who meets the other requirements of the statute. N.C. Gen. Stat. § 48–3–601(2)(b) (emphasis added). Thus, the statute providing a means to establish whether a putative father must consent to an adoption contemplates that the putative father may not know whether he is the biological father.

Petitioners’ argument is also contradicted by our Supreme Court’s decision in *Byrd*. In *Byrd*, when the biological father filed a complaint for custody of the child he “moved for a blood test to determine parentage, and he requested that his complaint for custody and offer of support be summarily dismissed if he was determined not to be the child’s biological father.” 354 N.C. at 192, 552 S.E.2d at 145. The trial court granted the motion for the blood test, and the results confirmed his paternity. *Id.* at 192, 552 S.E.2d at 146. Despite the fact that the respondent “conditioned his acknowledgement upon proof of a biological link” after an initial period of unconditional acknowledgement, our Supreme Court concluded the biological father satisfied the acknowledgement requirement of N.C. Gen. Stat. § 48–3–601(2)(b)(4). *Id.* at 195–96, 552 S.E.2d at 147. Consequently, we reject petitioners’ argument that respondent’s request for a blood test to confirm his paternity of Steven voided his acknowledgment of paternity.

C. Findings of Fact

DSS, as an *amicus curiae*, further argues that the trial court’s findings of fact 21 and 28 are not supported by competent evidence. We disagree.

In these findings of fact, the trial court found that on 18 or 19 August 2009 respondent told his mother and his stepmother, unconditionally and unequivocally, that he believed Steven was his child and that on 19 August 2009 respondent’s mother called DSS about Steven on behalf of respondent. Our review of the record reveals that these findings of fact are supported by competent evidence. DSS concedes that respondent, his mother, and his stepmother testified to these events, but DSS argues against the credibility of that testimony. We must defer to the trial court’s determination of witness credibility and uphold these findings of fact as they are supported by competent evidence. *See Shuler*, 162 N.C. at 330–31, 590 S.E.2d at 460.

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

DSS additionally argues that respondent's statements to his mother and his stepmother were insufficient to support the trial court's conclusion that he acknowledged paternity of Steven. This argument depends on concluding that the trial court could not consider the phone call placed by respondent's mother to DSS on respondent's behalf because respondent cannot claim the benefit of third-party actions. We have rejected that argument above. The trial court properly considered respondent's statements to his mother and stepmother and the phone call by respondent's mother to DSS. These findings of fact are supported by competent evidence, and the trial court did not err in concluding that, under the facts of this case, they were a sufficient acknowledgment of paternity pursuant to N.C. Gen. Stat. § 48-3-601(2)(b)(4).

D. Time Periods for Determining Compliance with N.C. Gen. Stat. § 48-3-601(2)(b)(4)

Next, petitioners' argue that the trial court erred by not analyzing the same time period in determining whether the putative father complied with the acknowledgment requirement of N.C. Gen. Stat. § 48-3-601(2)(b)(4) as it did in determining if respondent met the financial support and the visitation or communication requirements of subsection 48-3-601(2)(b)(4)(II). We disagree.

The trial court determined that respondent acknowledged paternity of Steven by his actions between the time of his discovery of Steven's birth (and the fact that Ms. Godwin had been pregnant) on 18 August 2009, and the filing of petitioners' petition for adoption, on 20 August 2009, approximately a two-day time period. When determining whether respondent provided sufficient financial support to or visited or communicated with Steven or Steven's mother, the trial court considered respondent's actions over the entirety of Ms. Godwin's pregnancy. This, petitioners contend, was an application of different standards for the determination of the acknowledgment, support, and communication requirements and was a violation of their constitutional due process rights. Petitioners argue that the time period for analyzing compliance with the statute must be the same with regard to each statutory requirement.

Petitioners do not specify whether their due process argument is based on rights guaranteed under our federal constitution or our state constitution, or both. Regardless, we do not reach their constitutional argument as petitioners failed to raise the issue in the trial court, and we may decline to address it when raised for the first time

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

during appeal. *Anderson v. Assimios*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). This is particularly so where we can resolve the issue on nonconstitutional grounds. *Id.* We conclude that petitioners' argument that different time periods cannot be considered when analyzing the sufficiency of respondent's actions for compliance with the acknowledgement, support, and communication requirements of section 48-3-601(2)(b)(4) is unsupported by caselaw or the language of the statute. Petitioners cite no caselaw expressly prohibiting the determination of the sufficiency of respondent's actions establishing an acknowledgement of paternity by analyzing a time period different from the time period in which the court considers the sufficiency of respondent's actions for establishing the support and communication requirements of the statute. Rather, petitioners contend that the two-day time period at issue here was not a "substantial and sufficient amount of time" as contemplated by our Supreme Court in *Byrd*, 354 N.C. at 195, 552 S.E.2d at 147. Yet, the Court concluded in *Byrd* that, there, the respondent had unconditionally acknowledged his paternity "for a substantial and sufficient amount of time *after initially learning of the pregnancy.*" *Id.* (emphasis added). We note that in *Byrd* the father was aware of the pregnancy for nearly its entire term, but in the absence of caselaw prohibiting the analysis of different periods of time for each of the elements, we are not persuaded by petitioners' argument.

Nor do we find support for petitioners' argument in the language of the statute. Indeed, our analysis of section 48-3-601(2)(b)(4) leads us to a contrary conclusion. Initially, we note that the time period set by the statute in consideration of all actions, is the period before the filing of the petition for adoption or a hearing held pursuant to N.C. Gen. Stat. § 48-2-206. N.C. Gen. Stat. § 48-3-601(2)(b)(4). Additionally, the acknowledgement requirement appears in subsection 48-3-601(2)(b)(4) while the support and communication requirements appear in a separate paragraph, subsection 48-3-601(2)(b)(4)(II). *Id.* The language of subsection 48-3-601(2)(b)(4)(II) provides that the support and the communication requirements may be met by actions intended to benefit the mother or the child and that these actions may occur during or after pregnancy. Finally, subsection 48-3-601(2)(b)(4)(III), which is not at issue here, provides that when a putative father's acknowledgement of paternity and his marriage to the mother are used to establish the necessity of his consent to the adoption, the marriage must occur *after* the child's birth. N.C. Gen. Stat. § 48-3-601(2)(b)(4)(III). This suggests that analysis

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

of different time periods may apply to the determination of each statutory requirement.

Under petitioners' logic, a putative father's acknowledgement of paternity *during* the mother's pregnancy and his marriage to the mother *after* the pregnancy could not establish the need for his consent. We cannot conclude that the legislature intended such an illogical result. See *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 342, 634 S.E.2d 548, 553 (stating that a statutory interpretation resulting in an illogical result is not permitted as it likely would not reflect the intent of the legislature), *appeal dismissed and disc. review denied*, 361 N.C. 167, 639 S.E.2d 650 (2006). Thus, we conclude that the statute contemplates that different time periods may be considered when determining if the putative father's actions establish the necessity of his consent to the adoption. The trial court did not err in doing so here.

E. Knowledge of the Pregnancy

Next, petitioners argue that the trial court erred as a matter of law in concluding that respondent satisfied the support and communication requirements of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) because his actions were made without the knowledge that Ms. Godwin was pregnant. We disagree.

In its order, the trial court concluded that respondent satisfied the support requirement of the statute in that he "provided reasonable and consistent support" for Ms. Godwin and Steven during Ms. Godwin's pregnancy by paying the monthly payment for their residence and contributing to utility and other daily expenses. The order additionally provided that respondent satisfied the visitation or communication requirement of the statute in that he and Ms. Godwin lived together during and after Ms. Godwin's pregnancy. The trial court concluded, however, that these actions by respondent were made "[u]nintentionally and unknowingly[.]"

Petitioners contend that in order to satisfy the requirements of section 48-3-601(2)(b)(4)(II), respondent's actions had to be the result of a conscious and deliberate choice, not a matter of happenstance. Petitioners cite no legal authority that expressly requires respondent to have acted with the knowledge that Ms. Godwin was in fact pregnant in order to comply with the statute. Indeed, the statute provides that the support and communication may be provided to either the mother *or* to the child, before or after pregnancy, and does not require knowledge of the pregnancy when doing so. N.C. Gen.

IN RE S.K.N.

[224 N.C. App. 41 (2012)]

Stat. § 48-3-601(2)(b)(4)(II). But, petitioners argue their interpretation of the statute requiring such knowledge is supported by our Supreme Court's statement in *Byrd* that the Court believed the legislature intended the subsections of 48-3-601 "to protect the interests and rights of men who have demonstrated paternal responsibility . . ." 354 N.C. at 194, 552 S.E.2d at 146. We discern no conflict between the Supreme Court's decision in *Byrd* and the trial court's conclusion that respondent's actions could be sufficient under section 48-3-601(2)(b)(4)(II) despite respondent's lack of knowledge that Ms. Godwin was pregnant. The record establishes that despite respondent's inquiries, Ms. Godwin repeatedly denied that she was pregnant and that she went to great lengths to conceal her pregnancy. Despite her denials, respondent continued to provide support to and reside with Ms. Godwin both during her pregnancy and after she secretly gave birth to Steven. Were we to adopt petitioners' logic, a biological mother could use fraud and deception to conceal her pregnancy in order to avoid the necessity of a biological father's consent to the adoption of their child. To permit such a result would contradict our Supreme Court's conclusion in *Byrd* that the legislature "did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father." 354 N.C. at 196, 552 S.E.2d at 148. The trial court did not err in concluding that respondent satisfied the support and communication requirements of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II), and petitioners' argument is overruled.

Conclusion

For the reasons stated above, we hold the trial court did not err in concluding that respondent satisfied the requirements of N.C. Gen. Stat. § 48-3-601, thereby necessitating his consent for the adoption of his son Steven. The trial court's order is affirmed.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

IN RE J.L.H.

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

IN THE MATTER OF: J.L.H.

No. COA12-452

Filed 4 December 2012

1. Termination of Parental Rights—willfully leaving child in foster care—lack of reasonable progress

The trial court properly terminated respondent's parental rights on the basis of willfully leaving her child in foster care for more than twelve months without showing reasonable progress. The trial court's findings demonstrated that, although respondent had participated in some services, her failure to participate with her own mental health treatment and her inconsistency in participating in the child's therapy was not reasonable progress under the circumstances.

2. Termination of Parental Rights—best interests of child—written findings required

A termination of parental rights order was remanded for further findings concerning the best interests of the child where the trial court did not make the written findings required by N.C.G.S. § 7B-1110 (2011). As amended, the statute explicitly requires written findings and the prior cases approving evident consideration of the factors without findings are no longer relevant. In this case the issues of whether termination would aid in the accomplishment of the permanent plan and the quality of the bond between the child and respondent were raised during the termination hearing, but the trial court did not make written findings.

Appeal by respondent-mother from order entered 1 February 2012 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 23 October 2012.

Twyla Hollingsworth-Richardson, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

M. Carridy Bender, for Guardian ad Litem.

Rebekah W. Davis, for respondent-appellant mother.

CALABRIA, Judge.

IN RE J.L.H.

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

Respondent-mother (“respondent”) appeals from the trial court’s order terminating her parental rights to J.L.H. (“Jennifer”).¹ We affirm in part and remand for further findings in part.

On 13 January 2010, the Mecklenburg County Department of Social Services, Youth and Family Services (“YFS”) filed a juvenile petition alleging that Jennifer was a neglected and dependent juvenile. The petition included allegations of improper supervision, sexual abuse, domestic violence, and substance abuse. At that time, the trial court ordered YFS to assume custody of Jennifer for placement in foster care. On 17 February 2010, the trial court adjudicated Jennifer a neglected and dependent juvenile pursuant to a mediated agreement with respondent.

In the following months, the trial court conducted several review and permanency planning hearings. On 14 February 2011, the trial court entered a written order, pursuant to a hearing on 3 February 2011, directing YFS to file a termination of parental rights petition within 60 days. On 11 February 2011, YFS filed a petition to terminate respondent’s parental rights on the grounds of neglect, willfully leaving Jennifer in foster care for more than twelve months without showing reasonable progress under the circumstances, and willfully failing to pay a reasonable portion of the cost Jennifer’s care.

On 21 and 22 September 2011 and 21 and 22 November 2011, the trial court conducted the termination hearing. On 1 February 2012, the trial court entered an order terminating respondent’s parental rights on the basis of neglect, willfully leaving Jennifer in foster care for more than twelve months without showing reasonable progress, and willfully failing to pay a reasonable portion of the cost of care of the children.² Respondent appeals.

II. Adjudication

[1] Respondent argues that the trial court erred in concluding that grounds existed to terminate her parental rights. We disagree.

“The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the con-

1. A pseudonym is used to protect the juvenile’s privacy and for ease of reading.

2. The trial court’s order also terminated the parental rights of Jennifer’s father. However, the father neither attended the termination hearing nor appealed the trial court’s order.

IN RE J.L.H.

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

clusions of law.” *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). “[T]he trial court’s findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.” *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

Pursuant to N.C. Gen. Stat. § 7B 1111(a)(2), a court may terminate parental rights when “[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B 1111(a)(2) (2011). The willful leaving of the juvenile in foster care is “something less than willful abandonment” and “does not require a showing of fault by the parent.” *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)(citations omitted).

Respondent argues, in part, that the trial court erred in concluding that termination was appropriate on this ground because she did everything she was told to do by petitioner. However, this Court has previously held that a finding of this ground may be made even when the parent has made some effort to regain custody of the child because the parent must also show reasonable and positive progress in correcting the conditions which led to the juvenile’s removal. *See In re Nolen*, 117 N.C. App. 693, 699-700, 453 S.E.2d 220, 224-25 (1995).

To support its conclusion that respondent willfully left Jennifer in foster care for more than twelve months without making reasonable progress under the circumstances, the trial court made the following findings in the adjudication portion of the termination order:

11. The respondent mother is still not participating in her own therapy. If the mother cannot address her own mental health needs, she cannot address [Jennifer’s] traumatization. The mother has expressed the opinion during this Court’s involvement as it relates to [Jennifer’s] sexual abuse by her sibling. . . . that “she just needs to get over it”! [Respondent] has not taken the steps necessary to address the issues which brought [Jennifer] into custody, and has not recognized the impact of [Jennifer’s] sexual victimization.

12. The respondent mother agreed that she would comply with therapy for herself and [Jennifer]. The respondent mother attended two therapy appointments with

IN RE J.L.H.

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

[Jennifer] in May 2011, attended no therapy appointments in June 2011, attended two therapy appointments in July 2011, attended no appointments in August 2011, attended one therapy appointment in September 2011, and has not returned since September 2011 to therapy.

13. As a part of the respondent mother's family service agreement or case plan, [respondent] was ordered to complete domestic violence counseling, substance abuse treatment, parenting education, mental health treatment, and engage in therapy with [Jennifer] and her sibling.

14. The respondent mother complied with elements of her domestic violence family service agreement obligation. [Respondent] completed the Women's Commission program in July 2010. [Respondent] completed parenting education in February 2011.

Respondent specifically challenges findings 11, 12, and 14 as unsupported by the evidence.³ Since finding of fact 13 is unchallenged, it is presumed to be correct and supported by the evidence. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982).

The record provides competent evidence to support findings of fact 11 and 12. Jennifer's therapist, Denise Little ("Ms. Little"), testified to respondent's numerous missed appointments and failure to participate in Jennifer's therapy. Ms. Little also testified that respondent's involvement was necessary to Jennifer's recovery and to respondent's understanding of the impact of sexual abuse on her child.

YFS social worker assistant Leslie Simmons ("Ms. Simmons") testified that she observed inappropriate touching between Jennifer and her brother during visits and that respondent failed to stop this behavior. YFS senior social worker Lynda Peperak ("Ms. Peperak") testified about respondent's overall performance on her case plan goals and behavior throughout YFS's interaction with respondent. Ms. Peperak reported respondent's inappropriate comments that Jennifer "should just get over [her sexual abuse]" and that "every child is

3. We note that respondent challenges other findings of fact made by the trial court in its order terminating her parental rights; however, we need not address the additional arguments on the trial court's other findings of fact because they are not relevant to this ground for termination. Thus, any error in those findings would not constitute reversible error. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

IN RE J.L.H.

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

touched inappropriately.” Ms. Peperak also described respondent’s participation in therapy, the many accommodations provided to respondent to encourage her to attend Jennifer’s therapy, and respondent’s apathetic attitude towards the lessons offered in domestic violence counseling, parenting classes, and therapy generally.

Finally, psychologist Dr. Terri Watters (“Dr. Watters”) testified regarding her psychological evaluations of respondent. The evaluations revealed respondent’s narcissistic traits. The court accepted into evidence and considered the Parenting Capacity Evaluation (“PCE”) which Dr. Watters wrote. In her PCE, Dr. Watters expressed concern that respondent would seek out another violent relationship if she failed to address her own mental health needs. Thus, findings of fact 11 and 12 were supported by clear, cogent, and convincing evidence.

As to finding of fact 14, respondent takes issue with the portion of the finding which states that she “complied with elements of her domestic violence service agreement obligation.” Respondent contends that this finding implies that she did not comply with the totality of the agreement. Respondent argues that, under the agreement, she was required to obtain an assessment and follow through on all recommendations and that she did what she was told.

Respondent is correct that her agreement required her to complete a domestic violence assessment and follow all treatment recommendations. Specifically, the agreement required her “to participate in Domestic Violence treatment *to learn about and engage in healthy relationships.*” (Emphasis added). However, Ms. Peperak testified that even though respondent had completed a twelve-week program at the Women’s Commission, she had not implemented the skills she had learned there. For example, Ms. Peperak testified that respondent failed to walk away or contact law enforcement when respondent “ran into” Jennifer’s father. Based upon Ms. Peperak’s testimony, we conclude finding of fact 14 is supported by clear, cogent and convincing evidence.

The trial court’s findings demonstrate that, although respondent had participated in some services, her failure to participate with her own mental health treatment and her inconsistency in participating in Jennifer’s therapy was not reasonable progress under the circumstances. Therefore, the trial court’s findings, which were supported by competent evidence, supported its conclusion that a ground existed to terminate respondent’s parental rights because respondent willfully left Jennifer in foster care for more than twelve months and

IN RE J.L.H.

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

failed to make reasonable progress to correct the conditions which led to Jennifer's removal.

Since we have found that the trial court properly terminated respondent's parental rights on the basis of her willfully leaving Jennifer in foster care for more than twelve months without showing reasonable progress, it is unnecessary to address her arguments on the remaining grounds found by the trial court. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003).

III. Best Interests

[2] Respondent argues that the trial court erred in concluding it was in Jennifer's best interests to terminate her parental rights. Specifically, respondent contends that the trial court failed to make the necessary findings of fact required by N.C. Gen. Stat. § 7B-1110. We agree.

The determination of whether termination is in the best interests of the minor child is governed by N.C. Gen. Stat. § 7B-1110.

In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2011). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). The trial court is "subject to reversal for abuse of discretion only upon a showing . . . that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

IN RE J.L.H.

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

In the instant case, the trial court made the following findings regarding the best interests of Jennifer:

The best interests of [Jennifer] would be served by the termination of parental rights of both respondent parents with respect to this juvenile.

[Jennifer] is in a placement and is being cared for appropriately.

...

[Jennifer] is only seven-years-old [sic] and is capable of being adopted. [Jennifer's] therapeutic needs are being met and she is progressing well and thriving in her current placement.

[Jennifer] is not in a foster/adopt placement, but the Court has no doubt she will be adopted.

However, the trial court made no findings which reflected consideration of N.C. Gen. Stat. § 7B-1110(a)(3), “whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile,” or of N.C. Gen. Stat. § 7B-1110(a)(4), “the bond between the juvenile and the parent.” Although the trial court concludes that Jennifer likely will be adopted, it fails to specifically state that termination of respondent’s parental rights is necessary to achieve that permanent plan. Furthermore, there was testimony at the hearing and evidence in the record relevant to the bond between respondent and Jennifer. Dr. Watters testified that there was “no doubt in [her] mind that there’s a bond between” Jennifer and respondent. She also testified that Jennifer respects respondent, and that Jennifer and respondent seem to enjoy their time together. Ms. Simmons also testified that she believed there was a bond between Jennifer and respondent.

However, in therapy, Jennifer stated that she misbehaved at school and in foster care, because she was afraid that she would be sent back to her mother if she was good. In addition, Jennifer’s incidents of poor behaviors increased after visits with respondent. Finally, Jennifer also stated that she did not trust her mother to keep her safe from further sexual abuse. Thus, the bond between Jennifer and respondent was relevant to the trial court’s best interests determination. Nevertheless, while the trial court was required to consider the statutory factors in N.C. Gen. Stat. § 7B-1110(a) and “make written findings regarding [those] that are relevant,” it failed to do so.

IN RE J.L.H.

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

Although petitioner acknowledges that the trial court did not make explicit findings on all of the relevant statutory factors, it still contends that the trial court's order is sufficient under this Court's decision in *In re S.C.H.*, 199 N.C. App. 658, 682 S.E.2d 469 (2009). *In S.C.H.*, the Court held that, "[a]lthough the trial court may have not made a specific finding addressing N.C. Gen. Stat. § 7B-1110(a)(4)," there was no abuse of discretion so long as "it [wa]s apparent that the trial court did consider" that factor. *Id.* at 668, 682 S.E.2d at 475. Respondent argues that there is also evidence in the instant case that the trial court considered all relevant factors in N.C. Gen. Stat. § 7B-1110.

However, at the time *S.C.H.* was decided, a different version of N.C. Gen. Stat. § 7B-1110 was in effect. This previous version of the statute stated, in relevant part:

After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court *shall consider the following*:

N.C. Gen. Stat. § 7B-1110(a) (2009)(emphasis added).

In 2011, N.C. Gen. Stat. § 7B-1110(a) was amended for all juvenile actions "filed or pending on or after" 1 October 2011. *See* 2011 N.C. Sess. Laws 295. As noted above, the current version of the statute directs the trial court to "consider the following criteria *and make written findings regarding the following that are relevant.*" N.C. Gen. Stat. § 7B-1110(a)(2011) (emphasis added). Therefore, due to this change in statutory language, *S.C.H.* and other cases similar to it are no longer applicable to this Court's evaluation of a trial court's best interests determination under N.C. Gen. Stat. § 7B-1110. The amended statute now explicitly requires the trial court to make written findings of fact on all relevant factors from N.C. Gen. Stat. § 7B-1110(a) when it determines whether termination is in the juvenile's best interests.

In the instant case, the issues of whether termination will aid in the accomplishment of the permanent plan and the quality of the bond between Jennifer and respondent were raised during the termination hearing, but the trial court did not make any written findings regarding these factors. As a result, the trial court's order does not comply with the requirements of N.C. Gen. Stat. § 7B-1110 (2011). Since the record contains evidence from which the court could make

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

findings as to this factor, we remand for entry of appropriate findings pursuant to N.C. Gen. Stat. § 7B-1110(a). *See In re E.M.*, 202 N.C. App. 761, 765, 692 S.E.2d 629, 631 (2010).

IV. Conclusion

The trial court correctly concluded that grounds existed to terminate respondent's parental rights on the ground of her willfully leaving Jennifer in foster care for more than twelve months without showing reasonable progress. Consequently, we affirm the adjudication portion of the trial court's order. However, the trial court failed to make findings on relevant factors included in N.C. Gen. Stat. § 7B-1110(a) when determining whether termination of respondent's parental rights was in Jennifer's best interests. Accordingly, we remand the disposition portion of the trial court's order for further findings as required by N.C. Gen. Stat. § 7B-1110(a).

Affirmed in part and remanded in part.

Judges BEASLEY and THIGPEN concur.

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

No. COA11-1544-2

Filed 4 December 2012

1. Zoning—standing—injury not redressed by decision—injury conjectural—city not directly affected—property too remote

The trial court did not err in a rezoning case by concluding that plaintiff City did not have standing to challenge defendant County's rezoning of the subject property. The City could not establish that it was likely the alleged injury would have been redressed by a favorable decision. Further, the alleged injury was conjectural or hypothetical, the contested zoning amendment did not "directly" affect the City, and the City's property was located three and a half miles from the rezoned property and thus was too remote to support the City's claim of standing.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

2. Zoning—statement of reasonableness—contemporaneous with adoption of amendment—sufficient

The trial court did not err in a rezoning case by granting summary judgment in favor of defendant County on plaintiffs' claim that the Board of Commissioners failed to comply with the requirements of N.C.G.S. § 153A-341. The Board's adoption of a statement of reasonableness contemporaneously with the adoption of the zoning amendment was sufficient to comply with the statute.

3. Zoning—contract zoning—no reciprocal agreement

The trial court did not err in a rezoning case by granting summary judgment in favor of defendant County because the Board of Commissioners did not engage in illegal contract zoning when it approved the rezoning of the subject property. There was no evidence that the Board obligated itself to, or entered into a reciprocal agreement with, the landowners or Sanderson Farms in exchange for approval of the rezoning application.

4. Zoning—duty to consider permissible uses of property fulfilled

The trial court did not err in a rezoning case by granting summary judgment in favor of defendants because the evidence established that the Board of Commissioners fulfilled its duty to consider all permissible uses of the property proposed to be rezoned.

5. Zoning—Rule 60(b) motion—no new evidence—attorney fees—no jurisdiction

The trial court did not abuse its discretion in a rezoning case by reaching its conclusion that it would deny plaintiffs' Rule 60(b) motion had it been before the court because plaintiffs offered no new information to support their motion. However, the trial court erred in awarding attorney fees and expenses to defendant County in responding to plaintiffs' motion because the trial court did not have jurisdiction to do so.

Appeal by plaintiffs 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.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

Brough Law Firm, by Robert E. Hornik, Jr., for plaintiffs-appellants.

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.

Plaintiffs¹ appeal from the trial court's order dismissing the City of Wilson's ("the City") claims for a lack of standing and granting summary judgment in favor of defendant Nash County ("the County") as to all remaining plaintiffs and their claims. After careful review, we affirm the trial court's 30 June 2011 order.

Additionally, pursuant to a petition for writ of certiorari, plaintiffs ask this Court to review the advisory opinion entered by the trial court in response to plaintiffs' Rule 60(b) motion filed during the pendency of this appeal and to review the trial court's order awarding Nash County attorneys' fees and expenses incurred in responding to the 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 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 parties to the underlying action.

Nash County is a member of a North Carolina not-for-profit corporation, Carolinas Gateway Partnership ("CGP"), whose mission is 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

1. "Plaintiffs" collectively refers to 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.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

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 “General Industrial,” which would permit a variety of industrial uses.

In order for the subject property to be a viable site for the poultry 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 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 sub-

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.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

ject of *Albright v. Nash County*, ___ N.C. App. ___, 731 S.E.2d 276 (2012) (unpublished).³

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. 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 several 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 statement of reasonableness 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 standing 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. Plaintiffs timely entered notice of appeal.

3. We note that *Albright* cites the original decision issued in this case (*Morgan v. Nash County*, ___ N.C. App. ___, ___ S.E.2d ___, (No. COA11-1544) (Aug. 21, 2012)), which was withdrawn for the hearing of additional issues. This decision, No. COA11-1544-2, replaces that original decision, No. COA11-1544.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

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 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

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

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 would have to 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 sprayfields would not be properly monitored, in contravention of state and federal regulations. Should such events occur, a separate action 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).

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

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 still 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 seeking 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 amendment. However, it is apparent that a 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 that was nearest to the rezoned property was located one-half mile from the rezoned property and was separated from it by a buffer of 45 acres. *Id.* Here, the City’s property is located three and a half miles from the

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

rezoned property and thus is 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"); *Zopfi v. City of Wilmington*, 273 N.C. 430, 431, 160 S.E.2d 325, 328 (1968) (standing found where the plaintiffs owned property in a subdivision "adjoining or in close proximity" to the rezoned property). The City's argument is overruled.

B. Requirements of N.C. Gen. Stat. § 153A-341

[2] Plaintiffs argue that the trial court erred in granting summary judgment in favor of Nash County on plaintiffs' claim that the Board of Commissioners failed to comply with the requirements of N.C. Gen. Stat. § 153A-341 when adopting the zoning amendment. We disagree.

Section 153A-341 of our General Statutes provides, in part, that "[p]rior to adopting or rejecting any zoning amendment, the governing board shall adopt a statement describing whether its action is consistent with an adopted comprehensive plan and explaining why the board considers the action taken to be reasonable and in the public interest." N.C. Gen. Stat. § 153A-341 (2011).

The minutes of the 4 April 2011 meeting of the Board establish that Commissioner Robbie B. Davis made a motion that contained two recommendations: (1) that the Board adopt a statement which explained why the proposed zoning amendment was reasonable, was in the public interest, and was consistent with the 2006 Nash County Land Development Plan (hereinafter "the statement of reasonableness" or "the statement"); and (2) that the Board approve the proposed zoning amendment. The motion was approved by a vote of five to two. The text of the statement of reasonableness was included in the written zoning amendment adopted by the Board.

Plaintiffs acknowledge the statement of reasonableness was verbally made and approved at the Board's meeting and that the text of the statement was included in the written zoning amendment. Plaintiffs do not argue that the statement is substantively deficient. Rather, plaintiffs argue that Nash County failed to comply with what they allege to be a procedural requirement of N.C. Gen. Stat. § 153A-341—that the statement be adopted *before* the adoption of a zoning amendment. We are not persuaded by plaintiffs' interpretation of the statute.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

“Pursuant to fundamental principles of statutory construction, we must first seek to discern the intent of the legislature, and in seeking to ascertain the legislative intent, the statutory language should be construed in context.” *James River Equip., Inc. v. Tharpe’s Excavating, Inc.*, 179 N.C. App. 336, 342, 634 S.E.2d 548, 553, *appeal dismissed and disc. review denied*, 361 N.C. 167, 639 S.E.2d 650 (2006). Interpretations that lead to “anomalous or illogical” results do not reflect the likely intent of the legislature. *Id.* (citation and quotation marks omitted).

Here, while N.C. Gen. Stat. § 153A-341 provides that a statement of reasonableness is to be adopted by the governing board “[p]rior to” its adoption or rejection of a zoning amendment, the same sentence provides that the statement must explain why the “action *taken*” by the governing board (i.e., the adoption or rejection of the zoning amendment) is reasonable and in the public interest. (Emphasis added.) Under plaintiffs’ interpretation, the governing board would be required to adopt the statement explaining its decision to approve or reject the proposed zoning amendment before it has made its decision. We cannot adopt such an illogical interpretation of the statute. *James River Equip.*, 179 N.C. App. at 342, 634 S.E.2d at 553. To effectuate legislative intent the “words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions[.]” *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706, *disc. review denied*, 312 N.C. 82, 321 S.E.2d 895 (1984). Thus, we conclude it is sufficient—if not necessary—for a governing board to adopt the statement that is required by N.C. Gen. Stat. § 153A-341 contemporaneously with the adoption or rejection of the zoning amendment.

Plaintiffs cite *Wally v. City of Kannapolis*, ___ N.C. ___, ___, 722 S.E.2d 481, 484 (2012), in which the Supreme Court of North Carolina held a zoning amendment to be void where the city council failed to approve a statement of reasonableness when adopting the amendment. The statute at issue in *Wally*, N.C. Gen. Stat. § 160A-383, is substantially similar to N.C. Gen. Stat. § 153A-341, but section 160A-383 applies to zoning amendments adopted by cities and towns rather than by counties. The relevant portion of section 160A-383 provides that

[w]hen adopting or rejecting any zoning amendment, the governing board *shall also approve a statement* describing whether its action is consistent with an

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the *action taken* to be reasonable and in the public interest.

N.C. Gen. Stat. § 160A-383 (2011) (emphasis added); *Wally*, ___ N.C. at ___, 722 S.E.2d at 483.

The *Wally* Court concluded that the plain language of section 160A-383 required the city council to “first, adopt or reject the zoning amendment, and second, approve a proper statement.” ___ N.C. at ___, 722 S.E.2d at 483. A staff report provided to the city council included the staff’s conclusion that the proposed zoning amendment was “ ‘consistent with the long range goals of the City, and reasonable in light of existing and approved infrastructure.’ ” *Id.* at ___, 722 S.E.2d at 482. Yet, when the city council adopted the zoning amendment it failed to approve a statement of reasonableness. *Id.* at ___, 722 S.E.2d at 483. The Court provided several grounds for its conclusion.

First, the Court noted the city council’s failure to adopt the statement was conclusively established by the trial court’s uncontested finding of fact that there was no written statement of reasonableness. *Id.* Second, the Court rejected the argument that the city council impliedly approved the staff report “by virtue of having the report in hand” when it adopted the zoning amendment because, the Court concluded, the language of the statute did not authorize an implied approval. *Id.* Furthermore, the staff report merely stated that “the *staff*” considered the action taken to be reasonable, rather than explaining why “ ‘the board’ ” considered the action to be reasonable, as required by the statute. *Id.* at ___, 722 S.E.2d at 483-84 (quoting N.C. Gen. Stat. § 160A-383). Lastly, the Court rejected the argument that the city council satisfied section 160A-383 by the adoption of a statement which announced that the city council’s final vote on the zoning amendment was “within the guidelines of its zoning authority”; the statement provided no *description* of whether the zoning amendment was consistent with any controlling land use plan and no *explanation* of why its actions were reasonable and in the public interest. *Id.* at ___, 722 S.E.2d at 484.

The facts presented here are distinguishable. While *Wally* involved an uncontested finding of fact that there was no written statement of reasonableness adopted by the zoning authority, here, we have no findings of fact on this point. Indeed, plaintiffs do not argue that the Board failed to adopt a statement but that it did so in the wrong

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

sequence; an argument we have rejected above. Second, the statement adopted did not merely reflect the reasoning of county staff but reflected the reasoning of the Board as to why the zoning amendment was consistent with the controlling land use plan, reasonable, and in the public interest. The statement adopted by the Board thus contained the statutorily required “description” and “explanation” that was absent in *Wally*. We conclude the Board’s adoption of the zoning amendment was proper under N.C. Gen. Stat. § 153A-341, and plaintiffs’ arguments are overruled.

C. Illegal Contract Zoning

[3] Plaintiffs next argue that the trial court erred in granting summary judgment in favor of Nash County because, plaintiffs allege, the Board of Commissioners engaged in an illegal contract zoning when it approved the rezoning of the subject property. We disagree.

“Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract.” *Chrismon v. Guilford County*, 322 N.C. 611, 635, 370 S.E.2d 579, 593 (1988). Determining that the zoning authority’s actions constituted an illegal contract zoning “depends upon a finding of a transaction in which both the landowner seeking a rezoning and the zoning authority undertake reciprocal obligations.” *Hall v. City of Durham*, 323 N.C. 293, 298-99, 372 S.E.2d 564, 568 (1988). “In short, a ‘meeting of the minds’ must occur; mutual assurances must be exchanged.” *Id.* In *Hall*, our Supreme Court rejected the argument that the city council engaged in an illegal contract zoning noting that while the record established the prospective developer “*did* make representations or offer assurances” to the city council, the record was devoid of any evidence that the city council “undertook to obligate itself” in return. *Id.* at 299, 372 S.E.2d at 568. Similarly, in *Chrismon*, 322 N.C. at 639, 370 S.E.2d at 595-96, our Supreme Court concluded that the approval of a rezoning application did not constitute an illegal contract zoning where the applicant made a unilateral promise to the board of commissioners concerning his proposed land use but the board did not reciprocate, and it made its decision only after a thorough consideration of the merits of the application. *See also Kerik v. Davidson County*, 145 N.C. App. 222, 232, 551 S.E.2d 186, 193 (2001) (concluding the board of commissioners approval of a rezoning application was not an illegal contract zoning despite the rezoning applicant’s promises to the board of commissioners where the board did not obligate itself to the applicant).

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

Here, plaintiffs contend that the Board approved the rezoning application with the expectation and understanding that Sanderson Farms would use the subject property for its processing facility. Nash County concedes that it was engaged in recruiting Sanderson Farms to build a poultry processing facility within the county and that the subject property was a possible location. Sanderson Farms did not own the subject property and was not the applicant seeking the rezoning; Nash County and the Williams family were the landowners and applicants. Moreover, as the County attorney reminded the Board in the public meeting held prior to the approval of the application, Sanderson Farms did not have an option to buy the subject property, and Nash County had no obligation to sell the subject property to the company. During the Board's discussion of the rezoning application, several Board members asserted that a vote to approve the rezoning was not a vote for Sanderson Farms's intended use of the land, that the property was still owned by Nash County, and that it would be marketed to any industries that could appropriately use the site. Indeed, one of the two Board members who voted against the approval of the rezoning stated that he was troubled by the fact that if the zoning amendment was adopted the subject property could be used for purposes other than poultry processing, such as mining, the disposal of radioactive waste, or as a landfill. That the Board approved the rezoning application with the knowledge of Sanderson Farms's interest in the subject property is not sufficient to establish that the Board engaged in illegal contract zoning. There is no evidence that the Board obligated itself to, or entered into a reciprocal agreement with, the landowners or Sanderson Farms in exchange for approval of the rezoning application, and the Board's actions did not constitute illegal contract zoning.

We conclude *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971), is distinguishable. There, the Court held an ordinance to be invalid where the record established that the zoning authority did not base its approval of the rezoning application on all uses permissible in the zoning district sought but, rather, on the "the specific plans of the applicant." *Id.* at 544-45, 178 S.E.2d at 440. The zoning authority in *Allred* "accepted the assurances of the applicant" regarding his development plan for the property when it approved his rezoning application. *Id.* at 545, 178 S.E.2d at 440. As we concluded above, here, there is no evidence of a reciprocal agreement between the Board and the landowners or Sanderson Farms. As we conclude below, the record establishes that the Board did consider all permis-

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

sible uses of the subject property in reaching its decision on the rezoning application, which further distinguishes *Allred* from this case.

D. Consideration of All Permissible Land Uses

[4] Plaintiffs also argue that the trial court erred by granting summary judgment because the Board failed to consider all permitted uses of the property subject to the rezoning application. We disagree.

“[W]hen rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a [Board of Commissioners] must determine that the property is suitable for all uses permitted in the new general use district” Consequently, all permissible uses of property proposed to be rezoned into a new classification must be considered for the rezoning to be valid.

Kerik, 145 N.C. App. at 233, 551 S.E.2d at 193 (quoting *Hall*, 323 N.C. at 305, 372 S.E.2d at 572). In *Kerik*, this Court concluded that where the board of commissioners received a detailed list of all the permitted uses in the relevant zoning districts and the minutes of the board’s meeting revealed that the board members considered many permissible uses of the property to be rezoned, that the board complied with its duty. *Id.* at 234, 551 S.E.2d at 193.

Similarly, here, the record demonstrates that the Board considered all of the permissible uses of the subject property: each Board member was provided with a list of all permitted uses for the General Industrial district; the minutes of the Board’s meeting reveal that the county planning director read aloud all permitted uses before the zoning amendment was adopted; the staff report to the Board also included a complete list of the permitted uses; and each Board member signed an affidavit averring that he or she considered all uses allowed in the zoning district being considered before casting his or her vote. As in *Kerik*, we conclude this evidence establishes that the Board fulfilled its duty to consider all permissible uses of the property proposed to be rezoned. Plaintiffs’ argument is overruled.

E. Plaintiffs’ Petition for Writ of Certiorari

[5] 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

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

plaintiffs' motion had plaintiffs 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, 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

The basis for plaintiffs' Rule 60(b) motion was plaintiffs' allegation of the discovery of new evidence in support of their claims against Nash County. The 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.

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 approxi-

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

mately 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 and cited *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 plaintiffs’ Rule 60(b) motion had it been before the court. See *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 709, 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 its advisory opinion with respect to that issue. See *In re Baby Boy Searce*, 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 would remand the matter to the trial court for entry of an order on the Rule 60 motion consistent with the trial court’s advisory opinion with respect to that issue), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986).

2. Award of Attorneys’ Fees and Expenses

In an order entered simultaneously with the advisory opinion concerning plaintiffs’ Rule 60(b) motion, the trial court awarded Nash County reasonable attorneys’ fees and expenses incurred in responding to plaintiffs’ motion. The trial court concluded that, because plaintiffs presented no new evidence to support their Rule 60(b) motion, their motion did not raise a justiciable issue.

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

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

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.⁴ 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. 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 subject matter 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 and whether the rezoning constituted an illegal contract zoning. Thus, we conclude the Rule 60(b) motion is necessarily one that is

4. 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.

MORGAN v. NASH CNTY.

[224 N.C. App. 60 (2012)]

affected by the outcome of this appeal, and the trial court did not have jurisdiction to enter 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 had been entered and 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. We also conclude that the Nash County Board of Commissioners complied with the requirements of N.C. Gen. Stat. § 153A-341, did not engage in an illegal contract zoning, and did not fail to consider all permissible uses when approving the rezoning of the subject property. 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 denying plaintiffs' Rule 60(b) motion.

VACATED as to the 30 April 2012 order awarding attorneys' fees and expenses.

Judges STROUD and ERVIN concur.

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

ERIN MICHELLE REAMS

v.

BRIAN JOSEPH RIGGAN

No. COA12-470

Filed 4 December 2012

1. Child Custody and Support—findings—supported by evidence

Findings in a child custody and support action were supported by the evidence and were binding on appeal even though defendant presented some contradictory evidence. Defendant did not argue that the trial court abused its discretion by awarding primary custody to plaintiff.

2. Child Custody and Support—support—health insurance—not employment based

A child custody and support order did not vary from the North Carolina Child Support Guidelines merely because the trial court ordered defendant to purchase health insurance when defendant did not have access to employment related health insurance. Because there was no variance, there was no violation in not making findings. Defendant did not properly argue that the trial court's findings supporting its ruling were insufficient.

3. Child Custody and Support—support—calculation of amount—error not properly argued

No error was found in the trial court's calculation of the amount of child support defendant was ordered to pay where the court multiplied defendant's weekly income by 4.3. Although the record was unclear concerning exactly how the trial court reached its determinations, the defendant made no argument that the record was deficient, that the trial court failed to make sufficient findings of fact, that the trial court improperly calculated either party's monthly income, or that the trial court applied different formulas in calculating the parties' gross monthly incomes. Defendant did not argue that the matter should be remanded for additional evidence or findings.

Judge BEASLEY concurring in part and dissenting in part.

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

Appeal by Defendant from order entered 18 October 2011 by Judge J. Henry Banks in District Court, Vance County. Heard in the Court of Appeals 25 September 2012.

Stainback, Satterwhite & Zollicoffer, PLLC, by Paul J. Stainback, for Plaintiff-Appellee.

Richard E. Jester for Defendant-Appellant.

McGEE, Judge.

Brian Joseph Riggan (Defendant) appeals from a child custody order entered 18 October 2011. Defendant and Erin Michelle Reams (Plaintiff) had a child together (the child), born 17 January 2005. Plaintiff and Defendant were never married. Plaintiff filed a complaint for child custody and child support on 5 April 2010. Defendant answered and counterclaimed on 14 May 2010. Both Plaintiff and Defendant sought sole custody of the child and child support. The trial court heard the matter on several dates between August and October 2011, and entered a custody order on 18 October 2011. The following are relevant findings of fact from the custody order:

6. That the Plaintiff and Defendant separated as is hereinabove set forth in January, 2006, because of indifference and failure and inability to communicate, and thereafter the Plaintiff and the Defendant lived separate and apart at all times thereafter.

7. That subsequent to the separation of the Plaintiff and the Defendant the Plaintiff and her minor child relocated their residence to Youngsville, located in Franklin County, North Carolina, and that since the relocation of the Plaintiff and the Defendant the minor child . . . has become enrolled, attended, and presently attends Youngsville Elementary School, which is a “year-round” school, and that while she has been at said school said child has been “doing well”.

8. That since the separation of the Plaintiff and the Defendant both the Plaintiff and the Defendant have married, and that they have married individuals other than each other, with the Plaintiff living with her present husband in Youngsville, North Carolina, and the Defendant living with his present wife in Henderson, Vance County, North Carolina.

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

. . . .

15. That the Plaintiff is presently employed as a bartender at Carolina Ale House located in Wake Forest, North Carolina, and that she has been employed at the Carolina Ale House for the last four years next preceding the hearing of this action, and that from such employment the Plaintiff earns between Five Hundred and no/100 (\$500.00) Dollars and Seven Hundred and no/100 (\$700.00) Dollars per week, and that her hours of work extend on a weekly basis of Monday through Friday from 10:00 A.M. until 4:00 P.M.

16. That the Defendant is employed as maintenance foreman at Eastern Minerals, Inc. located in Henderson, North Carolina, and he has been so employed for more than three years next preceding the hearing of this action, and that he has a weekly work schedule which extends Monday through Friday from 7:30 A.M. until 4:00 P.M.; further, the Defendant earns Fourteen and 22/100 (\$14.22) Dollars per hour and that he works forty hours per week, . . . but that he currently does not have employment benefits which provides health insurance for the use and benefit of the Defendant and/or his dependents.

17. That following the separation of the parties in 2006, the Defendant exercised visitation and manifested interest in the minor child . . . on a sporadic basis; that the Defendant has visited the minor child's school once since she has been attending Youngsville Elementary School, and that upon the Plaintiff first enrolling the minor child in school the Defendant objected to such enrollment; that the Plaintiff transports the minor child . . . to and from school on a daily basis, and that she helps the minor child with her homework and reading skills on a daily basis.

18. That since the birth of [the child] the Plaintiff has been the primary caregiver and has had the basic responsibility for the rearing, upbringing, raising and nurturing of the minor child . . . since the birth of said child; that the Defendant has exercised regular visitation with the minor child since shortly after the filing of this action.

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

. . . .

20. That effective March 1, 2007, the Defendant was ordered to pay child support for the use and benefit of the minor child . . . and that the Defendant thereafter paid approximately One Hundred and no/100 (\$100.00) Dollars under and pursuant to this order, although said order extended up to and through November 1, 2007, at which time the Plaintiff agreed, executed and signed documents waiving child support, and that the Defendant did not pay child support before March 1, 2007 and he has not paid child support subsequent to November 1, 2007.

. . . .

22. That the Plaintiff and the Defendant are both gainfully employed and that from said employment the Plaintiff and the Defendant derive wages with which to contribute to the support and maintenance of the minor child . . . and that both of them ought to contribute to the support and maintenance of said minor child in conformity with the North Carolina Child Support Guidelines.

23. That both the Plaintiff and the Defendant have adequate dwellings and facilities in which to maintain a minor child during the time each of them is exercising custody of or visitation privileges with said minor [child] as is hereinafter set forth.

Based in part on these uncontested findings of fact, the trial court concluded the following:

7. That both the Plaintiff and the Defendant are fit and proper persons to have and to exercise care, custody, control and supervision of the minor child, and that both the Plaintiff and the Defendant have adequate dwellings and facilities in which to look after and provide for said minor child, and that the Plaintiff and the Defendant both have income with which to contribute to the support and maintenance of said minor child.

8. That the Court determines that it is in the best interest and general welfare of the minor child . . . that the

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

Plaintiff should have primary custody of said child at all times hereafter and that the Defendant should be awarded reasonable visitation privileges with said minor child at all times hereafter as shall be hereinafter set forth.

The trial court then ordered that Plaintiff have primary custody of the child, granted Defendant visitation rights, ordered Defendant to pay child support in the amount of \$390.41 per month, ordered Defendant to obtain health insurance for the child within sixty days, and dismissed Defendant's counterclaim. Defendant appeals.

I.

The issues on appeal are whether: (1) evidence supports certain of the trial court's findings of fact, (2) the trial court erred in requiring Defendant to obtain health insurance for the child, and (3) the trial court required Defendant to pay too much in child support.

II.

The order we are reviewing on appeal is a child custody order.

Under our standard of review in custody proceedings, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." Whether those findings of fact support the trial court's conclusions of law is reviewable de novo.

Mason v. Dwinnell, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008) (citations omitted).

The trial court's entire objective in [custody] cases is to determine the best environment for the child or children. . . . [T]hese decisions are often difficult, but even where parents love their children, "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." Of necessity in these cases, the trial court is vested with wide discretion. "[The trial court] has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." "[The trial court] can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges."

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

Surles v. Surles, 113 N.C. App. 32, 36-37, 437 S.E.2d 661, 663 (1993) (citations omitted).

III.

[1] Defendant challenges findings of fact seventeen through twenty-one, and from these challenges argues:

[The] conclusion that it is in the child's best interest for [Plaintiff] to have primary custody was based in at least some part on the [trial court's] belief that [Defendant] had never been fully involved in his child's life as stated in the errant findings of fact 17 and 18. Because that "fact" is not actually a fact, the trial court's basis for it's [sic] conclusion is not fully founded and should be reconsidered upon remand.

Finding of fact nineteen involved a domestic violence protective order filed by Plaintiff, but subsequently dismissed by the consent of both parties. Finding of fact twenty-one is in reality a conclusion of law. Neither is relevant as a finding of fact, and we have not included them above. Concerning findings seventeen, eighteen, and twenty, although Defendant has presented some evidence contradicting some portions of these findings, Defendant's argument still fails. After careful review of the record, we hold that there is substantial evidence in support of these findings and, therefore, they are binding on appeal. *Mason*, 190 N.C. App. at 221, 660 S.E.2d at 66.

We note that Defendant makes no argument that the trial court's decision to award primary custody to Plaintiff constituted an abuse of discretion, and we shall not attempt to make Defendant's argument for him. We further hold that we find no abuse of discretion. We affirm the trial court's award of primary custody to Plaintiff, and the visitation schedule included in the custody order.

IV.

[2] Defendant argues that the trial court erred in ordering him to provide medical insurance for the child. We disagree.

Specifically, Defendant argues that the trial court's order requiring Defendant to obtain health insurance for the child violated a statutory mandate. N.C. Gen. Stat. § 50-13.4(c1) (2011) directs that "the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent[.]" The North Carolina Child Support

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

Guidelines (2011), *Health Insurance and Health Care Costs*, states in relevant part:

The court may order either parent to obtain and maintain health (medical or medical and dental) insurance coverage for a child if it is actually and currently available to the parent at a reasonable cost. Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of delivery mechanism. If health insurance is not actually and currently available to a parent at a reasonable cost at the time the court orders child support, the court may enter an order requiring the parent to obtain and maintain health insurance for a child if and when the parent has access to reasonably-priced health insurance for the child.

The trial court found that Defendant's employment did not provide health insurance benefits. Defendant argues that, because his employer does not provide health insurance benefits, he cannot obtain health insurance for the child at a reasonable cost as defined in the guidelines.

First, the guidelines state: "Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of delivery mechanism." *Id.* Defendant makes no argument that he does not have access to "other group health insurance." Second, we do not interpret this sentence as defining the only two methods through which health insurance may be determined to be "reasonably-priced." We interpret this sentence as stating that, if a parent has access to employment-related or other group health insurance, this insurance will be considered "reasonably-priced" as a matter of law. This does not preclude the trial court from determining that some other health insurance is also reasonably priced. The custody order does not violate N.C.G.S. § 50-13.4(c1) merely because the trial court ordered Defendant to purchase health insurance for the child when Defendant did not have access to employment-related health insurance.

Defendant also argues that the trial court violated N.C. Gen. Stat. § 50-13.4(c), which states: "If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered."

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

Defendant argues that the trial court deviated from the guidelines by requiring him to obtain health insurance for the child even though Defendant's employer did not provide health insurance benefits. Because we hold that the trial court did not vary from the guidelines by ordering Defendant to obtain health insurance for the child even though Defendant did not have employer-funded health insurance, we also hold that the trial court did not violate N.C.G.S. § 50-13.4(c) by failing to make specific findings of fact on this matter.

Defendant does not argue that the trial court erred by failing to make sufficient findings in support of its ruling that Defendant should provide health insurance for the child. Likewise, Defendant makes no argument that any health insurance premiums he pays for the child should be factored into his child support payments. Therefore, these issues are not before us. *Belk ex rel. Belk v. Belk*, ___ N.C. App. ___, ___, 728 S.E.2d 356, 359 (2012) (arguments not made in appellant's brief are abandoned). This argument is without merit.

The dissent states Defendant does argue that "the trial court erred by failing to make specific findings of fact with regard to the availability of medical insurance." Defendant's argument concerning "specific findings of fact" was solely directed to Defendant's assertion that the trial court had deviated from the guidelines and, therefore, N.C.G.S. § 50-13.4(c) required the trial court to justify deviation from the guidelines through specific findings of fact. Because we have held that Defendant has not shown a deviation from the guidelines, the requirements of N.C.G.S. § 50-13.4(c) are inapplicable. Defendant's argument on appeal concerning the lack of findings of fact is limited to his argument concerning N.C.G.S. § 50-13.4(c), and does not apply to Defendant's argument in general. If, as the dissent states, this is the core of Defendant's argument, Defendant has failed to make this argument properly.

While it is true that the heading of Defendant's argument states that there was no evidence of the availability of reasonably priced medical insurance, the only evidence, or lack thereof, actually addressed in Defendant's argument is Defendant's testimony that he does not have employer provided health insurance. Defendant simply does not make any argument that he has no access to other reasonably-priced health insurance, and, importantly, Defendant does not argue that the trial court erred by failing to make findings concerning any other reasonably-priced health insurance available to Defendant. We refuse to make additional arguments for Defendant. *Belk*, ___ N.C. App. at ___, 728 S.E.2d at 359.

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

We agree with the statement of law concerning the trial court's duty to make the appropriate determinations and support its ruling with sufficient findings of fact, and that it is not Defendant's burden to insure that the trial court meet its duty. It is, however, Defendant's duty to comply with the North Carolina Rules of Appellate Procedure and present our Court with an argument, supported by citations to relevant law, for every issue Defendant would like our Court to address. N.C.R. App. P. 28(b)(6). We have not shifted the trial court's burden to Defendant. We are dealing with two entirely independent burdens—one at the trial level and one for appeal.

V.

[3] Defendant finally argues that the trial court erred in its calculation of the amount of child support Defendant was ordered to pay. We disagree.

Defendant's argument is that he earns \$14.22 per hour and works forty hours a week—thus, Defendant earns \$568.80 per week. None of these amounts are contested. However, Defendant argues that, in order to determine his gross monthly income, the \$568.80 figure should be multiplied by four, because there are four weeks in a month. There are, however, more than four weeks in a month, and Defendant cites nothing in his brief to support his position. The trial court determined that Defendant's gross monthly income was \$2,445.84, which is \$568.80 multiplied by 4.3. Plaintiff contends that this is the common multiplier used to determine gross monthly income when gross weekly income is established. We need not address this contention because Defendant provides no support for his argument that the trial court erred in its calculation. *Belk*, ___ N.C. App. at ___, 728 S.E.2d at 359 (Rule 28 of the North Carolina Rules of Appellate Procedure requires sufficient argument to be made in support of an appellant's contention and citations in support of the argument. Failure to properly argue an issue on appeal results in abandonment of that argument.).

We further note that when Defendant's \$568.80 weekly income is multiplied by the fifty-two weeks in a year, then that amount is divided by the twelve months in a year, a monthly income of \$2,464.80 is derived, which is greater than Defendant's gross monthly income determined by the trial court—\$2,445.84. Defendant has failed to show that the trial court erred, or that any error prejudiced him.

We again agree with the dissent that the record before us is unclear concerning exactly how the trial court reached its child sup-

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

port amount determinations. The dissent states that “it appears Plaintiff’s monthly income was calculated using a multiplier of four on a weekly income of \$600.” Though this seems a reasonable assumption, it is an assumption we are not free to make. It is possible, though unlikely, that the trial court applied a multiplier of 4.3 to both Plaintiff’s and Defendant’s monthly income. Unfortunately, the record does not indicate what multiplier the trial court applied, nor what specific monthly income the trial court settled on for either party.

The dissent also correctly points out that the record fails to indicate that the trial court properly verified the incomes of the parties through documentation. However, these issues are not argued by Defendant on appeal. Defendant makes no argument that the record is deficient, that the trial court failed to make sufficient findings of fact, that the trial court improperly calculated either party’s monthly income, or that the trial court applied different formulas in calculating the parties’ gross monthly incomes. Defendant does not argue that this matter should be remanded to the trial court for additional evidence or findings, or that the trial court should apply a multiplier of 4.3 to Plaintiff’s monthly income. Instead, Defendant makes a number of unsupported assumptions and then argues this Court should order that his monthly child support obligation be reduced. Based upon the argument Defendant has actually made on appeal, we find it to be without merit.

Affirmed.

Judge THIGPEN concurs.

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

BEASLEY, Judge concurring in part and dissenting in part.

I agree with the majority with regard to the issue of custody, but respectfully dissent and would reverse and remand for further findings on the issues of medical insurance and child support.

With regard to the issue of medical insurance, the majority asserts that Defendant does not argue that the trial court erred by failing to make sufficient findings.¹ However, a careful review of

1. At trial, Defendant testified that “[m]y current wage at Eastern Minerals is \$14.22 per hour. I make \$450 per week, but benefits are not available.” A summary of Defendant’s testimony is included in the record pursuant to the parties’ consent; therefore, this issue is preserved on appeal.

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

Defendant's arguments reveals that Defendant indeed argues that the trial court erred by failing to make specific findings of fact with regard to the availability of medical insurance. Defendant's overall claim is that the trial court erred by ordering him to provide medical insurance where there was no evidence that such was available. Within this argument, Defendant further alleges that the trial court was bound by the Guidelines to order that a parent provide insurance only where such insurance is available at a reasonable cost, and in order to deviate from this, that is, to order a parent to provide insurance where it is not available, specific findings are required. Defendant then states that the trial court made no such findings in this case and, instead, merely found that insurance was unavailable. This, Defendant concludes, is insufficient under the Guidelines. Thus, the core of Defendant's argument is that the trial court erred by not making sufficient findings to support its ruling.

Further, Defendant is correct in attributing error to the trial court's order. The majority concludes that the Guidelines' definition of reasonably priced health insurance "does not preclude the trial court from determining that some other health insurance is also reasonably priced" and that the burden of proving the unavailability of this "other health insurance" rests on Defendant. However, the trial court has "no authority" to make an order for the provision of health insurance unless it **first** finds that it is available at a reasonable cost. *Buncombe County. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 291, 531 S.E.2d 240, 245 (2000); *see also Buncombe Cty. ex rel. Frady v. Rogers*, 148 N.C. App. 401, 404, 559 S.E.2d 227, 229 (2002) ("Before ordering a party to obtain health insurance, the trial court must make the determination whether insurance is available to the party at a reasonable cost."). This precedent makes clear that the burden rests on the trial court to make these findings, not on the Defendant as the majority would place it. *Rogers*, 148 N.C. App. at 404, 559 S.E.2d at 229 ("It is the court's responsibility to make the factual finding that Defendant does or does not have access to insurance . . . [or] can procure insurance for his minor child in some other way at a reasonable cost.").

Because there is no evidence in the record that medical insurance is available at a reasonable cost to Defendant, the trial court necessarily erred under the precedent of this Court. I would reverse and remand on this issue for further findings.

The majority dismisses Defendant's argument because it finds that Defendant failed to offer support for the contention that the trial

REAMS v. RIGGAN

[224 N.C. App. 78 (2012)]

court should have multiplied his weekly income by four to calculate his monthly income. However, Defendant argues that the trial court erred in calculating the wages of both parties because it did not apply a consistent formula to both parties. The only reason Defendant contends the trial court should have used a multiplier of four in calculating his income was because it appears that this is how the trial court calculated Plaintiff's income. In reviewing the calculations of the court, it is clear that Defendant is correct in his allegation that the court did not apply a consistent formula. Defendant's monthly income was reached using a multiplier of 4.3, which is the formula that Plaintiff proposed as proper on the Schedule A form. However, the monthly figure reached for Plaintiff's income cannot be reached with a multiplier of 4.3, regardless of what figure one chooses from the weekly range of \$500-700 Plaintiff provided. Instead, it appears Plaintiff's monthly income was calculated using a multiplier of four on a weekly income of \$600. Thus, regardless of which formula is proper, the trial court failed to consistently apply a single formula and, as a consequence, the result is unfair and improper. *See Walker v. Walker*, 38 N.C. App. 226, 228, 247 S.E.2d 615, 616 (1978)(citing *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976)("The determination of child support must be done in such way to result in fairness to all parties.")).

Further, under the Guidelines, the trial court is required to verify the income of the parties through documentation. North Carolina Child Support Guidelines (2011)("Income statements of the parties should be verified through documentation of both current and past income."). Here, there is nothing on the record to show how the trial court reached the figures it did and the only earnings statements on the record came from each parties' oral testimony. Thus, it is impossible for this Court to analyze whether the trial court fairly calculated each party's income. Because the trial court failed to make any finding as to why a deviation from the Guidelines was warranted, the trial court is bound by the Guidelines. *Id.* I would reverse and remand for further findings consistent with the Guidelines.

IN THE COURT OF APPEALS

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

SOUTHERN SEEDING SERVICE, INC.

v.

W.C. ENGLISH, INC.; LIBERTY MUTUAL INSURANCE COMPANY; AND TRAVELERS
CASUALTY & SURETY COMPANY OF AMERICA

No. COA12-636

Filed 4 December 2012

Costs—breach of contract—cost calculation—attorney fees

The trial court did not err in a breach of contract case by awarding damages and attorney fees to plaintiff. The 18 November 2008 invoice and the accompanying itemized accounting of all of plaintiff's actual costs incurred after 1 July 2007 were evidence that a reasonable mind could accept as adequate to support the trial court's finding that plaintiff's cost calculation was correct. Further, the award of attorney fees was permissible pursuant to N.C.G.S. § 44A-35.

Appeal by defendants from Amended Judgment entered 8 March 2012 by Judge Shannon R. Joseph in Guilford County Superior Court. Heard in the Court of Appeals 24 October 2012.

Conner Gwyn Schenck, PLLC, by A. Holt Gwyn and Timothy R. Wyatt, for Plaintiff-appellee.

Ragsdale Liggett, PLLC, by William W. Pollock and Amie C. Sivon, for Defendant-appellants.

HUNTER, JR., Robert N., Judge.

Liberty Mutual Insurance Company ("Liberty Mutual"), Travelers Casualty & Surety Company of America ("Travelers") (collectively, "the sureties"), and W.C. English, Inc. ("English") (collectively "Appellants") appeal from an Amended Judgment entered 8 March 2012 by Judge Shannon R. Joseph in Guilford County Superior Court in favor of Southern Seeding Service, Inc. ("Southern Seeding"). Appellants argue that the trial court erred in awarding damages and attorneys' fees to Southern Seeding. We affirm.

I. Factual and Procedural History

On 15 July 2003, the North Carolina Department of Transportation ("NCDOT") initiated and published provisions for a construction project (the "Project") concerning the Western Loop of Interstate 40 in

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

Greensboro. Shortly thereafter APAC-Atlantic, Inc. (“APAC”) was hired as the general contractor on the Project. APAC in turn executed a Contract Payment Bond with NCDOT, as required by N.C. Gen. Stat. § 44A-26, which guaranteed payment to all subcontractors and material suppliers on the Project. Liberty Mutual and Travelers signed as sureties to the payment bond. APAC entered into a subcontract with English on 9 September 2003 for the grading, erosion control, and grassing services of the Project. On 8 September 2003, English entered into a contract with Southern Seeding to perform grassing services on the Project. The subcontract between Southern Seeding and English contained, in pertinent part, the following provision:

Unit prices herein quoted are based upon the assumption that the contract will be completed within time as specified in the specifications at time of bidding. Should our work be delayed beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate us for increased cost

NCDOT’s provisions specified that the Project should have been completed by 1 July 2007, the date upon which Southern Seeding relied in preparing the equitable adjustment clause. Nowhere in the subcontract between Southern Seeding and English was the phrase “equitable adjustment” explicitly defined.

Southern Seeding began working on the Project on 26 September 2003. Through no fault of its own, Southern Seeding’s work on the Project continued well past the Project’s scheduled completion date. The record reveals that English’s failure to properly complete the erosion work on time prior to seeding was responsible in some part for the delays.

Southern Seeding regularly sent English letters regarding the delays and increasing costs throughout their work on the Project. On 29 June 2006, Southern Seeding sent English a memo about the delays and cost increases, asserting that they would not be responsible for any liquidated damages charged to English for the delays. On 13 July 2006, Southern Seeding sent another memo to English regarding the extra expenses created by English’s failures to complete the erosion work. The memo stated: “We have been put, and continue to be put to extreme extra expense in our work due to the manner in which the erosion control work has been managed.” APAC was copied on this memo.

On 4 October 2007, in what the parties’ refer to as the “Supplemental Seeding” agreement, APAC requested that Southern

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

Seeding perform work outside of the original bid. On 24 October 2007 Southern Seeding sent another memo to English complaining of delays and price increases, and informing English that it was “keeping detailed records on all items, quantities, costs, etc. since July 1 [2007] in order to furnish the necessary information to make fair and equitable adjustments in unit prices.” On 4 December 2007 Southern Seeding notified English of: (a) its intention to file a claim against them, (b) its plan to file a claim for extra costs for the Supplemental Seeding work from NCDOT, and (c) that it was keeping track of all costs incurred after 1 July 2007 for purposes of calculating and recovering an equitable adjustment.

The Project was not completed until 21 March 2008, over 250 days past 1 July 2007, the scheduled completion date. Southern Seeding performed roughly one-third of its work after 1 July 2007. On 24 March 2008 Southern Seeding notified English that it had completed work on the Project.

Southern Seeding demanded payment for work performed after the completion date. On 17 July 2008 it sent a letter to APAC informing them and their sureties that it would file a claim against the payment bond if English did not pay them for the Supplemental Seeding work and the work completed after the scheduled completion date. On 13 November 2008 English replied that it needed actual certified payrolls and invoices for work performed after the completion date before it could assess any additional compensation claim.¹

On 23 February 2009 Southern Seeding demanded: (a) payment for the Supplemental Seeding work, and (b) money owed because of work performed after the completion date. On 10 June 2009 English responded, offering Southern Seeding \$35,424.44 for the Supplemental Seeding work and \$2,300.00 for the work performed after the scheduled completion date. On 16 June 2009, Southern Seeding rejected the offer, and demanded \$75,140.80 for the Supplemental Seeding work and \$194,941.39 for the work performed after the completion date. On 30 June 2009, English sent a letter to Southern Seeding with a check for \$77,440.80 in an effort to settle both claims: (a) the Supplemental Seeding work, and (b) the work performed after the completion date. On 6 July 2009 Southern Seeding returned and rejected the check, and notified English of Southern Seeding’s intent to bring legal action.

1. In making these demands English seems to have given an example of what it considered to be an appropriate calculation of cost increases, or at least an example of what figures it would need to make an appropriate calculation.

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

On 23 September 2009, Southern Seeding filed a complaint in Guilford County Superior Court, claiming: (1) that English breached its subcontract with Southern Seeding by failing to pay Southern Seeding \$194,941.39 under the equitable adjustment clause for the increased costs of materials, labor, and equipment accrued after 1 July 2007, and (2) that Liberty Mutual and Travelers are liable to Plaintiff for payment under the payment bond because of English's failure to compensate Southern Seeding for its work on the Project.²

After a bench trial, the trial court entered judgment denying Southern Seeding's requested relief, holding that "English was not obligated to equitably adjust Southern Seeding's unit prices for increased cost, if any, arising from working past 1 July 2007." Southern Seeding appealed the trial court's decision to this Court on 3 November 2010. This Court held "that the trial court erred in concluding that [Southern Seeding] [wa]s not entitled to an equitable adjustment," and "reverse[d] and remand[ed] to the trial court for further proceedings consistent with" its opinion. *Southern Seeding Serv. v. W.C. English, Inc.*, ___ N.C. App. ___, ___, 719 S.E.2d 211, 216 (2011).³

On remand and following a bench trial on the merits, the trial court found that Southern Seeding's "invoice of 18 November 2008 represented a reasonable, equitable adjustment to the Subcontract to compensate Southern Seeding for its actual costs for work performed after 1 July 2007." Furthermore, the trial court held that "English's unreasonable refusal to equitably adjust the Subcontract, to compensate Southern Seeding for its actual costs for work performed after 1 July 2007, constitute[d] material breach of the Subcontract, and proximately caused damages to Southern Seeding in the amount of \$194,941.39." Accordingly, the court held that Southern Seeding "[wa]s entitled to recover a money judgment against Defendants, jointly and severally, in the amount of \$194,941.39, plus interest at the rate of eight percent (8%) per annum from 18 December 2008, until paid." The trial court's calculation of damages was based upon:

2. Southern Seeding appears to have received satisfactory payment for the Supplemental Seeding work, as it does not argue the issue on appeal. Evidence of such satisfaction in the record is scant, though Southern Seeding concedes in its brief that "English paid . . . for the Overrun Tasks and Extra Work Tasks[.]"

3. This Court also held that "Liberty Mutual and Travelers Casualty [were] liable to [Southern Seeding] as sureties on the payment bond." *Southern Seeding Serv.*, ___ N.C. App. at ___, 719 S.E.2d at 217.

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

(i) the escalation language in Paragraph 15 of the Subcontract, (ii) the actual production rate incurred by Southern Seeding's forces after 1 July 2007 (as distinct from Southern Seeding's work productivity prior to 1 July 2007, which was less productive and more costly), (iii) NCDOT's prior approval of a \$45.00 labor/equipment rate per man-hour for Southern Seeding's forces to overrun items, and (iv) English's prior agreement to a \$45.97 labor/equipment rate per man-hour for Southern Seeding's extra work performed by Southern Seeding for English (for which NCDOT was not responsible).

In addition, the trial court held that since Southern Seeding "is the prevailing party in this action as defined in N.C. Gen. Stat. § 44A-35 and there was an unreasonable refusal by English to fully resolve the matter which constituted the basis of the suit[,]" English was required, pursuant to N.C. Gen. Stat. § 44A-35 to pay Southern Seeding reasonable attorneys' fees "in the total amount of \$24,310.50[.]"

II. Jurisdiction

Jurisdiction rests in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Appellants appeal from a final judgment of the Superior Court as a matter of right.

III. Analysis

English argues that the trial court erred: (1) by awarding damages to Southern Seeding "that were speculative and not supported by the evidence" and (2) by awarding attorneys' fees to Southern Seeding under N.C. Gen. Stat. § 44A-35, "because neither the principal nor the sureties failed to make payment and English is not a party to the bond." We disagree.

A. Equitable Adjustment

As English acknowledges, North Carolina law does not provide a legal definition for the term "equitable adjustment."⁴ The contract between the parties is similarly silent as to the term's meaning. Nothing in the record suggests the parties implicitly or explicitly contemplated the methodology which was to be used in calculating any "equitable adjustment."

4. English observes that "[u]nfortunately, there are no North Carolina cases that provide any guidance on how to apply an equitable adjustment clause for labor and materials cost increases."

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

At trial, Ralph Stout, the president of Southern Seeding, testified that, in calculating the “equitable adjustment,” he compared his original bid amount for the per-unit costs with the per-unit costs after 1 July 2007. Mr. Stout testified that Southern Seeding sought the following: the per-unit costs of doing work after 1 July 2007 minus the original per-unit bid amount.

John Jordan, English’s senior vice president, in turn testified that he believed Southern Seeding’s claim was for damages incurred after 1 July 2007 and that he defined “equitable adjustment” as “the difference in the cost of [] materials.” Mr. Jordan, while silent on the matter of the methodology used to determine the equitable adjustment, testified that he thought the rates used in Southern Seeding’s calculation for materials and labor were “overstated.” He did testify, however, that the quantities were “probably accurate.” Thus, it appears the parties disagreed on the rates used in the calculation, not the calculation methodology itself.

“Equitable adjustment” can be defined by the parties to a contract. Normally, standard form contracts or government contracts allocate the risks of an equitable adjustment to the parties by providing an accounting methodology by which the parties can calculate the amount of any adjustment. However, in the absence of such express terms, as is the case here, the courts are left to examine industry custom, usage, and practice in determining the method of damage calculation.

The American Institute of Architects (“AIA”) defines “equitable adjustment” as a remedy for contract breach that is calculated as “a price based upon cost plus overhead and profit.” 1 Jonathan J. Sweet, *Sweet on Construction Industry Contracts Major AIA Documents* § 13.03 (5th ed. 2009). The “Government Contracts Cyclopedic Guide to Law, Administration, [and] Procedure” defines “equitable adjustment” as “the difference between the cost of the work required by the contract and the cost of the changed work, plus profit, whether or not the fair market value is the same. The object is to make the contractor whole.” 4 John Cosgrove McBride & Thomas J. Touhey, *Government Contracts Cyclopedic Guide to Law, Administration, Procedure* (Walter A. I. Wilson ed. 2009). This treatise further notes that the “term ‘equitable adjustment’ has a long history and has become a term of art in government contracts. With respect to profit, the consistent practice is to allow it on work actually done[.]” *Id.*

Regarding delay damages, the treatise holds that “[i]n a suit for breach of contract grounded on delay caused by the government’s

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

defective specifications, the contractor's recovery is not limited to a time extension, but encompasses whatever monetary damages the contractor can prove that resulted from the government fault." *Id.* The treatise goes into detail regarding how an equitable adjustment is to be calculated:

As a general proposition, a contractor can recover under the changes clause all of the increases in cost which can be shown to result directly from the defects or extra corrective work required. This recovery can include costs of delays directly resulting from government errors, loss of labor efficiency, disruption of the work sequence and acceleration costs. Recovery of any of these costs is subject to proof of the relationship of the claimed costs to the work as changed. . . .

The amount of an equitable adjustment is a factual issue to be resolved insofar as possible by ascertaining the actual cost to the contractor, with the addition of a reasonable and customary allowance for profit. . . .

As a general rule, the proper method for computing an equitable adjustment in price is the reasonable cost of the extra labor and materials plus appropriate overhead markups, plus profit. The actual costs incurred by the contractor are presumptively reasonable and are regarded as sufficient to establish a prima facie case for recovery.

Id. The treatise later notes that "[w]hen an equitable adjustment is made, it must include overhead as an element." *Id.* In summary, an equitable adjustment is a breach of contract remedy ascertained via a factual analysis of the actual costs to the contractor of the additional or uncontracted-for work, including overhead and a reasonable profit. *Id.*

This methodology is consistent with that utilized by Southern Seeding and the trial court to calculate the equitable adjustment due Southern seeding. Indeed, English does not ask this Court to establish a standard by which an equitable adjustment should be calculated in North Carolina. Thus, in the absence of evidence in the record that the term "equitable adjustment" had an agreed upon meaning, and in light of North Carolina law's silence on a legal definition for the term, we must treat Southern Seeding's award as the result of a breach of contract damages calculation. It appears from

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

the record that Southern Seeding, and the trial court, utilized a “benefit of the bargain” method under the guise of calculating an “equitable adjustment.” And since English only argues on appeal that the rates and dates used in this calculation are not supported by competent evidence, we review on appeal only whether competent evidence exists to support the factual conclusions of the trial court’s damages calculation, not the methodology itself.

B. Competent evidence exists to support the trial court’s finding that Southern Seeding’s calculation of costs for work performed after 1 July 2007 is correct.

We review conclusions of law from a bench trial *de novo*. *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 668-69, 646 S.E.2d 851, 854 (2007). The trial court’s findings of fact are binding on appeal if there is competent evidence to support them. *Biemann and Rowell Co. v. Donohoe Cos., Inc.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding. *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005).

On appeal, English contends that the trial court erred in relying on the equitable adjustment cost calculation Southern Seeding submitted because: (1) Southern Seeding used the wrong date in their costs calculation, (2) Southern Seeding failed to present evidence to prove its calculation accurately reflected its actual costs after 1 July 2007, and (3) Southern Seeding’s calculation includes items other than materials and costs. Since these are questions of fact, our review on appeal is limited to a determination of whether there was competent evidence before the trial court to support its findings. *Biemann*, 147 N.C. App. at 242, 556 S.E.2d at 4. Thus, the issue in this case can be stated as follows: Is there competent evidence to support the trial court’s finding that Southern Seeding’s cost calculation is correct? The record answers this question in the affirmative.

The trial court found:

Southern Seeding’s invoice of 18 November 2008 represented a reasonable, equitable adjustment to the Subcontract to compensate Southern Seeding for its actual costs for work performed after 1 July 2007, based on (i) the escalation language in Paragraph 15 of the Subcontract, (ii) the actual production rate incurred by

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

Southern Seeding's forces after 1 July 2007 (as distinct from Southern Seeding's work productivity prior to 1 July 2007, which was less productive and more costly), (iii) NCDOT's prior approval of a \$45.00 labor/equipment rate per man-hour for Southern Seeding's forces to overrun items, and (iv) English's prior agreement to a \$45.97 labor/equipment rate per man-hour for Southern Seeding's extra work performed by Southern Seeding for English (for which NCDOT was not responsible).

Plaintiff's Exhibit 30, a spreadsheet specifically detailing an itemized account of all of Southern Seeding's actual costs of materials and labor incurred after 1 July 2007, accompanied the invoice the court referenced above. The spreadsheet includes clear, detailed lists of the amount of materials used, how much per unit the materials had cost, when the materials were expended, and the amount and rate of man-hours utilized on which dates.

The trial court clearly found this invoice and the accompanying spreadsheet as competent evidence to show: (1) Southern Seeding correctly used 1 July 2007 as its starting date, (2) the calculation represented actual costs, and (3) the calculation properly included only material, labor, and costs. The spreadsheet details each of these items with clarity and specificity.

"When we review an order from a non-jury trial, '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 . . .'" *Holloway v. Holloway*, ___ N.C. App. ___, ___, 726 S.E.2d 198, 204 (2012) (quoting *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)). The 18 November 2008 invoice, and the accompanying itemized accounting of all of Southern Seeding's actual costs incurred after 1 July 2007, is evidence that a reasonable mind could accept as adequate to support the trial court's finding that Southern Seeding's cost calculation is correct. Therefore, we affirm.

C. The trial court correctly determined that English owed attorneys' fees to Southern Seeding.

This Court reviews a trial court's award of attorneys' fees for an abuse of discretion. *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 155, 647 S.E.2d 672, 674, *disc. review denied*, 362 N.C. 86, 655 S.E.2d 837 (2007). Whether an award of attorneys' fees is allow-

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

able pursuant to statute is reviewable *de novo*. *Id.* at 156, 647 S.E.2d at 674.

The trial court awarded attorneys' fees to Southern Seeding in the amount of \$24,310.50 pursuant to N.C. Gen. Stat. § 44A-35, after finding that Southern Seeding was "the prevailing party in this action . . . and there was an unreasonable refusal by English to fully resolve the matter which constituted the basis of the suit." English argues it does not owe attorneys' fees "because neither the principal nor the sureties failed to make payment and English is not a party to the bond." We disagree.

Since English does not contest the amount of attorneys' fees, but only whether they should have been awarded pursuant to N.C. Gen. Stat. § 44A-35, we review whether the trial court's award of attorneys' fees was permissible under that statute *de novo* as a question of law.

N.C. Gen. Stat. § 44A-35 (2011) states, in pertinent part:

In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim

N.C. Gen. Stat. § 44A-35. Thus, the statute requires the satisfaction of two elements for attorneys' fees to be properly awarded: (1) the party so awarded must be the prevailing party, and (2) the party being required to pay attorneys' fees must have unreasonably refused to resolve the matter.

English does not contend that Southern Seeding was not the prevailing party, but does proffer three arguments as to why an award of attorneys' fees was inappropriate. First, it contends, "the obligations of the payment bond are not triggered until there has been a default under the bond, which has not occurred here." Second, English claims that they cannot be ordered to pay attorneys' fees because they are not "a party to the payment bond[.]" Finally, English argues

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

that it does not owe attorneys' fees because it was not obligated to pay the equitable adjustment funds until the trial court entered the Amended Judgment, and thus English did not unreasonably refuse to settle. Each contention is without merit.

English's first two arguments are misplaced. Though the payment bond is relevant to matters of payment of damages and equitable adjustment following a breach of contract, it has no bearing on an award of attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35. The statute is clear regarding the only elements that must be met for an award: (1) the party so awarded must be the prevailing party, and (2) the party being required to pay the fees must have unreasonably refused to resolve the matter that constituted the suit. N.C. Gen. Stat. § 44A-35. Since the trial court found that each of these elements was satisfied, English's arguments with respect to the payment bond are misplaced.

English's third and final argument is that it did not unreasonably refuse to settle because it was not obligated to pay the equitable adjustment funds until the trial court entered the Amended Judgment. Put differently, English contends that their duty to settle did not arise until they were ordered by the court to pay Southern Seeding damages. This notion is inconsistent with North Carolina law.

In *Terry's Floor Fashions, Inc. v. Crown General Contractors, Inc.*, a property owner and a general contractor failed to pay a sub-contractor for work the sub-contractor had performed. 184 N.C. App. 1, 6, 645 S.E.2d 810, 814 (2007). After its attempts to get paid were met with dismissiveness by the general contractor and property owner, the sub-contractor filed suit against both of them in order to recover. *Id.* at 7, 645 S.E.2d at 814. After winning the lawsuit in 2005, the sub-contractor "filed a motion to recover attorneys fees pursuant to N.C. Gen. Stat. § 44A-35. In support of its motion, [the sub-contractor] alleged that defendant [property owner] had 'unreasonably refus[ed] to fully resolve [the] matter which constituted the basis of this suit.'" *Id.* at 8, 645 S.E.2d at 815 (third and fourth alterations in original).

As evidence of the defendants' unreasonable refusal to settle the matter, the sub-contractor, and subsequently the trial court, relied upon correspondence between the parties conducted prior to judgment, not actions taken after judgment. *Id.* at 8-9, 645 S.E.2d at 815-16. Specifically, the trial court noted that two letters written before the trial court's judgment by the property owner indicating its

S. SEEDING SERV., INC. v. W.C. ENGLISH, INC.

[224 N.C. App. 90 (2012)]

refusal to settle the matter manifested evidence of defendants' unreasonable refusal to settle. *Id.*

After considering the trial court's findings of fact regarding the defendants' pre-trial refusals to settle, this Court affirmed the ruling of the trial court, noting that the defendants' actions prior to judgment manifested an unreasonable refusal to settle and that, as a result, "the trial court's award of attorneys fees was the product of a reasoned decision." *Id.* at 18, 645 S.E.2d at 821.

The facts in the case *sub judice* are very similar to those in *Terry*. Southern Seeding, like the sub-contractor in *Terry*, was not appropriately paid for work it performed for the defendants. After failed attempts to secure payment, Southern Seeding, like the sub-contractor in *Terry*, took the matter to trial. The defendants in *Terry*, like those in the facts at hand, lost at trial and were required to pay attorneys' fees under N.C. Gen. Stat. § 44A-35. And just as the defendants in *Terry* were found to have unreasonably refused to settle specifically because of their actions taken or not taken prior to judgment, so also is English guilty of unreasonably refusing to settle because of actions taken or not taken prior to judgment. Thus, English's contention—that it was not obligated to pay the equitable adjustment funds until the trial court entered the Amended Judgment and thus did not unreasonably refuse to settle—is without merit.

Accordingly, we hold that the trial court's award of attorneys' fees to Southern Seeding was permissible pursuant to N.C. Gen. Stat. § 44A-35. The judgment of the trial court is

AFFIRMED.

Judges HUNTER, Robert C. and CALABRIA concur.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

STATE OF NORTH CAROLINA

v.

BILLY BOYETT

No. COA12-222

Filed 4 December 2012

1. Rape—attempted second-degree—penetration—conflicting evidence

The trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest where the victim's testimony could support both the proposition that the defendant penetrated her and that he did not. This holding has no bearing on defendant's second-degree sexual offense convictions, which do not require penetration.

2. Sexual Offenses—instructions—use of “victim”

Any error was harmless in a prosecution for multiple sex offenses where the trial court used the victim's name when referring to the elements of the crime but used the term “victim,” as found in the pattern jury instructions, when describing the generic definition of the crime. The trial court was not intimating any opinion by using the word “victim.”

3. Appeal and Error—preservation of issues—no objection at trial—violation of statutory mandate

The right to appeal is preserved notwithstanding defendant's failure to object at trial when the trial court acts contrary to statutory mandates and defendant is prejudiced. This defendant's appeal from orders directing him to register as a sex offender and to enroll in lifetime satellite-based monitoring was heard for that reason.

4. Satellite-Based Monitoring—aggravated offense—penetration—second-degree sexual offense

The trial court erred by entering an order requiring that defendant enroll in satellite-based monitoring on the basis that his second-degree sexual offense conviction constituted an aggravated offense. Without a review of the underlying factual scenario giving rise to the second-degree sexual offense conviction, the trial court could not have determined whether defend-

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

ant's second-degree sexual offense involved penetration, as required for an aggravated offense.

5. Sexual Offenders—lifetime registration—aggravated offense—reportable offense

The trial court erred by finding that defendant's conviction for second-degree sexual offense was an aggravated offense and then ordering registration as a sex offender for life where that determination could not have been made without reviewing the underlying facts. However, defendant's second-degree sexual offense conviction constituted a reportable offense, and, on remand, the trial court may require defendant to register as a sex offender for a period of 30 years.

Appeal by Defendant from judgments entered 10 October 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 28 August 2012.

Roy Cooper, Attorney General, by Sarah Meacham, Assistant Attorney General, for the State.

Russell J. Hollers III, for the Defendant.

THIGPEN, Judge.

Defendant appeals from judgments entered convicting him of six counts of second-degree rape, ten counts of second-degree sexual offense, and six counts of incest, challenging the trial court's instructions to the jury, the trial court's use of the word "victim" in the jury instructions, and the trial court's order requiring that Defendant be subject to lifetime registration as a sex offender and lifetime enrollment in satellite-based monitoring.

The evidence of record tends to show the following: In February 2010, the stepfather of J.B.¹("the victim") listened in on a telephone conversation between the victim and her grandfather, Billy Boyett ("Defendant")—by means of a telephone extension in another room—during which time the stepfather overheard Defendant ask the victim when he could again have sexual interactions with her. The stepfather confronted the victim, and the victim confided in her mother and stepfather that Defendant had engaged in sexual intercourse with her numerous times. The victim said that, since her

1. The victim's name has been redacted to protect the identity of the victim.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

eighteenth birthday,² Defendant had approached her for sex. The victim explained that she had performed fellatio on Defendant, that Defendant had inserted his finger into her vagina, and that Defendant had attempted to have vaginal intercourse with her. The victim would say, “No,” attempting to avoid the sexual encounters by tightening her legs and turning her face away. Defendant, however, would push her legs apart, and, sometimes, it hurt the victim. The victim estimated that Defendant had approached her for sex approximately fifty times, that she had performed fellatio on Defendant five or more times, and that Defendant had digitally penetrated her vagina five or more times. Defendant’s last sexual contact with the victim was in January 2010.

A Sheriff’s detective spoke with the victim and Defendant, at which time the victim told the detective about her sexual encounters with Defendant. Defendant also admitted to the detective that the victim had performed fellatio on him and that he had digitally penetrated her vagina.

Defendant was indicted on ten counts each of second-degree rape, second-degree sexual offense,³ and incest. Defendant was tried at the 3 October 2011 session of New Hanover County Superior Court, and the jury found Defendant guilty of six counts of second-degree rape, ten counts of second-degree sexual offense, and six counts of incest. The trial court entered judgments, consistent with the jury’s verdicts, sentencing Defendant consecutively to 73 to 97 months incarceration on the second-degree rape convictions, 73 to 97 months incarceration on the second-degree sexual offense convictions, and 13 to 16 months on the incest convictions. The trial court also ordered Defendant to register as a sex offender for his lifetime and to enroll in lifetime satellite-based monitoring.

2. Defendant did not initiate sexual contact with the victim prior to her eighteenth birthday.

3. All ten second-degree sexual offense charges were based on both of two theories of the crime provided by N.C. Gen. Stat. § 14-27.5(a): (1) that Defendant engaged in the sexual act “[b]y force and against the will of the other person[.]” or (2) that Defendant engaged in the sexual act “with another person . . . [w]ho is mentally disabled, mentally incapacitated, or physically helpless[.]” *Id.* The evidence of record showed that, in 2009, the victim received a psychological assessment after which she was diagnosed with a depressive disorder and “mild mental retardation.” The psychologist testified that “it would be difficult for [the victim] to disobey an authority figure[.]” There was also evidence sufficient for the question of whether Defendant used or threatened force to be properly one for the jury.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

I. Jury Instructions

[1] In Defendant's first argument, he contends the trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest. We agree.

Defendant did not properly preserve this issue for appeal by lodging an objection at trial, but requests that the Court review for plain error. "Plain error analysis applies to evidentiary matters and jury instructions." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, ___ U.S. ___, 175 L. Ed. 2d 362 (2009).

"A prerequisite to our engaging in a plain error analysis is the determination that the instruction complained of constitutes error at all[;] [t]hen, [b]efore deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal quotation marks omitted)).

In determining whether there was error in a jury instruction, this Court has stated, "[i]t is elementary that the trial court, in its instructions to the jury, is required to declare and explain the law arising on the evidence." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979) (citing N.C. Gen. Stat. § 15A-1232). With regard to jury instructions on attempts and lesser included offenses, "[a] trial court is only required to instruct the jury on a lesser included offense when there is evidence presented from which the jury could find that such offense was committed." *State v. Stinson*, 127 N.C. App. 252, 258, 489 S.E.2d 182, 186 (1997) (citation omitted). "The determining factor is the presence of evidence to support a conviction of the lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984) (citations omitted). An attempted first-degree rape instruction is "warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences." *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986) (citations omitted), *superseded by statute on other grounds by* N.C. Gen. Stat. § 8C-1, Rule 404(b), *as recognized in* *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994).

Regarding plain error, our Courts have stated the following:

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted) (emphasis and alteration in original). Defendant bears the burden of showing that an error arose to the level of plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Second-degree rape is defined by N.C. Gen. Stat. § 14-27.3 (2011), which states, in pertinent part, that “[a] person is guilty of rape in the second-degree if the person engages in vaginal intercourse with another person[.]” *Id.* Likewise, incest is defined by N.C. Gen. Stat. § 14-178 (2011), which states, in pertinent part, that “[a] person commits the offense of incest if the person engages in carnal intercourse[.] . . .” *Id.* In the context of rape and incest, our Courts have stated, “[t]he slightest penetration of the sexual organ of the female by the sexual organ of the male amounts to carnal knowledge in a legal sense.” *State v. Bruce*, 315 N.C. 273, 281-82, 337 S.E.2d 510, 516 (1985).

In this case, witnesses gave the following testimony regarding penetration: The victim said Defendant “tr[ie]d to get his penis to go inside my vagina.” When asked how far Defendant was able to get his penis inside her vagina, the victim replied, “Not very far. If he could even get it in at all.” According to the victim, this was because Defendant could not maintain an erection. When asked more specifically, in a police interview, about the degree of penetration, the victim affirmed that Defendant's penis went “past the lips.” Defendant denies that he penetrated her, explaining that he could not maintain an erection.

Defendant cites three cases to support his argument that the evidence in this case was such that the trial court committed plain error

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

by failing to charge the jury on attempted second-degree rape and attempted incest: *Johnson*, 317 N.C. 417, 347 S.E.2d 7, *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004), and *State v. Carter*, ___ N.C. App. ___, 718 S.E.2d 687 (2011), *disc. review allowed*, ___ N.C. ___, 731 S.E.2d 140 (2012).

In *Johnson*, 317 N.C. 417, 347 S.E.2d 7, the trial court held:

[T]he court . . . err[ed] in failing to instruct the jury on attempted first degree rape⁴ with respect to [the victim] because there was conflicting evidence of penetration in her case. A trial court must submit a lesser included offense instruction if the evidence would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater. Instructions pertaining to attempted first degree rape as a lesser included offense of first degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences.

Id. at 435-36, 347 S.E.2d at 18. *Johnson* provides authority for the conclusion that the trial court committed *error* by failing to instruct on attempted second-degree rape and attempted incest in this case; however, *Johnson* did not review the question for *plain error*, and is therefore not instructive regarding our analysis on that point.

In *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004), the defendant was convicted of attempted second-degree rape, and this Court upheld his conviction, stating the trial court properly gave the jury an instruction on attempted second-degree rape, as the evidence supported it:

“It is error for the trial court to submit as an alternative verdict a lesser included offense which is not actually supported by any evidence in the case.” *State v. Ray*, 299 N.C. 151, 163, 261 S.E.2d 789, 797 (1980). “Instructions on the lesser included offenses of first degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration.” *State v. Wright*, 304 N.C. 349, 353, 283 S.E.2d 502, 505 (1981).

4. We note that both the statute defining first degree rape, N.C. Gen. Stat. § 14-27.2 (2011), and the statute defining second-degree rape, N.C. Gen. Stat. § 14-27.3, require “vaginal intercourse[.]” which is defined in either case as “[t]he slightest penetration of the sexual organ[.]” *Bruce*, 315 N.C. at 281-82, 337 S.E.2d at 516.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

In this case, although the majority of the victim's testimony was that defendant did in fact penetrate her vagina, there is other evidence in the case that puts the fact of penetration in doubt or conflicts with the victim's testimony. The victim testified in one instance that she was not sure the defendant penetrated her vagina and in reporting the rape to others stated defendant had attempted to rape her. The medical evidence consisted of testimony that the only abnormalities observed were the abrasions to the introitus, located at the opening of the vagina, which were not specific to, nor diagnostic of, sexual abuse. Further, defendant presented evidence that the rape suspect kit revealed that none of defendant's hairs were found on the victim, none of the victim's hairs were found on him, and further no semen was found inside the victim or on her clothes. This is all evidence supporting an attempted rape conviction and the trial court did not err in submitting this charge to the jury and therefore, defendant is not entitled to reversal of his attempted rape conviction.

Id. at 733-74, 594 S.E.2d at 425. *Couser* stands for the proposition that a jury instruction on attempted rape is proper if evidence concerning penetration is conflicting. However, *Couser* also did not address the specific question posed by Defendant on appeal in this case, which is whether the trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest upon the evidence presented here.

The third case cited by Defendant, *State v. Carter*, ___ N.C. App. ___, 718 S.E.2d 687 (2011), *disc. review allowed*, ___ N.C. ___, 731 S.E.2d 140 (2012),⁵ specifically addresses the question presented in this appeal. In *Carter*, the Court held that "the trial court's failure to instruct the jury on attempted first-degree sexual offense constituted plain error" when the evidence presented regarding anal penetration

5. Our Supreme Court has granted discretionary review, and briefs have been submitted by the parties, on the question of whether this Court erred in concluding that the trial court in *Carter* committed plain error by failing to instruct the jury on attempted first degree sexual offense. Ultimately, our Supreme Court's decision in *Carter* will be controlling on this issue. However, presently, this Court is bound by *Carter*. *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) (stating that "[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").

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

was conflicting. *Id.* at ___, 718 S.E.2d at 698. The following evidence was presented regarding penetration in *Carter*:

Even a cursory examination of the record reveals that the evidence concerning the issue of penetration was in conflict. Although Vanessa answered in the affirmative when asked if Defendant “stuck . . . his penis . . . in . . . her bottom,” she also testified that Defendant placed his penis “on [her] buttole” and that Defendant’s penis “would be between my butt cheeks . . . over my buttole or hole in my anus.” When asked to clarify her testimony, Vanessa stated that “he would put his doodle between my butt cheeks and it will be sort of pressing on my buttole.” Finally, Ms. Carroll testified that a “penis . . . inside a butt crack” or “on a buttole or on butt cheeks” could cause an anal fissure if “enough vigor [is] pressed against the anus” and that other types of trauma, such as “[c]onstipation, a large amount of diarrhea, . . . irritable bowel syndrome . . . [or] any type of other trauma” could have caused Vanessa’s anal fissure as well.

Id. at ___, 718 S.E.2d at 697.

The State, however, cites *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985), to support its argument that the trial court did not commit plain error by failing to instruct on attempted second-degree rape and attempted incest in this case. In *Williams*, the jury was instructed to find defendant guilty of first-degree rape or not guilty. The defendant contended that the evidence regarding penetration was equivocal and that an instruction on attempted first-degree rape was required. The defendant in *Williams* relied on his statement as evidence requiring an instruction on attempted first-degree rape, which contained the following:

I embarrassingly removed my pants to my knees, and without touching her elsewhere, *struggled to penetrate without an erection*. At this the girl began a muffled laugh, so I got up and dressed as Shannone was going through her purse.

Id. at 351, 333 S.E.2d at 718 (emphasis in original). The North Carolina Supreme Court addressed the defendant’s argument that the foregoing statement was evidence that he did not penetrate the victim’s vagina by stating the following:

STATE v. BOYETT

[224 N.C. App. 101 (2012)]12]

The simple fact that a person struggles to accomplish some feat, taken by itself, implies neither success nor failure. The fact that defendant “struggled to penetrate” is far from equivocal and in no way negates a completed act. A careful reading of defendant’s statement as a whole fails to alter this observation. While penetration is best achieved when there is an erection, by no means can penetration to the degree necessary to satisfy the penetration element of rape be excluded because there is no erection. *See State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984). Luanne Odom testified unequivocally that defendant inserted “his penis . . . into my vagina.” . . . [W]e hold that Luanne Odom’s testimony and defendant’s failure to deny penetration compelled the instruction given by the trial court.

Id. at 352, 333 S.E.2d at 718. The Court held that the trial court’s failure to instruct on attempted first-degree rape was not plain error.

We believe the evidence in this case aligns more with *Carter* than with *Williams*. Here, the Defendant denies penetration. Also, the victim testified that Defendant “tr[ie]d to get his penis to go inside my vagina.” When asked whether Defendant was able to insert his penis, the victim said, “Not very far. If he could even get it in at all.” According to the victim, this was because Defendant could not maintain an erection. In a police interview, when asked about the degree of penetration, the victim affirmed that Defendant’s penis went “past the lips.” At trial, the victim gave the following testimony:

A: He would lay on top of me and actually try and get it to go in, or he’d have me laying in a diagonal direction against the bed.

Q: And when you say he would try to get it in, what do you mean by that?

A: He would try and get his penis to go inside my vagina.

Q: Okay. Was he able to ever?

A: (Shakes head negatively.)

Q: How far was he able to get his penis inside?

A: Not very far. If he could even get it in at all.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

Q: So I guess I'm a little bit confused about what you mean by "he tried." Is that he just asked you, or did he physically touch his penis with – in your vagina?

A: Physically touched.

This case is distinguishable from *Williams*: In *Williams*, the victim testified unequivocally that the defendant inserted "his penis . . . into my vagina." *Id.* at 352, 333 S.E.2d at 718. The victim's assertion in *Williams* was only contradicted by the defendant's statement that he "struggled to penetrate[.]" *Id.* at 351, 333 S.E.2d at 718 (emphasis omitted). Here, however, the victim's own statements support the proposition that Defendant did, in fact, penetrate her vagina, but the victim's statements also put the fact of penetration in doubt. Defendant denies penetration, explaining that he could not maintain an erection.

The evidence on penetration in *Carter*, however, is remarkably similar to the evidence presented in this case, and, resultantly, we believe *Carter* is indistinguishable. In *Carter*, even though the victim replied affirmatively when asked whether the defendant penetrated her, other statements by the victim tend to show that no penetration occurred. Like this case, the victim's testimony in *Carter* could support both the proposition that the defendant penetrated her and that he did not.⁶

Based on the Court's holding in *State v. Carter*, ___ N.C. App. ___, 718 S.E.2d 687, and our review of the evidence in the present case, we conclude the trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest. As such, Defendant must receive a new trial on his six second-degree rape convictions and his six incest convictions. This holding, however, has no bearing on Defendant's ten second-degree sexual offense convictions, as the statute defining the second-degree sexual offense for which Defendant was convicted, N.C. Gen. Stat. § 14-27.5(a) (2011), provides that "[a] person is guilty of a sexual offense in the second-degree if the person engages in a sexual act with another per-

6. We note, lest confusion arise, that this Court does not give greater weight to the testimony of a victim in cases involving sexual offenses than to any other witness. This Court does not weigh evidence at all. *State v. Moore*, ___ N.C. ___, ___, 726 S.E.2d 168, 174 (2012) ("The jury's role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove.") In the cases above, however, the victims' testimony is essential to our analysis.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

son: (1) By force and against the will of the other person; or (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.” *Id.* The term “sexual act” encompasses “cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse[.]”⁷ N.C. Gen. Stat. § 14-27.1(4) (2011). Therefore, a Defendant may be guilty of a second-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.5(a) without “intercourse” or “penetration.”

II. Jury Instructions and the Term, “victim”

[2] In Defendant’s second argument, he contends the trial court erred by denying his motion to refrain from referring to J.B. as the “victim” in its instructions to the jury, because this reference was a prohibited expression of the trial court’s opinion. We find this argument without merit.

N.C. Gen. Stat. § 15A-1232 (2011) provides that “[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved[.]” *Id.* Likewise, N.C. Gen. Stat. § 15A-1222 (2011) provides that “[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.” *Id.*

“In evaluating whether a judge’s comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.” *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). “Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.” *Id.*

In this case, during the charge conference, Defendant objected to the use of the word “victim” in reference to J.B. The court responded to Defendant’s objection by deciding to use J.B.’s name when referring to the elements of the crime but to use the term, “victim,” as found in the pattern jury instructions when describing the generic definition of the crime. The following, for example, is a portion of the trial court’s jury instructions:

7. In this case, there was some evidence of fellatio, vaginal intercourse, and digital penetration.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

If you do not find the defendant guilty of second-degree rape on the basis of engaging in vaginal intercourse with a mentally disabled victim and if you do not find him guilty of second-degree rape on the basis of engaging in vaginal intercourse with a victim by the use or threatened use of force, it would be your duty to return a verdict of not guilty. Regarding case number 10-CRS-7654, Count 1, if you find from the evidence beyond a reasonable doubt that between July 18, 2006, and July 18, 2008, and on a completely separate occasion than alleged in Counts 1 through 5 of 11-CRS-2155, the defendant engaged in vaginal intercourse with [J.B.], and at that time she suffered from mental retardation and as a result was permanently rendered so substantially incapable of resisting an act of vaginal intercourse as to be mentally disabled, and that the defendant knew or should reasonably have known that the victim was mentally disabled, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt about one or more of these things, you would not return a verdict of guilty of second-degree rape on the basis of engaging in vaginal intercourse with a mentally disabled victim.

We find this Court's opinion in *State v. Henderson*, 155 N.C. App. 719, 574 S.E.2d 700, *disc. review denied*, 357 N.C. 64, 579 S.E.2d 569 (2003), instructive in this case. In *Henderson*, the defendant made a similar objection to the trial court's use of the word, "victim," in the jury instructions. This court concluded the defendant's trial was not prejudiced by the trial court's use of the word, "victim," and gave the following explanation:

We do not feel that defendant has shown undue prejudice arising from the use of the term "victim" so as to justify awarding a new trial. . . . [T]he trial court was not intimating that he had committed any crime. The word victim is included in the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges and is used regularly to instruct on the charges of first-degree rape and first-degree sexual offense. While defendant makes a valid point that the use of a more neutral term such as "alleged victim" or "complainant" would remove any possibility that the

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

jury would confuse the trial court's instruction for the comments on the evidence, defendant has failed to show prejudicial error for the trial court to follow the pattern jury instructions.

Id. at 723, 574 S.E.2d at 703-04.

We believe, in this case, it is clear that the trial court was not intimating any opinion upon whether Defendant had committed the crimes charged by using the word, "victim," in its charge to the jury. The trial court simply gave the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges. We conclude the trial court's use of the word, "victim," in its charge to the jury did not reasonably have a prejudicial effect on the result of the trial, and therefore, any error was harmless.

III: Sex Offender Registration and Satellite-Based Monitoring

[3] In Defendant's third argument, he contends the trial court erred in ordering Defendant to register as a sex offender for the duration of his life and to enroll in lifetime satellite-based monitoring, because the Judicial Findings and Order for Sex Offenders was based on file number 10 CRS 7654—the second-degree sexual offense convictions. Defendant contends a second-degree sexual offense cannot constitute an "aggravated offense" as defined by N.C. Gen. Stat. § 14-208.6(1a) (2011). This argument has merit.

"[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Defendant alleges a violation of a statutory mandate, and "[a]lleged statutory errors are questions of law." *State v. Mackey*, ___ N.C. App. ___, ___, 708 S.E.2d 719, 721 (2011), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 246 (2011). A question of law is reviewed *de novo*. *Id.* Under the *de novo* standard, the Court "considers the matter anew and freely substitutes its own judgment for that of the lower" court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

We first address Defendant's argument pertaining to the alleged error in the order requiring his enrollment in satellite-based monitoring for life, after which we proceed to the lifetime sex offender registration portion of the order. Although both Defendant and the State combine their arguments pertaining to lifetime sex offender registra-

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

tion and lifetime satellite-based monitoring, the law relating to registration and monitoring in the general statutes mandates that the effect of any error in the trial court's aggravated offense determination would necessarily lead to a different result on the registration issue from the monitoring issue.

A. Satellite-Based Monitoring

[4] N.C. Gen. Stat. § 14-208.40A (2011) provides that, in the sentencing phase of trial, a court determining whether to require a convicted criminal defendant to enroll in satellite-based monitoring must first ascertain whether the defendant had been convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4) (2011). If Defendant has been convicted of a reportable offense, the court must then determine, upon evidence submitted by the district attorney,⁸ whether the defendant falls into one of the following five categories:

- (i) the offender has been classified as a sexually violent predator pursuant to [N.C. Gen. Stat. §] 14-208.20,
- (ii) the offender is a recidivist,
- (iii) the conviction offense was an aggravated offense,
- (iv) the conviction offense was a violation of [N.C. Gen. Stat. §§] 14-27.2A or 14-27.4A, or
- (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(b) (2011). If the court finds that the defendant falls into one of the first four categories, it "shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. § 14-208.40A(c) (2011); *see also* N.C. Gen. Stat. § 14-208.40B(c). Another procedure, involving a risk assessment of the defendant by the Department of Correction, is implemented if the defendant falls into the fifth category. *See* N.C. Gen. Stat. § 14-208.40A(d) and (e) (2011).

In this case, the trial court correctly found that second-degree sexual offense is a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4).⁹ However, the trial court then determined, in the sec-

8. Also, "[t]he offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct." N.C. Gen. Stat. § 14-208.40A(a) (2011).

9. Second-degree sexual offense, defined by N.C. Gen. Stat. § 14-27.5, is a "sexually violent offense" according to N.C. Gen. Stat. § 14-208.6(5) (2011).

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

ond stage of the required analysis, that Defendant’s second-degree sexual offense was an “aggravated offense.” The trial court committed error by doing so.

A close reading of the applicable statutes and relevant decisions shows that a second-degree sexual offense conviction cannot be an “aggravated offense.” See *State v. Parker*, 721 S.E.2d 762 (2012)¹⁰; see also *State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010) (holding, in the context of sexual battery, that “because sexual battery does not involve ‘vaginal, anal, or oral penetration[,]’ sexual battery is not an ‘aggravated offense’ for the purposes of N.C.G.S. § 14–208.40B”). In determining whether a particular crime constitutes an aggravated offense, “the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.” *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010). In other words, the elements of the conviction offense must “fit within” the statutory definition of “aggravated offense.” *State v. Singleton*, 201 N.C. App. 620, 630, 689 S.E.2d 562, 569, *disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010).

N.C. Gen. Stat. § 14-208.6(1a) defines an “aggravated offense” as any criminal offense that includes either “(i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” N.C. Gen. Stat. § 14-208.6(1a) (2011). Thus, under either prong of the statutory definition, a sexual act involving vaginal, anal, or oral penetration must be *in the elements* of the conviction offense in order for a crime to constitute an “aggravated offense.” See *Parker*, 721 S.E.2d 762 (2012), *Davison*, 201 N.C. App. at 364, 689 S.E.2d at 517, *State v. Phillips*, 203 N.C. App. 326, 329, 691 S.E.2d 104, 106, *disc. review denied*, 364 N.C. 439, 702 S.E.2d 794 (2010).

Here, the trial court determined that Defendant’s second-degree sexual offense convictions were “aggravated offenses.” The statute defining second-degree sexual offense states that the following are

10. Although, *State v. Parker*, 721 S.E.2d 762 (2012), is an unpublished opinion, the Court in *Parker* squarely addressed the question here—whether a second-degree sexual offense conviction constitutes an aggravated offense. Even though *Parker* is not binding authority on this Court, the *Parker* Court’s reading of the relevant statutes and law is accurate. We reiterate language from the *Parker* Court’s explanation on this issue.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

the elements constituting the crime: “the person engages in a sexual act with another person: (1) By force and against the will of the other person; or (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.” N.C. Gen. Stat. § 14-27.5(a). The term “sexual act” in the context of second-degree sexual offense encompasses “cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse[;] [s]exual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body.” N.C. Gen. Stat. § 14-27.1(4).

On appeal, Defendant specifically argues that penetration must be an elemental part of the crime constituting an aggravated offense; but “penetration is not required to commit second-degree sex offense because there are several ‘sexual acts’ that do not require penetration[.]” On this basis, Defendant argues the trial court erred in its determination that his second-degree sexual offense convictions were aggravated offenses. We agree.

After considering only the elements of second-degree sexual offense, as required by *Davison*, 201 N.C. App. at 364, 689 S.E.2d at 517, to determine whether the elements “fit within” the statutory definition of “aggravated offense,” *Singleton*, ___ N.C. App. at ___, 689 S.E.2d at 569, it is clear that a sexual act constituting a second-degree sexual offense does not require, but may involve, penetration. *See Parker*, 721 S.E.2d 762 (2012). Other sexual acts, not involving penetration, *see* N.C. Gen. Stat. § 14-27.1(4), may also constitute a second-degree sexual offense. Thus, a conviction of second-degree sexual offense may or may not be based on a sexual act involving penetration in the underlying facts. A review of the underlying facts by the trial court in its determination as to whether a conviction constitutes an aggravated offense is prohibited. *Davison*, 201 N.C. App. at 364, 689 S.E.2d at 517. Without a review of the underlying factual scenario giving rise to the second-degree sexual offense conviction in this case, the trial court could not have determined whether Defendant’s second-degree sexual offense conviction involved—as required to constitute an aggravated offense—penetration. Therefore, in light of our review of the plain language of the statutes at issue, and the decisions construing those statutes, we must conclude that the trial court erred when it determined that Defendant’s conviction of second-degree sexual offense by the commission of a sexual act under N.C. Gen. Stat. § 14-27.5(a) was an “aggravated offense” as defined under

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

N.C. Gen. Stat. § 14-208.6(1a). Upon consideration of the elements of the offense only, and not the underlying factual scenario giving rise to the convictions, the elements of second-degree sexual offense do not “fit within” the statutory definition of “aggravated offense.” *See, e.g., Phillips*, 203 N.C. App. at 329, 691 S.E.2d at 107 (holding that a defendant’s conviction of felonious child abuse under N.C. Gen. Stat. § 14-318.4(a2) (2011) may or may not have been a conviction based on proof of the commission of “a sexual act involving penetration,” which is required for an offense to be considered an “aggravated offense” under N.C. Gen. Stat. § 14-208.6(1a), and concluding, in light of the rule in *Davison* prohibiting consideration of the underlying factual scenario giving rise to the conviction, that the defendant’s felonious child abuse conviction was not an “aggravated offense”). As the basis of the trial court’s order requiring that Defendant enroll in lifetime satellite-based monitoring was that Defendant’s offense of conviction, second-degree sexual offense, was an aggravated offense, this portion of the order must be reversed. We hold the trial court erred in this case by entering an order for sex offenders requiring that Defendant enroll in satellite-based monitoring on the basis that the second-degree sexual offense conviction constituted an aggravated offense.

B. Lifetime Registration Requirement

[5] Defendant also contends the error discussed above invalidates a different portion of the same order, which requires him to “register as a sex offender . . . for his/her natural life.” Defendant presents the same argument for both lifetime sex offender registration and lifetime satellite-based monitoring – specifically, that “[b]ecause proof of second-degree sex offense does not require penetration, it is not an aggravated offense requiring lifetime registration.” We agree.

N.C. Gen. Stat. § 14-208.23 (2011) mandates lifetime registration for an offender who is a recidivist, has been convicted of committing an aggravated offense, or is a sexually violent predator. N.C. Gen. Stat. § 14-208.7 (2011) mandates registration for thirty years for an offender who has committed a reportable conviction.¹¹

In this case, the trial court found that Defendant was neither a recidivist nor a sexually violent predator, but found that the second-degree sexual offense was an aggravated offense, and, on this basis, ordered that Defendant register as a sex offender for life. *See* N.C.

11. There is no similar statutory mandate requiring enrollment in satellite-based monitoring for offenders who have committed reportable convictions.

STATE v. BOYETT

[224 N.C. App. 101 (2012)]

Gen. Stat. § 14-208.23 (2011). In the previous section, we explained that the trial court's determination that Defendant had been convicted of an aggravated offense was in error, which invalidated the satellite-based monitoring portion of the order. Because the portion of the trial court's order requiring Defendant's lifetime sex offender registration was based on the same erroneous determination by the trial court in the previous subsection that Defendant's second-degree sexual offense conviction was an aggravated offense, it follows that the lifetime registration requirement was erroneously entered. However, on remand, the trial court may enter an order, based on Defendant's second-degree sexual offense conviction, requiring Defendant to register as a sex offender for a period of 30 years, given that Defendant's second-degree sexual offense conviction constitutes a reportable offense, even though it does not constitute an aggravated one. *See* N.C. Gen. Stat. § 14-208.7.

We advise the trial court to consider that, on remand, and after Defendant's new trial, there may be additional convictions serving to elevate Defendant's classification with regard to lifetime satellite-based monitoring enrollment and lifetime sex offender registration. However, even if Defendant is acquitted of the second-degree rape and incest charges in his new trial, Defendant's second-degree sexual offense convictions from the trial on appeal in the present case remain intact, and, resultantly, N.C. Gen. Stat. § 14-208.7 requires that Defendant register as a sex offender for thirty years based on those convictions.

We acknowledge the State's argument in its brief, citing *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000), and contending that the reference in the order to second-degree sexual offense, 10 CRS 7654, was a clerical error. The State proposes the proper remedy is to remand the case for reentry of the order based on Defendant's convictions of second-degree rape and incest. However, because Defendant is entitled to a new trial on his second-degree rape and incest convictions, this remedy is not available.

For the foregoing reasons, we reverse the trial court's order requiring Defendant's lifetime registration as a sex offender and lifetime enrollment in satellite-based monitoring, and remand this case to the New Hanover County Superior Court for a new trial on Defendant's second-degree rape and incest convictions. If, at the conclusion of the new trial, the jury finds Defendant guilty of second-degree rape or incest, the trial court shall determine, in accordance with N.C. Gen. Stat. § 14-208.40A and N.C. Gen. Stat. § 14-208.23, whether Defendant's lifetime registration as a sex offender and life-

STATE v. BURTON

[224 N.C. App. 120 (2012)]

time enrollment in satellite-based monitoring is proper based on Defendant's convictions and classifications, and enter an order consistent therewith.

In summary, Defendant shall receive a new trial on his second-degree rape and incest convictions. There was no error at trial with regard to Defendant's second-degree sexual offense convictions. However, the trial court's order requiring Defendant's lifetime registration as a sex offender and lifetime enrollment in satellite-based monitoring based on second-degree sexual offense, which is not an aggravated offense, is reversed and remanded.

NO ERROR, in part; NEW TRIAL, in part; REVERSED and REMANDED, in part.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA
v.
MICHAEL WAYNE BURTON

No. COA12-354

Filed 4 December 2012

1. Arson—sufficiency of evidence—maliciously and willfully set fire

The trial court did not err in a first-degree arson case by denying defendant's motion to dismiss for insufficient evidence. The State's evidence established more than a suspicion of defendant's guilt, including that defendant maliciously and willfully set fire to the house.

2. Pretrial proceedings—motion to continue—reasonable opportunity to prepare defense—no prejudice

The trial court did not err in a first-degree arson case by denying defendant's motion to continue his case because his alibi witnesses failed to appear. Defendant was given a reasonable time and opportunity to prepare his defense. Furthermore, even if it was error for the trial court to deny defendant's motion, defendant was not prejudiced by the error.

STATE v. BURTON

[224 N.C. App. 120 (2012)]

3. Constitutional Law—effective assistance of counsel

Defendant did not receive ineffective assistance of counsel in a first-degree arson case. Defendant failed to establish that 1) there was a reasonable probability of a different outcome had his attorney made a motion for mistrial; 2) his counsel's preparation of the alibi defense amounted to ineffective assistance of counsel; and 3) he was prejudiced by his counsel's assurance to the jury that he would establish an alibi defense.

Defendant appeals from order entered by Judge Paul G. Gessner on 28 September 2011 in Durham County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State.

James W. Carter for defendant-appellant.

HUNTER, Robert C., Judge.

Michael Wayne Burton (“defendant”) appeals from the trial court’s order imposing a sentence of 67 to 90 months imprisonment following a jury verdict finding defendant guilty of first degree arson for setting fire to his former landlord’s house. First, defendant argues the trial court erred by denying his motion to dismiss the charge for insufficient evidence. Second, defendant argues the trial court erred by denying his motion to continue when defendant’s alibi witnesses failed to appear for trial, because denial of the motion: (1) denied defendant his right to present his defense; and (2) denied defendant of his right to effective assistance of counsel. Third, defendant argues he received ineffective assistance of counsel because his attorney: (1) failed to move for a mistrial after the jury heard inadmissible testimony that defendant threatened to set fire to the house owned by his former landlord; (2) failed to effectively prepare and present his alibi defense; and (3) failed to present alibi evidence he promised to deliver to the jury in his opening statement. After careful review, we find no error.

Background

Defendant was arrested and indicted for first degree arson for burning the house owned by his former landlord, Mr. Mark Campbell.¹ Defendant gave notice of an alibi defense and provided the names of

1. Defendant was also charged with the violation of a domestic violence protective order, but the charge was voluntarily dismissed by the State for lack of service of the order on defendant.

STATE v. BURTON

[224 N.C. App. 120 (2012)]

two alibi witnesses. On 19 September 2011, defendant sought and was granted a continuance for his trial date to allow additional time for defendant to locate his alibi witnesses. The matter came on for a jury trial before Judge Paul Gessner during the 26 September 2011 Criminal Session of the Superior Court of Durham County. Defendant made another motion to continue the trial on the basis that his two alibi witnesses could not be located. The motion was denied.

The State's evidence tended to establish the following facts. In July 2009, Mark Campbell ("Mr. Campbell") purchased a house located on Lancaster Street in Durham, North Carolina through a foreclosure sale. Mr. Campbell had the intent of renovating the house but defendant and Phillip Caldrony ("Mr. Caldrony") were living in the house at the time of the foreclosure. Mr. Caldrony told Mr. Campbell that defendant owned the house before the foreclosure. After acquiring the house, Mr. Campbell offered for defendant and Mr. Caldrony to rent a second house he owned on North Roxboro Street, which they did.

After moving into the second house, defendant failed to make consistent rent payments to Mr. Campbell. Defendant, however, had allowed Julia Jones ("Ms. Jones") to move into Mr. Campbell's house, and defendant collected rent from Ms. Jones. In December 2010, Mr. Campbell learned of this arrangement, confronted defendant, and told him he would have to move out of the house in January. Ms. Jones described defendant as being enraged and combative about having to move and stated that he would throw objects around the house. Ms. Jones testified that defendant blamed her for his eviction and that he believed there was a conspiracy between Ms. Jones and Mr. Caldrony to have him evicted.

In January 2011, Mr. Campbell helped defendant move his belongings out of the house over the course of a few days. While moving defendant's belongings, defendant told Mr. Campbell that he could not believe Mr. Campbell was " 'put[ting] him out[,]'" but he did not seem to blame Mr. Campbell. On 25 January 2011, the day of the fire, defendant had "one little pile" of belongings left in the house, and Mr. Campbell told defendant they could move those belongings the next day. That night, Ms. Jones locked her bedroom door and went to take a shower in the bathroom down the hall. While Ms. Jones was in the shower, Mr. Caldrony smelled something burning and saw smoke coming from Ms. Jones's bedroom. When Ms. Jones unlocked the door to her room, she and Mr. Caldrony saw her mattress and bed-

STATE v. BURTON

[224 N.C. App. 120 (2012)]

room wall on fire. Realizing there was nothing they could do to extinguish the fire, Mr. Caldrony called 911, and they left the house.

When the firemen arrived, one of them asked Ms. Jones to move her car away from the house. As she was moving her car, Ms. Jones saw someone in the bushes directly in front of her. She turned on the car's high-beam headlights, saw defendant stand up, look at her, turn away, and leave. Ms. Jones immediately got out of her car, ran back toward the house, and told a fireman that she had seen defendant in the bushes.

The investigation into the fire did not determine its cause, but an officer with the fire department concluded the fire started near Ms. Jones's bed at a point underneath the bedroom window. No accelerants were found.

Two days after the fire, Ms. Jones was interviewed by an investigator with the Durham Police Department, Kristi Roberts ("Investigator Roberts"). Ms. Jones explained to Investigator Roberts that she believed defendant had followed through on a threat he had made to her. When asked at trial to clarify what she meant by that statement, Ms. Jones stated:

I thought he was going to do bodily harm. I thought that once I park at night, he was going to try to attack me when I left my car. I thought he would try to do something in the house. It's just—but I—I didn't know, but I knew it was going to be something.

Investigator Roberts testified that when she interviewed Mr. Caldrony he stated that defendant had threatened to set the North Roxboro Street house on fire. Defendant objected and moved to strike this testimony. The motion was granted, and the trial court instructed the jury that the testimony could only be used for corroboration of previous testimony.

At the conclusion of the State's evidence, defendant moved for the trial court to dismiss the case for insufficient evidence. The motion was denied. Defendant declined to present any evidence. The jury found defendant guilty of first degree arson, and defendant gave notice of appeal in open court.

STATE v. BURTON

[224 N.C. App. 120 (2012)]

Discussion

I. Motion to Dismiss

[1] Defendant first argues the trial court erred by denying his motion to dismiss the charge for insufficient evidence. We disagree.

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A motion to dismiss for insufficient evidence is properly denied if there is "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 913, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. *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). Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when "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 (quoting *Barnes*, 334 N.C. at 75, 430 S.E.2d at 919). If so, it is the jury's duty to determine if the defendant is actually guilty. *Id.*

Defendant contends that the State's evidence created no more than a suspicion that he started the fire and was therefore insufficient to survive his motion to dismiss. In support of his argument, defendant cites our Supreme Court's decision in *State v. Blizzard*, 280 N.C. 11, 16, 184 S.E.2d 851, 854 (1971). The defendant in *Blizzard* was charged with the malicious burning of a dwelling house, and the State's evidence established the following circumstantial evidence: before the fire, a car similar to the defendant's was seen parked on the road approximately one and one-quarter miles from the scene of the fire, *id.* at 15, 184 S.E.2d at 853; a police officer reported that a smell of gasoline was noticeable during the fire, *id.* at 14, 184 S.E.2d at 853; after the fire, the defendant's footprints were found approximately 60 feet from the house, *id.* at 15, 184 S.E.2d at 853; and, ten days after the fire, a search of the defendant's car led to the discovery of a plastic gasoline jug, *id.* at 15, 184 S.E.2d at 854. In response,

STATE v. BURTON

[224 N.C. App. 120 (2012)]

the defendant offered evidence to explain the presence of his car and footprints. *Id.* Additionally, the State's witnesses established that the defendant regularly bought a jug of gasoline, but that many people did so for its use in yard equipment. *Id.* at 16, 184 S.E.2d at 854. The *Blizzard* Court concluded that while the defendant's evidence did not contradict the State's evidence, it provided an explanation for the presence of his car, his footprints, and the gasoline jug, and thus rebutted the inference of his guilt. *Id.* The Court held that the State's evidence raised merely a suspicion of guilt and could not survive his motion to dismiss. *Id.* at 16-17, 184 S.E.2d at 854-55.

Here, we conclude the State's evidence did not merely establish a suspicion of defendant's guilt but established a reasonable inference of guilt sufficient to survive his motion to dismiss. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Defendant points to minor inconsistencies in Ms. Jones's testimony wherein she described seeing defendant in the bushes near the house during the fire and that he left upon being noticed by her. Ms. Jones testified that she saw defendant "laying down" but upon being noticed he stood up and left the scene. Yet, in her statement given to the police three days after the fire, Ms. Jones described defendant as being in the bushes but "stooped down and tangled up in something" before "running" from the scene upon being noticed by her. Defendant argues that evidence that he walked with a limp, a walking stick, and wore an orthopedic boot rendered Ms. Jones's testimony not credible. The record however contains testimony from multiple witnesses that, despite his limp, defendant was frequently seen walking in the neighborhood, "moving at a pretty good pace," and that he was seen "shooting baskets" at the basketball goal behind Mr. Campbell's house on several occasions. Moreover, upon a defendant's motion to dismiss the trial court does not resolve issues of witness credibility, but is only concerned with the sufficiency of the evidence. *State v. Ellis*, 168 N.C. App. 651, 657, 608 S.E.2d 803, 807 (2005). The State's evidence established more than a suspicion of defendant's guilt, and his reliance on *Blizzard* is misplaced.

Defendant further argues there was no evidence the fire was willfully and maliciously started. "Arson is the willful and malicious burning of the dwelling house of another person." *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 637 (1988). A showing of express malice is not required in arson cases. *State v. Bruton*, 165 N.C. App. 801, 806-07, 600 S.E.2d 49, 53 (2004). Malice "is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be

STATE v. BURTON

[224 N.C. App. 120 (2012)]

inferred.’ ” *Id.* (quoting *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003)).

The record reveals substantial evidence that defendant blamed Ms. Jones and Mr. Caldrony for his eviction from Mr. Campbell’s house, that he was “enraged” for being evicted, and that he had threatened to harm Ms. Jones. The fire started in Ms. Jones’s bedroom and occurred hours after defendant moved all but a small amount of his belongings out of the house. Additionally, defendant was seen outside of the house, lying down or crouching in the bushes during the fire, and fleeing the scene upon being noticed by Ms. Jones. Viewing the evidence in the light most favorable to the State, the evidence was sufficient to allow a jury to conclude that defendant maliciously and willfully set fire to the house. “In ‘borderline’ or close cases, our courts have consistently expressed a preference for submitting issues to the jury” *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (holding the trial court did not err in denying the defendant’s motion to dismiss a charge of arson in light of the State’s circumstantial evidence of defendant’s guilt) (citation omitted). The trial court did not err in denying defendant’s motion to dismiss, and defendant’s argument is overruled.

II. Motion to Continue

[2] Next, defendant argues that because his alibi witnesses failed to appear the trial court erred by denying his motion to continue in that denial of the motion: (1) denied defendant his right to present his defense; and (2) denied defendant his right to effective assistance of counsel. We disagree.

If a motion to continue is based on a constitutional right, the denial of the motion is reviewed *de novo* rather than for abuse of discretion. *State v. Thomas*, 294 N.C. 105, 111, 240 S.E.2d 426, 431 (1978). “ ‘Due process requires that every defendant be allowed a *reasonable time and opportunity* to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony.’ ” *Id.* at 113, 240 S.E.2d at 433 (addressing the defendant’s argument that the denial of a motion to continue infringed upon his constitutional right to present his defense) (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970) (emphasis added)). For the reviewing court to grant a defendant a new trial based on the trial court’s denial of a motion to continue, the defendant must establish that denial of the motion was error and that he was prejudiced by the error. *Id.* at 111, 240 S.E.2d at 431-32.

STATE v. BURTON

[224 N.C. App. 120 (2012)]

Here, in support of his motion to continue, defendant's counsel argued that the alibi witnesses had moved out of the state after being served subpoenas, but he believed one witness had returned to the area. Despite his efforts to contact the witness he believed had returned to the area, defendant's counsel was unable to do so, and he sought a continuation to allow more time to find the witness. In denying the motion, the trial court noted that both alibi witnesses were served months prior to trial and that the trial had already been continued for one week so that defendant could locate the alibi witnesses. On these facts, we conclude that defendant was given a "reasonable time and opportunity[,]" *id.*, to prepare his defense, and that the trial court did not err in denying his motion. Even if it was error for the trial court to deny defendant's motion, we conclude defendant was not prejudiced by the error. Defendant's cross-examination of Investigator Roberts established that one of the two purported alibi witnesses told the investigator that defendant was at the witness's residence at the time of the fire. Additionally, the trial court instructed the jurors that they were to consider defendant's alibi evidence in their deliberations. Defendant's argument is overruled.

III. Ineffective Assistance of Counsel

[3] Defendant argues he received ineffective assistance of counsel because his attorney: (1) failed to move for a mistrial after the jury heard inadmissible testimony that defendant threatened to set fire to the house; (2) failed to effectively prepare and present his alibi defense; and (3) failed to present alibi evidence that he promised the jury he would produce.

Under the two-prong test for ineffective assistance of counsel adopted by our Supreme Court, "the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms." *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Thus, defendant must show his attorney "made 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). After satisfying this first prong, a defendant "must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error." *Id.*

Here, defendant's counsel did not move for a mistrial upon Investigator Roberts's testimony that defendant threatened to set fire to

STATE v. BURTON

[224 N.C. App. 120 (2012)]

Mr. Campbell's house. His counsel, however, objected and moved to strike the testimony. The trial court granted the motion and gave a limiting instruction. While "it cannot be presumed that a limiting instruction is automatically sufficient to negate highly inflammatory evidence[.]" *State v. Brown*, ___ N.C. App. ___, ___, 710 S.E.2d 265, 281 (2011), *aff'd per curium*, ___ N.C. ___, 722 S.E.2d 508 (2012), in light of the other evidence of defendant's guilt, we conclude that this testimony did not result in "substantial and irreparable prejudice" to defendant as required for a mistrial by N.C. Gen. Stat. § 15A-1061 (2011). Defendant has failed to establish that there was a reasonable probability of a different outcome had his attorney made a motion for mistrial, and counsel need not make a motion for which there is not a reasonable probability that it would be granted. Defendant's argument is overruled.

Defendant also argues that his counsel failed to adequately prepare his alibi defense. The record reveals, however, that defendant's counsel subpoenaed the two alibi witnesses, actively pursued contact with the witnesses, and procured a continuance for defendant's trial. Additionally, as noted above, defendant's counsel introduced evidence of defendant's alibi through the cross-examination of Investigator Roberts. Thus, defendant has not established that his counsel's preparation of the alibi defense amounted to ineffective assistance of counsel.

Lastly, defendant argues that his attorney erred by promising the alibi defense in his opening statement and then failing to provide the evidence. As our Supreme Court stated in *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987), counsel should "avoid promising to prove matters in opening statements, without a reasonable belief that evidence exists which supports the promises[.]" While the opening arguments are not recorded in the transcript, defendant's counsel introduced evidence of defendant's alibi, and the trial court instructed the jury to consider defendant's alibi evidence in its deliberations. Thus, defendant was able to provide evidence of his alibi, and he has failed to show that he was prejudiced by his counsel's assurance to the jury that he would establish an alibi defense.

Conclusion

For the reasons stated above, we find no error.

NO ERROR.

Judges BRYANT and STEELMAN concur.

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

STATE OF NORTH CAROLINA

v.

RYAN SCOTT CORKUM

No. COA12-526

Filed 4 December 2012

Probation and Parole—confinement credit—post-release supervision revoked—mootness—time constraints of appeal

The trial court erred in a probation violation case by vacating its previous award of eight days of confinement credit toward the remaining nine months of defendant's sentence after his post-release supervision was revoked. Although the issue concerning the award of confinement credit to defendant became moot once defendant completed his sentence, it was in the public's interest to have this issue resolved because all felons seeking confinement credit following revocation of post-release supervision would face similar time constraints when appealing a denial of confinement credit, which effectively prevented the issue regarding the trial judge's discretion from being resolved.

On writ of certiorari to review order entered 19 August 2011 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

N.C. Prisoner Legal Services, Inc., by D. Tucker Charns, for defendant appellant.

McCULLOUGH, Judge.

Ryan Scott Corkum (“defendant”) appeals from the trial court's order vacating its previous award of eight days of confinement credit toward the remaining nine months of his sentence after his post-release supervision was revoked. For the following reasons, we reverse the order of the trial court.

I. Background

On 7 February 2005, defendant was indicted by a Guilford County grand jury for statutory rape of a thirteen-year-old girl and for con-

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

tributing to the delinquency of a minor. On 7 March 2005, defendant entered into a plea arrangement, whereby defendant pled guilty to solicitation to commit second-degree statutory rape and contributing to the delinquency of a juvenile. Defendant received a sentence of twenty-nine to forty-four months that was suspended on condition that defendant complete forty-eight months of supervised probation and comply with other conditions.

A violation report was filed 17 May 2005, reporting that defendant had violated the terms of his probation by failing to enroll in sex offender specific treatment and leaving his county of residence without prior approval from his probation officer. On 14 July 2005, the trial court entered an order modifying and continuing defendant's probation by imposing an active term.

On 21 April 2006, a second violation report was filed reporting that defendant had violated the terms of his modified probation by failing to be at his residence during curfew hours, failing to pay supervision fees, changing his address without obtaining prior approval from or notifying the supervising officer, failing to complete a sexual abuse treatment program, and absconding. As a result, defendant's probation was revoked on 6 June 2006 and his suspended sentence was activated. Defendant was awarded confinement credit for 208 days.

In accordance with N.C. Gen. Stat. § 15A-1368.2, defendant was released from prison with nine months remaining on his active sentence and began a five-year period of post-release supervision ending 26 January 2015.

On 3 November 2010, a violation report was filed reporting that defendant violated the terms of his post-release supervision by residing in a residence with minor children. Defendant was held in custody for eight days pending a post-release supervision revocation hearing on the violation. At the hearing held 12 November 2010, defendant admitted to the violations. Nevertheless, defendant was released and post-release supervision was reinstated.

On 19 January 2011, another violation report was filed reporting that defendant violated the terms of post-release supervision by failing to notify the post-release supervision officer of any change of residence or living arrangements. As a result of the violation, defendant's

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

post-release supervision was revoked and defendant was reincarcerated to serve the remainder of his original sentence.

On 17 August 2011, defendant's request for confinement credit for the eight days he previously spent in custody awaiting the hearing on his first post-release supervision violation was filed. The trial court initially filed an order on the same day granting defendant eight days of confinement credit. However, on 19 August 2011, the trial court filed an additional order vacating the award of confinement credit.

Defendant filed a petition for writ of certiorari with this Court that was granted by order filed 14 September 2011. Defendant now appeals the 19 August 2011 order.

II. Analysis

The sole issue on appeal is whether the trial court erred in exercising its discretion and denying confinement credit for the time defendant was incarcerated, pending a revocation hearing on his first violation of post-release supervision. However, as a preliminary matter we must first address the issue of mootness.

Mootness

In the present case, defendant submitted his petition for writ of certiorari to this Court on 23 August 2011. The petition was subsequently granted by order filed 14 September 2011. In his petition for writ of certiorari, defendant stated that his projected release date was "no later than 30 September 2011[;]" and, in fact, petitioner was released from custody upon the completion of his sentence on 30 August 2011. Consequently, the issue concerning the award of confinement credit to defendant became moot once defendant completed his sentence.

"[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). Thus, "an appeal presenting a question which has become moot will be dismissed." *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). There are, however, exceptions to the general rule that moot cases should be dismissed. See *In re Investigation Into the Injury of Brooks*, 143 N.C. App. 601, 604, 548 S.E.2d 748, 751 (2001) (recognizing "at least five exceptions to the general rule that moot cases should be dismissed.").

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

In this case, defendant argues that the “capable of repetition, yet evading review”¹ exception and the “public interest”² exception apply.

Concerning “capable of repetition, yet evading review,” “[t]here are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.’” *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002) (quoting *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989)). Here, defendant’s post-release supervision was revoked and defendant was reincarcerated to serve the remaining nine months of his original sentence. Thus, at most, defendant had nine months in which to seek confinement credit from the trial court, file an appeal when credit was denied, and fully litigate the appeal before the issue became moot. This nine-month duration is too short for an appeal to be decided. Additionally, it is not unreasonable to think defendant may encounter this same issue in the future should he face additional convictions.

Furthermore, even if defendant does not encounter this same issue, it is in the public’s interest that we resolve the issue. Under structured sentencing, both before and after the amendments implemented by the Justice Reinvestment Act of 2011, 2011 N.C. Sess. Laws ch. 192 (S.L. 2011-192 (H 642)), all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge’s discretion from being resolved.

Confinement Credit

The facts in this case are not in dispute. Instead, as the State asserts, what is at issue is a legal dispute over the confinement credit statutes and case law. Our primary focus is on N.C. Gen. Stat. § 15-196.1 (2011).

1. “[A] case which is ‘capable of repetition, yet evading review’ may present an exception to the mootness doctrine.’” *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (2002) (quoting *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989)).

2. The mootness “rule is subject to an exception . . . when the question involved is a matter of public interest. In such cases the courts have a duty to make a determination.” *Matthews*, 35 N.C. App. at 770, 242 S.E.2d at 654.

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

Id.

Here, defendant contends the trial court was required pursuant to N.C. Gen. Stat. § 15-196.1 to credit him with the eight days he spent in custody awaiting a revocation hearing for his first violation of post-release supervision. After reviewing the statute and case law, we agree with defendant.

“In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.” *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). To determine the legislature’s intent, we first look to the language of the statute. *See id.*; *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). In this case, we find the language of N.C. Gen. Stat. § 15-196.1 clear and unambiguous that four requirements must be met before a credit is required.

First, the statute provides credit for “time . . . spent, committed to or in confinement in any State or local correctional, mental or other institution” N.C. Gen. Stat. § 15-196.1. Here, defendant was in custody at a local detention center for eight days awaiting a post-release supervision revocation hearing.

Second, the statute requires that the time spent in confinement be “as a result of the charge that culminated in the sentence.” *Id.* At issue here is the remaining nine months of the original sentence imposed on defendant as a result of a plea agreement whereby defendant pled guilty to charges of solicitation to commit second-degree rape and contributing to the delinquency of a juvenile. Both the eight days

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

defendant spent in confinement awaiting his first post-release supervision revocation hearing and the activated nine-month sentence are a result of the original charges. There is no new sentence imposed as a result of a revocation of post-release supervision; only the remaining portion of the original sentence is activated.

Third, the statute sets forth that “[t]he credit provided shall . . . include credit for all time spent in custody pending . . . [a] post-release supervision revocation hearing[.]” *Id.* Here, defendant requested eight days of confinement credit for time he spent in confinement pending a post-release supervision revocation hearing. The fact that the remaining nine months of defendant’s sentence was not activated as a result of the first violation of post-release supervision does not bar a credit from later being applied after post-release supervision is revoked following a second violation where the time spent in prison resulted from the same original conviction that culminated in the sentence.

Fourth, the statute prohibits a credit if the time spent in confinement has been credited towards another sentence. *Id.* In defendant’s case, the eight days of confinement has not been credited to any other sentence.

Where each portion of N.C. Gen. Stat. § 15-196.1 is satisfied, the language of the statute does not allow the trial judge to exercise discretion in awarding confinement credit. The statute provides that the “term of a sentence *shall* be credited with and diminished by the total amount of time a defendant has spent . . . in confinement” N.C. Gen. Stat. § 15-196.1 (emphasis added). “Defendant thus has a statutory right to credit against his sentence for any time spent in custody on that particular charge, whether pre-trial or post-conviction.” *State v. Reynolds*, 164 N.C. App. 406, 408, 595 S.E.2d 788, 789 (2004).

In opposition, the State argues that the language of N.C. Gen. Stat. § 15-196.1 and related statutes require that a sentence be imposed as a condition precedent to an award of confinement credit. We agree with this statement. However, the sentence required to be imposed as a condition precedent is the original sentence imposed as a result of defendant’s guilty plea. As stated earlier, the nine-month sentence is the remainder of the original sentence which is activated as a result of defendant’s failure to comply with terms of his post-release supervision. It is not a new sentence.

STATE v. CORKUM

[224 N.C. App. 129 (2012)]

The State cites both N.C. Gen. Stat. §§ 15-196.3 and 15-196.4 in support of its position. Concerning N.C. Gen. Stat. § 15-196.3 (2011), the State argues that the intent of the legislature is to reduce a sentence and not to reduce the period of post-release supervision. We agree, but find this argument misplaced. Here, the confinement credit will reduce the remaining nine months of defendant's original sentence. The confinement credit does not reduce defendant's period of post-release supervision. Concerning N.C. Gen. Stat. § 15-196.4 (2011), the State argues that the statute "shows that credit is awarded only if a revocation proceeding culminates in a sentence of active imprisonment." Again, we agree. Yet, we fail to see how the State's argument affects this case. The statute provides that "[u]pon sentencing or activating a sentence, the judge presiding shall determine the credits to which the defendant is entitled" N.C. Gen. Stat. § 15-196.4. In this case, the remaining nine months of defendant's sentence was activated upon the revocation of his post-release supervision following defendant's second violation. Thus, an award of credit is appropriate under the statute.

Furthermore, although we find no case directly on point involving the award of confinement credit following revocation of post-release supervision, we find that a review of case law concerning the award of confinement credit following probation revocation supports our interpretation of the relevant statutes.

In *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994), the N.C. Supreme Court upheld our award of confinement credit to the defendant for time spent in custody as a condition of probation after the defendant's probation was revoked. In so holding, our Supreme Court stated that "[t]he language of section 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge." *Id.* at 556, 444 S.E.2d at 185. The State contends that *Farris* cannot be relied on in the present case because it was decided before structured sentencing was enacted and therefore does not concern post-release supervision. Although we acknowledge that post-release supervision was not implemented until structured sentencing, we are not persuaded by the State's argument. In *State v. Lutz*, 177 N.C. App. 140, 628 S.E.2d 34 (2006), decided after the implementation of structured sentencing, we cited *Farris* and reiterated the legislature's intent in N.C. Gen. Stat. § 15-196.1, "that a defendant be credited with all time defendant was in custody and not at liberty . . ." *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35 (quoting *Farris*, 336 N.C. at 556, 444 S.E.2d at

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

185). As a result, in *Lutz* we awarded the defendant confinement credit for time spent in a court ordered substance abuse program as a condition of probation. *Id.* at 144, 628 S.E.2d at 36.

As the State concedes in its reply to defendant's petition for writ of certiorari, if defendant's post-release supervision had been revoked for his first violation, defendant undoubtedly would have been entitled to confinement credit for the eight days he spent incarcerated pending the hearing. Where the legislature intended that defendant be credited with all time spent in custody as a result of the charge culminating in the sentence, we see no reason why the eight days should not now be credited after the revocation of defendant's post-release supervision following a second violation where defendant is serving the same nine-month sentence that he would have served had post-release supervision been revoked following the first violation.

III. Conclusion

For the reasons discussed above, we reverse the order of the trial court.

Reversed.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA

v.

STEVE WAYNE GOLDEN

No. COA12-265

Filed 4 December 2012

1. Evidence—prior crimes or bad acts—admissible

The trial court did not err in a prosecution for perpetrating a hoax on law enforcement officers by use of a false bomb or other device by admitting evidence of defendant's prior acts against his estranged wife. The prior incidents were properly admitted to show defendant's intent to perpetrate a hoax by use of a false bomb and because those incidents were part of the chain of events leading up to the crime. Similarity of the acts was not pertinent to the purpose for which the incidents were admitted.

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

2. Evidence—prior crimes or bad acts—not more prejudicial than probative

Evidence of prior bad acts against defendant's estranged wife was not more prejudicial than probative in a prosecution for perpetrating a hoax on law enforcement officers by use of a false bomb or other device found in his truck at his estranged wife's house.

3. Police Officers—perpetrating a hoax on law enforcement with false bomb—evidence sufficient

There was sufficient evidence of perpetrating a hoax on law enforcement officers by use of a false bomb or other device. Regarding the disputed first and fourth elements of the offense, and viewing the evidence in the light most favorable to the State, a jury could reasonably have found that defendant himself placed the device in his truck and that defendant intended to trick the officers.

4. Criminal Law—flight—after commission of crime—evidence insufficient

The trial court committed harmless error in a prosecution for perpetrating a hoax on law enforcement officers by use of a false bomb or other device by giving an instruction on flight when there was no evidence that defendant fled after the commission of the crime. There was no prejudice because there was no reasonable possibility that the jury would have found defendant not guilty in the absence of the flight instruction.

Appeal by defendant from judgment entered 4 August 2011 by Judge Edgar B. Gregory in Randolph County Superior Court. Heard in the Court of Appeals 27 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

Leslie C. Rawls for defendant-appellant.

GEER, Judge.

Defendant Steve Wayne Golden appeals from his conviction of perpetrating a hoax on law enforcement officers by use of a false bomb or other device. Defendant primarily argues on appeal that evidence of prior acts against his estranged wife was improperly admitted under Rule 404(b) of the North Carolina Rules of Evidence. Because, however, that evidence tended to show that defendant intended to deceive people with the realistic fake bomb he admittedly

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

made and because those acts were part of the chain of circumstances leading to the charged offense, we hold that the trial court did not err in admitting the evidence.

Facts

The State's evidence tended to show the following facts. On 27 March 2010, Darlene Golden was in her home in Asheboro, North Carolina when she looked out of her window and saw defendant, her estranged husband, in his truck. Ms. Golden watched the truck pull up close to the curb in front of her home and then drive away. Ms. Golden had previously obtained a domestic violence protection order against defendant following two incidents in which defendant aggressively confronted and threatened Ms. Golden. After seeing defendant in his truck, Ms. Golden called 911.

Asheboro Police Officer Mike Welborn responded to Ms. Golden's call. After speaking with Ms. Golden about the incident, Officer Welborn left and drove around the area to see if defendant was still in the neighborhood. When he failed to locate defendant's truck, Officer Welborn returned to Ms. Golden's home. Upon his return, Officer Welborn saw defendant walking down Ms. Golden's driveway. When defendant noticed Officer Welborn's patrol car, defendant turned and ran. Officer Welborn drove around the block, exited his vehicle, and ran after defendant.

Officer Welborn overtook defendant as defendant attempted to crawl and hide underneath defendant's truck. Officer Welborn ordered defendant out and, as defendant stood, the officer noticed a large knife in defendant's waistband. Officer Welborn then repeatedly commanded defendant to lie back down on the ground. Despite these commands, defendant refused to lie down and began walking toward the officer. According to Officer Welborn, it "appeared that nothing mattered to [defendant]" and that defendant "looked as if he was deciding what to do as he was refusing to lay down." This behavior, and the presence of the knife in defendant's waistband, caused Officer Welborn to draw his service weapon. Only when defendant was a short distance from Officer Welborn did defendant finally comply with the commands to lie on the ground. Officer Welborn handcuffed defendant, arrested defendant for violating the domestic violence protection order, and removed the knife from defendant's belt as well as a second knife from defendant's pocket.

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

According to Officer Welborn, once defendant was handcuffed and seated on the curb, he became “irate” and began “[c]ussing” Officer Welborn and the other officers. After defendant was taken into custody, Asheboro Police Officer Russ Smith arrived at the scene. Officer Smith observed that defendant was “very irate, cursing loudly.” Specifically, Officer Smith heard defendant “‘shouting ‘fuck you’ several times to the officers on the scene,’” as well as making threats against Ms. Golden. Asheboro Police Lieutenant Maxine Wright also observed defendant “yelling and screaming.” When Lieutenant Wright tried to calm defendant down, he cursed at her.

Officer Smith then asked defendant if there was anything in defendant’s truck that would compromise the officers’ safety. Defendant responded that there was not. When Officer Smith asked defendant if the officers could search his truck, defendant responded by “bobbing his head back and forth, and [saying] something to the effect of ‘There’s nothing in there; go ahead.’” Officer Welborn then drove defendant to jail.

Lieutenant Wright and another responding officer, Asheboro Police Officer Charles Perrin, conducted a search of defendant’s truck. Officer Perrin immediately observed, “‘in plain view, three knives: One on the dash, one knife was sticking in the dash, and one in the driver’s door.’” The knife laying on the dash was, according to Lieutenant Wright, a “martial arts-type knife that had a handle and the knife was round.”

In addition to the knives, Lieutenant Wright quickly saw, behind the driver’s seat of defendant’s truck, “the butt of . . . a firearm” that looked like a rifle. The gun ultimately turned out to be a “BB rifle.” Lieutenant Wright then saw, also on the driver’s side of the vehicle, an item with a long wooden handle that she determined to be a “meat cleaver.” Upon further search, the officers found a bag containing “a cylinder-type item” covered with aluminum foil, black electrical tape, red wires, and batteries.

Although Lieutenant Wright initially believed the cylindrical device was used to smoke marijuana (because she had smelled marijuana in the truck), she began to suspect the object was an improvised explosive device when she also found latex gloves in the bag containing the object. During training, she had learned that explosive materials were handled using latex gloves. Lieutenant Wright immediately evacuated the area and contacted Asheboro Police Officer Terry Jones who worked with a canine unit specializing in explosives detection.

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

Officer Jones responded to the scene with his canine unit. When Officer Jones examined the device, he agreed that it could be an improvised explosive device. He photographed the device and sent the photograph to Officer Timothy Loughman of the Cumberland County Sheriff's Office to obtain a more expert opinion. After looking at the photograph, Officer Loughman advised Officer Jones to treat the device as a potential explosive device and to evacuate the area within 1,000 feet of the device.

Meanwhile, at the jail, Officer Welborn watched defendant " 'pacing around the jail, stating he was not staying and when he gets out, that bitch was dead.' " According to Officer Welborn, defendant " 'continuously made threats about killing his wife' " in front of the officers at the jail and, anytime Ms. Golden's name was mentioned, defendant's " 'anger would build until the point he would punch the walls in rage.' "

While still at the jail with defendant, Officer Welborn learned that there was a potential bomb at the scene of defendant's arrest. Officer Welborn then asked defendant, " 'Is there anything around [Ms. Golden's] residence or in your vehicle that I need to know about?' " Defendant then replied " 'that there was nothing around the residence, but there was a device in his vehicle that he made with someone and it was fake.' " Defendant claimed " 'it was a gag' " and described the object as " 'a toilet paper roll with batteries and wires taped around it.' " Officer Welborn immediately relayed this information to Lieutenant Wright, but advised her to " 'use caution due to [defendant's] behavior towards law enforcement,' " including defendant's anger, his "yelling and screaming," and his cursing of the officers.

Lieutenant Wright contacted the Greensboro bomb squad, which services Asheboro, and requested assistance. The bomb squad responded to the call and followed its protocol regarding potential explosive devices. After taking extensive measures, including the use of a remotely operated robot, the bomb squad determined that the object in defendant's truck was not an explosive device.

Defendant was indicted for perpetrating a hoax by use of a false bomb or other device on 12 July 2010. Defendant was subsequently indicted for being a habitual felon on 11 October 2010. Defendant did not present any evidence at trial. The jury found defendant guilty of perpetrating a hoax by use of a false bomb or other device. Defendant then pled guilty to being a habitual felon, and the trial court sentenced defendant to a presumptive-range term of 116 to 149 months imprisonment. Defendant timely appealed to this Court.

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

I

[1] Defendant first argues that the trial court erred under Rules 404(b) and 403 of the Rules of Evidence in admitting evidence of defendant's prior hostile behavior towards Ms. Golden. Defendant argues that "the evidence was not relevant to the offense charged and any probative value was substantially outweighed by its prejudicial effect." (Emphasis omitted.) We disagree.

A determination whether evidence was properly admitted under Rule 404(b) involves a three-step test. First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). Second, is that purpose relevant to an issue material to the pending case? *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (1999). Third, does the probative value of the evidence substantially outweigh the danger of unfair prejudice? *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006).

With respect to the first two steps, "[w]e review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). We review the trial court's determination of the third step—the Rule 403 balancing test—for abuse of discretion. *Id.*

Here, defendant challenges the admission of Ms. Golden's testimony regarding three interactions between defendant and Ms. Golden. In the first incident, defendant went to Ms. Golden's workplace and presented her with a document titled the "Separation and Last Testimony and Will of Steven Wayne Golden." The document accused Ms. Golden of adultery, disavowed all support for Ms. Golden and her children, and was signed with defendant's thumb print in blood followed by "strange symbols." The second incident involved defendant "ranting and raving" in and around Ms. Golden's workplace and stating to Ms. Golden, "If I ever catch you with somebody or if I ever see you dating anybody, I'll put you and him in the hospital.' "

The third incident occurred on the evening that defendant learned Ms. Golden had obtained a domestic violence protective order against him. Defendant drove to Ms. Golden's father's house, and, as Ms. Golden drove away from the residence, defendant angrily hit the side window of Ms. Golden's car where their young son was sitting in his car seat. Defendant subsequently followed Ms. Golden in

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

his truck, pulled in front of her to stop her, exited his truck and walked toward Ms. Golden's car, but then reentered his truck and drove away.

The trial court found this evidence relevant to show defendant's "plan, intent, and scheme in the present case" and instructed the jury that the evidence should only be considered for those limited purposes. Proper purposes for the admission of evidence under Rule 404(b) include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."

Rule 404(b) is "a clear general rule of *inclusion*["]."¹ *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. As a result, the list of purposes set out in Rule 404(b) "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995).

In addition to the proper purposes enumerated in Rule 404(b), "[i]t is well established that evidence is admissible under Rule 404(b) when the other bad acts are part of the chain of circumstances leading up to the event at issue or when necessary 'in order to provide a complete picture for the jury.'" *State v. Rollins*, 220 N.C. App. 443, 448, 725 S.E.2d 456, 461 (quoting *State v. Madures*, 197 N.C. App. 682, 688, 678 S.E.2d 361, 365 (2009)), *appeal dismissed*, 366 N.C. 242, 731 S.E.2d 415 (2012). *See also State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (" 'Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'" (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985))).

Here, the evidence of the prior incidents with Ms. Golden was properly admitted both because it showed defendant's intent to perpetrate a hoax by use of a false bomb and because those incidents were part of the chain of events leading up to the crime. The evidence was necessary to complete the story of the crime for the jury.

Defendant was charged with violating N.C. Gen. Stat. § 14-69.2(a) (2011), which provides:

[A]ny person who, with intent to perpetrate a hoax, conceals, places, or displays any device, machine, instru-

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

ment or artifact, so as to cause any person reasonably to believe the same to be a bomb or other device capable of causing injury to persons or property is guilty of a Class H felony.

The mens rea element—intent to perpetrate a hoax—requires that the defendant intend to commit or carry out an act intended to trick or dupe. *See Black's Law Dictionary* 1256 (9th ed. 2009) (defining “perpetrate” as “[t]o commit or carry out”); *Webster's Third New International Dictionary* 1075 (1968) (defining “hoax” as “an act intended to trick or dupe”).

The challenged evidence tended to show that defendant had an ongoing objective of scaring Ms. Golden by suggesting that he would physically harm her and others around her. A jury could reasonably conclude from the evidence that defendant made the fake bomb with the intention that it appear real as part of a scheme to terrorize Ms. Golden. Likewise, a jury could decide that the fake bomb was in defendant's truck because he intended to use it to scare Ms. Golden and anyone with her. The evidence would, therefore, permit the jury to conclude that defendant did not intend the device to be merely a “gag,” as he claimed, but rather intended that it trick Ms. Golden and other people into believing it was a bomb. The evidence was, therefore, relevant to defendant's intent.

Further, the evidence of the three incidents is part of a chain of events that place the crime in context. Those incidents tend to explain why defendant created the fake bomb and why he had it in his truck when he drove to Ms. Golden's house. Those incidents are “necessary in order to provide a complete picture for the jury.” *Rollins*, 220 N.C. App. at 448, 725 S.E.2d at 461 (internal quotation marks omitted).

Defendant, however, argues that the three incidents did not meet the requirement of similarity and quotes *State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002) (internal quotation marks omitted): “Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.” He contends that because the three incidents were not similar to the charged offense, they were inadmissible under Rule 404(b).

Defendant has failed to recognize that the admissibility of prior bad acts evidence under Rule 404(b) depends on the specific purpose for which the evidence is offered and the facts of each case. *See State v. Carter*, 338 N.C. 569, 589, 451 S.E.2d 157, 168 (1994) (“[T]he facts

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

of each case will ultimately determine whether evidence of a defendant's former crime is pertinent in his prosecution for another independent crime.”); *State v. Haskins*, 104 N.C. App. 675, 682, 411 S.E.2d 376, 382 (1991) (“When determining the relevancy of other crimes evidence offered to prove defendant's motive, the degree of similarity between the uncharged and the charged crimes is considerably less important than when such evidence is offered to prove identity.”).

In *Al-Bayyinah*, evidence of two prior robberies was offered to prove the defendant's identity as the perpetrator of a third robbery—the charged offense. 356 N.C. at 152-53, 567 S.E.2d at 121-23. Our Supreme Court emphasized that, when used to prove identity, admission of evidence under Rule 404(b) “is constrained by the requirements of similarity and temporal proximity.” *Id.* at 154, 567 S.E.2d at 123.

When, as in *Al-Bayyinah*, prior acts are admitted to establish identity or to show a common plan or scheme, the similarity of the prior acts to the charged offense is a critical factor in making the prior acts relevant to the purpose for which the evidence is offered. It is the similarity that shows identity and a common plan. *See, e.g., Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (“Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them.” (internal quotation marks omitted)). Here, under the circumstances of this case, “similarity” is simply not pertinent to the purpose for which the incidents were admitted. *See, e.g., State v. Murillo*, 349 N.C. 573, 591, 509 S.E.2d 752, 762 (1998) (“The evidence was admitted to show the escalating nature of [defendant's] attacks and to rebut his claim that the killing was accidental. Testimony about a defendant-husband's arguments with, violence toward, and threats to his wife are properly admitted in his subsequent trial for her murder.”).

Defendant additionally argues that the evidence was inadmissible under Rule 404(b) because “it requires pure speculation to suggest that the presence of the gag device in the truck is evidence of intent to use the device against Mrs. Golden” and that “[s]peculation alone is not sufficient to support the court's allowing the evidence.” We hold that the evidence presented by the State is sufficient to give rise to a reasonable inference that defendant created the fake bomb to scare Ms. Golden.

While defendant points to *State v. Hamilton*, 351 N.C. 14, 20, 519 S.E.2d 514, 519 (1999), as support for his position, that decision addressed the similarity requirement when evidence of a prior bad

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

act is offered to prove the identity of the perpetrator of the crime. In *Hamilton*, the Court upheld the trial court's exclusion of evidence proffered by the defendant of a prior knife attack by a witness. *Id.* Although the defendant contended that the prior knife attack was relevant to prove that the witness—and not the defendant—had committed the murder at issue, the Court noted that the defendant had failed to meet his burden of showing some unusual facts present in both crimes sufficient to suggest that the same person—the witness—had committed both crimes. *Id.* The Court held that in the absence of unusual facts tying the witness to both crimes, “any answer elicited from [the witness] on cross-examination about the 1987 knife threat would create, at best, a speculative inference that [the witness] killed [the victim]—an inference that does not point directly to the guilt of [the witness].” *Id.* (internal quotation marks omitted). Since the evidence in this case was not offered to prove identity or any other purpose requiring similarity of crimes, *Hamilton* does not suggest that admission of the incidents involving Ms. Golden was error.

[2] The question remains whether, under Rule 403, the trial court abused its discretion in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907. “An abuse of discretion occurs when a trial judge’s ruling is manifestly unsupported by reason.” *Id.* (internal quotation marks omitted).

The trial court, in this case, heard the prior bad acts evidence outside the presence of the jury and heard arguments from counsel before ruling on admissibility of the evidence. The court specifically considered Rule 403 and concluded that “the probative value of the prior bad acts substantially outweighs the possible prejudicial effect.” In addition, the trial court gave the jury a limiting instruction before admitting the evidence. Given the importance of the evidence in tending to show the chain of circumstances leading to the commission of the charged offense, the context of the offense, and defendant’s intent, and the careful process employed by the court, the trial court’s determination that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice was entirely reasonable. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160-61 (finding no abuse of discretion given relevance of evidence to proper purpose and given trial court’s careful handling of issue, including hearing testimony of 404(b) witness outside presence of jury, hearing arguments of counsel, considering Rule 403, and giving a limiting instruction). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence.

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

II

[3] Defendant next argues that the trial court erred in denying defendant's motion to dismiss. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"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, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

The elements of the crime of perpetrating a hoax by use of a false bomb or other device are (1) concealing, placing, or displaying, (2) a false bomb or other device, (3) in such a way as to cause another person to reasonably believe that the device was a bomb or other device capable of causing injury to persons or property, (4) with the intent to perpetrate a hoax. *See* N.C. Gen. Stat. § 14-69.2(a). Defendant does not dispute that the State presented substantial evidence as to the second and third elements.

Regarding the first element, defendant argues that his admission to Officer Welborn that there was a "gag" device in defendant's truck showed only that defendant knew the device was located in his truck and not that defendant concealed, placed, or displayed the device. However, viewing the evidence in the light most favorable to the State, a jury could reasonably have found that defendant himself placed the device in his truck given his admission that he made the fake bomb and given the evidence regarding his actions toward Ms. Golden. Further, the jury could also have reasonably found that defendant concealed the device by not telling Officer Smith about the device when asked whether there was anything in defendant's truck that could harm the officers. *See Black's Law Dictionary* 327 (9th ed. 2009) (defining "concealment," in part, as "[t]he act of refraining from

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

disclosure; esp., an act by which one prevents or hinders the discovery of something”). Thus, the State presented substantial evidence of the first element.

Regarding the fourth element, defendant argues that the State failed to present evidence that defendant intended to trick the officers. As previously discussed, the Rule 404(b) evidence—as well as the evidence of the events the day of the charged crime—suggested that defendant had made the fake bomb and put it in his truck with the objective of using it to scare Ms. Golden and anyone with her. In addition, when confronted by the officers, defendant engaged in behavior threatening enough to cause an officer to draw his gun and engaged in an extremely hostile verbal assault on the officers. Immediately thereafter, defendant consented to the officers searching his truck and told them that there was nothing in the truck that could harm the officers. Yet, the truck contained multiple knives, a meat cleaver, and a BB rifle, as well as the fake bomb. Given this evidence, a jury could reasonably conclude that defendant intended to trick the officers as well when he did not tell them that the bomb-like device in his truck was fake.

Defendant nonetheless contends that there was not substantial evidence of the requisite intent because defendant had “not displayed or even mentioned [the device] to anyone before the police search discovered it.” Defendant’s argument fails to recognize that the State’s evidence tended to show defendant’s *purposeful* concealment of the existence of the device. Moreover, defendant’s contention that he “did not invite the police to search, so that they might discover and be fooled by the device,” mischaracterizes the evidence. In the light most favorable to the State, defendant invited the officers to search when he replied to Officer Smith’s request for consent to search the truck by stating, “There’s nothing in there; go ahead.’ ”

Defendant also contends that his admission, at the jail, that a “gag” device was in his truck belies any intent to deceive or trick the officers. Defendant’s argument views the evidence in the light most favorable to defendant, contrary to the established standard for motions to dismiss. *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223. In addition, defendant only admitted a “gag” device was in his truck *after* the officers located the device. Defendant’s belated admission does not absolve him of the requisite mental state when defendant initially stated there was nothing in his truck the officers needed to know about before they searched it.

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

III

[4] Finally, defendant argues that the trial court erred by overruling defendant's objection and giving a jury instruction on flight when the evidence did not show flight in relation to the charged offense. "[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).

"[O]ur courts have long held that a trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.'" *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). Here, defendant objected to the following instruction by the trial court:

The State contends, and the defendant denies, that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt.

We agree with defendant that the trial court's flight instruction was improper because there is no evidence " 'defendant fled *after* commission of the *crime charged*.'" *Id.* at 165, 388 S.E.2d at 434 (emphasis added) (quoting *Irick*, 291 N.C. at 494, 231 S.E.2d at 842). The State's evidence tended to show that defendant fled from Ms. Golden's driveway when defendant initially saw Officer Welborn's patrol car. Officer Welborn gave chase and overtook defendant as defendant attempted to crawl underneath his truck, parked near Ms. Golden's house.

Defendant's alleged commission of the charged crime could not have occurred until defendant consented to the search of his vehicle and stated to Officer Smith that there was nothing in the vehicle that the police needed to be concerned about despite defendant's knowledge of the fake bomb. Defendant made no attempt to flee *after* making these statements to Officer Smith. In fact, the officers had already secured defendant in custody at the time defendant made these statements. Thus, defendant's flight from Ms. Golden's house cannot be

STATE v. GOLDEN

[224 N.C. App. 136 (2012)]

considered as evidence of defendant's guilt of the crime of perpetrating a hoax by use of a false bomb or other device.

The trial court's instruction on flight was, therefore, erroneous. "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Here, defendant does not make any specific argument regarding prejudice from the erroneous instruction. Based on our review of the record, we cannot conclude that there is a reasonable possibility that the jury would have found defendant not guilty in the absence of the flight instruction. The instructional error was harmless given defendant's admission that he made the very realistic-looking fake bomb together with his repeated attempts to scare Ms. Golden (even after entry of the domestic violence protective order), his extraordinarily hostile and non-cooperative behavior upon being arrested, and his glib claim, when consenting to a search, that his truck contained nothing harmful even though there were several knives, a meat cleaver, a BB rifle, and a fake bomb in it. We, therefore, hold that defendant received a trial free of prejudicial error.

No error.

Chief Judge MARTIN and Judge STROUD concur.

STATE v. GRIER

[224 N.C. App. 150 (2012)]

STATE OF NORTH CAROLINA

v.

MARY COLEMAN GRIER

No. COA12-448

Filed 4 December 2012

1. Larceny—chose in action—forgery—not mutually exclusive offenses—valid instrument not required

There was no plain error in a prosecution for larceny of a chose in action, forgery, and uttering a forged paper or instrument where the trial court failed to instruct the jury that larceny of a chose in action required a valid instrument or that the crimes were mutually exclusive.

2. Larceny—chose in action—blank check—evidence not sufficient

The theft of a blank check does not support a claim for larceny of a chose in action and there was no evidence that defendant committed larceny of a chose in action when she took a check from the victim's checkbook and cashed it for \$465.00. There was no evidence that the check evidenced any debt or obligation prior to the taking.

Appeal by defendant from judgment entered 14 September 2011 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Because the trial court did not err by failing to instruct the jury that the crime of forgery, uttering, and larceny of a chose in action were mutually exclusive crimes, we affirm the trial court. Because defendant did not feloniously steal, take and carry away, or take by robbery a chose in action, we reverse the judgment entered against defendant on the charge of larceny of a chose in action.

STATE v. GRIER

[224 N.C. App. 150 (2012)]

The evidence presented at trial tended to show that, on 18 October 2010, Thera Wright—78 years old at the time of trial—was eating breakfast at a Chick-fil-A restaurant when she was approached by a woman whom she did not know. Defendant introduced herself as Barbara Mason. Defendant offered her services to provide in-home care to handicap persons three or five days a week; Medicare would cover all expenses. Ms. Wright declined the offer but indicated that her sister, who suffered from Alzheimer's disease, may be able to use defendant's services. Defendant was provided with the name and telephone number of Ms. Wright's sister. In turn, defendant wrote a note referencing Medicare and Medicaid and a telephone number on a restaurant napkin.

Later that day, Ms. Wright was surprised by defendant's appearance at her residence. Ms. Wright did not recall giving defendant her address. Defendant stated that she had been to the residence of Ms. Wright's sister-in-law. Ms. Wright invited defendant into her home. The two spoke for ten minutes. After defendant left, Ms. Wright could not find her pocketbook. She called the phone number defendant provided her with on the napkin at the Chick-fil-A restaurant and heard an automated message providing the time of day. Ms. Wright called her bank and cancelled her credit cards. Then she called the police to report the crime and the name Barbara Mason. The next day Ms. Wright went to SunTrust Bank to explain what had happened regarding the loss of her pocketbook including her checkbook. A bank representative informed her that a check for \$465.00 had been cashed made payable to Mary Grier.

In an interview with Charlotte Mecklenburg Police detectives, defendant acknowledged that she stole and cashed Ms. Wright's check.

Defendant was charged with forgery, uttering forged paper, larceny of a chose in action, and attaining habitual felon status. A jury trial commenced on 12 September 2011 in Mecklenburg County Superior Court before the Honorable W. Robert Bell. The jury returned verdicts of guilty on all charges. The trial court entered a consolidated judgment in accordance with the jury verdicts. Defendant appeals.

On appeal, defendant argues that (I) the trial court erred by failing to instruct the jury that defendant couldn't be convicted of mutually exclusive crimes and (II) there was insufficient evidence to support the conviction for larceny of a chose in action.

STATE v. GRIER

[224 N.C. App. 150 (2012)]

I

[1] Defendant argues that the trial court erred by failing to instruct the jury that the crimes of forgery, uttering a forged check, and larceny of a chose in action are mutually exclusive. Defendant contends that a single instrument cannot be both a forgery and a valid chose in action. We disagree.

As the State notes in its brief, defendant failed to raise this objection before the trial court, but defendant argues that the trial court's failure to instruct the jury on mutually exclusive offenses amounts to plain error.

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

N.C. R. App. P. 10(a)(4) (2012).

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

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alterations in original)) (quotations and brackets omitted).

Initially, we note that defendant's argument relies upon the contention that the crime of forgery and uttering a forged check require a counterfeit instrument while the evidence of larceny of a chose in action requires a showing that the defendant "stole a *valid* instrument." (Emphasis in the original).

STATE v. GRIER

[224 N.C. App. 150 (2012)]

Pursuant to section 14-75, “Larceny of chose in action” occurs when “any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check or other order for the payment of money issued by or drawn on any bank . . . being the property of any other person” N.C. Gen. Stat. § 14-75 (2011). But, contrary to defendant’s argument, section 14-75 does not require that the “bank note, check or other order for payment” be *valid*.

Thus, defendant cannot maintain the argument that the State is required to make a showing that a financial instrument such as a bank note or check in order to be a chose in action must be valid. Further, defendant points us to no authority, and we find none, indicating that the crimes of larceny of a chose in action and forgery and uttering a forged paper or instrument are mutually exclusive. Therefore, the trial court did not err in failing to instruct the jury that larceny of a chose in action required a valid instrument or that the crimes charged were mutually exclusive. Accordingly, defendant’s argument is overruled.

II

[2] Defendant argues that there was insufficient evidence to convict her of larceny of a chose in action. Defendant contends that the evidence presented during trial was that she took and carried away Ms. Wright’s blank check. Defendant further contends that the theft of a blank check does not support a claim for larceny of a chose in action. We agree.

“When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor.” *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citation omitted). “[T]he trial court must determine whether substantial evidence has been presented in support of each element of the charged offense.” *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 626 (2011) (citations and quotations omitted). On appeal, “this Court determines whether the State presented substantial evidence’ in support of each element of the charged offense. ‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (citations and quotations omitted).

A “chose in action” is pertinently defined as “[a] proprietary right in personam, such as a debt owed by another person” Black’s Law Dictionary 234 (7th ed. 1999). Again, “Larceny of chose in action” occurs when “any person shall feloniously steal, take and carry away,

STATE v. GRIER

[224 N.C. App. 150 (2012)]

or take by robbery, any bank note, check or other order for the payment of money issued by or drawn on any bank . . . being the property of any other person . . .” N.C.G.S. § 14-75 (2011). *See generally, State v. Campbell*, 103 N.C. 268, 269-70 (103 N.C. 344, 346), 9 S.E. 410, 410 (1889) (“When, . . . the indictment charges the larceny of one of the several species of **choses in action** specified in the statute, and there is no count for larceny at common law, as suggested, the State must prove the larceny of the chose in action as charged, else the prosecution must fail, because the charge is, not for the larceny merely of a piece of paper on which the note or other thing is written, but of the valuable written evidence of the chose in action as charged and as designated in the statute. It is the latter embodied and evidenced by the writing that is charged to have been stolen. It would not comport with just and settled criminal procedure to indict a person for the larceny of a promissory note, and allow him to be convicted upon such charge of stealing a piece of paper. Stealing the latter, if an offense at all, is a common law offense, and essentially different from the statutory offense of stealing a promissory note. The former is not necessarily a part of, or embraced by, the latter. The note might be written on parchment, linen, silk or cotton cloth, or the like. Neither principle nor statutory provision requires promissory notes and like things to be written on paper, though ordinarily, for the greater convenience, they are so written.”).

Here, Ms. Wright testified that she invited defendant into her home, and after defendant left, Ms. Wright could not find her pocketbook. The pocketbook contained Ms. Wright’s checkbook. The next day, a bank representative informed Ms. Wright that a check had been cashed against her account for \$465.00.

Q And any of the writing on this check, any of the handwriting on this check, is any of that your writing?

A No.

Q So you didn't fill in any of this information?

A No.

Q And that is not your signature on the check?

A No.

Q Did you authorize anybody to fill out this check to [defendant] Mary Grier?

A No.

STATE v. HOFF

[224 N.C. App. 155 (2012)]

Q Do you know a [defendant] Mary Grier?

...

A No.

Q You wouldn't have written a check to her?

A No.

During the investigation of the theft report, defendant was interviewed by a detective in the financial crimes unit of the Charlotte Mecklenburg Police Department. The detective testified that during her interview, defendant admitted that she stole and cashed Ms. Wright's check.

Despite the record evidence that defendant took a check from Ms. Wright's checkbook and cashed a check made payable to herself for \$465.00, there is no evidence that the check evidenced any debt or obligation prior to the taking. Therefore, there is no evidence that defendant committed larceny of a chose in action. *See* Black's Law Dictionary 234 (7th ed. 1999); *see also, generally, Campbell*, 103 N.C. at 269-70 (103 N.C. at 346), 9 S.E. at 410. Accordingly, we reverse the judgment of the trial court as to this charge and remand for further proceedings.

Affirmed in part; reversed in part.

Judges MCGEE and THIGPEN concur.

STATE OF NORTH CAROLINA
v.
ABDUL HASSAN JAMAAL HOFF

No. COA12-771

Filed 4 December 2012

1. Burglary—sufficient evidence—defendant as perpetrator—fingerprints—in-court identification

The trial court did not err in a first-degree burglary case by denying defendant's motion to dismiss the charge. A witness's in-court identification of defendant as the intruder constituted some evidence other than defendant's fingerprints identifying him as

STATE v. HOFF

[224 N.C. App. 155 (2012)]

the perpetrator. Thus, the State presented substantial evidence identifying defendant as the perpetrator of the charged crime.

2. Constitutional Law—effective assistance of counsel—burglary—fingerprint evidence

Defendant did not receive ineffective assistance of counsel in a first-degree burglary case when his trial counsel did not move to exclude fingerprint evidence against him or cross-examine the State’s fingerprint expert on the reliability of his methodology. There was no reasonable probability that the outcome of the trial would have been different had counsel objected to the admission of the fingerprint evidence or cross-examined the expert on the reliability of his methodology.

Appeal by defendant from judgment entered 2 February 2012 by Judge Paul C. Ridgeway in Superior Court, Person County. Heard in the Court of Appeals 14 November 2012.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Irons & Irons, P.A. by Ben G. Irons, II, for defendant-appellant.

STROUD, Judge.

I. Factual Background

Abdul Hassan Jamaal Hoff (“defendant”) was indicted on 11 September 2010 for burglary in the first degree. The case went to jury trial and the jury returned a verdict of guilty. Defendant gave notice of appeal in open court. The facts presented at trial were as follows:

In the early morning of 8 October 2010, Mr. Robert Clayton was asleep in his home when he heard movement in the house where he lived alone. He saw a light shining on his ceiling and suspected that someone had broken into his house. Mr. Clayton grabbed his gun, fired one shot “down the hall,” and turned on the light in his bathroom, where he saw a black male in a hooded coat standing by his commode. Mr. Clayton then pointed his gun at the intruder and said “I ought to shoot you right in the belly.” The intruder said that he was in the wrong house and that “you shot my brother.” The intruder ran and left the house when Mr. Clayton grabbed his phone to call the police.

When the police arrived on the scene they found a broken sliding basement window, which they discovered was the entry point for the

STATE v. HOFF

[224 N.C. App. 155 (2012)]

intruder. An investigator from the Raleigh/Wake County City-County Bureau of Identification (CCBI) found a set of fingerprints in “excellent” condition on the outside of an adjoining window and ran them through the FBI fingerprint database, which returned several possible matches, including defendant. The investigator then compared the fingerprints collected at Mr. Clayton’s house with defendant’s and found that they were a match.

Defendant moved to dismiss the burglary charge on the ground that the State failed to establish that defendant was the man who broke into Mr. Clayton’s house. The trial court denied defendant’s motion. Defendant presented no evidence, but renewed his motion to dismiss at the close of all evidence, which was denied again. Defendant now appeals from the jury’s verdict of guilty as to burglary in the first degree.

II. Motion to Dismiss

[1] Defendant first argues on appeal that the trial court erred in denying his motion to dismiss the charge against him because the State failed to present substantial evidence identifying him as the perpetrator of the charged crime. For the following reasons, we disagree.¹

A. Standard of Review

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. Lopez, ___ N.C. App. ___, ___, 723 S.E.2d 164, 171-72, *disc. rev. denied*, ___ N.C. ___, ___ S.E.2d ___ (2012).

B. Substantial evidence of defendant as perpetrator

1. Defendant does not contest the lack of evidence as to the required intent or any other essential element for burglary in the first degree. Therefore, we consider that argument abandoned. N.C.R. App. P. 28(b).

STATE v. HOFF

[224 N.C. App. 155 (2012)]

Defendant contends that the fingerprint evidence alone is insufficient to identify him as the perpetrator and that the trial court erred in denying his motion to dismiss. “Fingerprint evidence, standing alone, is sufficient to withstand a motion for nonsuit only if there is *substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.” *State v. Irick*, 291 N.C. 480, 491-92, 231 S.E.2d 833, 841 (1977) (citations and quotation marks omitted) (emphasis in original).

Here, there was evidence other than fingerprints that defendant was the perpetrator. Specifically, the State claims that Mr. Clayton identified defendant at trial as the intruder on the night in question. Defendant counters that Mr. Clayton could not actually identify him as the intruder. The question, then, is whether Mr. Clayton’s in-court identification constitutes other evidence identifying defendant as the perpetrator.

An in-court

identification of the perpetrator of a crime is not inadmissible because the witness is not absolutely certain of the identification, so long as the witness had a reasonable possibility of observation sufficient to permit subsequent identification. Such uncertainty goes to the credibility and weight of the testimony, and it is well established that the credibility, probative force, and weight of the testimony are matters for the jury.

State v. Moses, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999) (citations, quotation marks, and brackets omitted).

The prosecutor and Mr. Clayton had the following convoluted exchange:

[Prosecutor]: All right. Now, later, were you shown a picture of how Mr. Hoff looked as of October of 2010?

[Mr. Clayton]: Yes. I seen a picture.

[Prosecutor]: And before we came in here today I asked you when you looked at it, um, whether or not it was consistent with the person you saw in your house that morning.

[Mr. Clayton]: No. Those pictures don’t look like, you know, him then. He didn’t have no glasses or nothing.

STATE v. HOFF

[224 N.C. App. 155 (2012)]

[Prosecutor]: So, in terms of the appearance, the defendant is now wearing glasses and the hair doesn't look the same as back then?

[Mr. Clayton]: No.

....

[Prosecutor]: Is the defendant's appearance from his picture back in October of 2010 consistent with the person you saw in your house?

[Mr. Clayton]: Well, he's a little bit heavier now than he was then.

....

[Prosecutor]: Mr. Clayton, I'm handing you what has been marked as state's exhibit number 1. Do you see the person, Mr. Hoff, in this photograph?

[Mr. Clayton]: Well, he looks more like it than he do now.

Then, the prosecutor asked Mr. Clayton to compare the picture of defendant to the intruder, but Mr. Clayton did not directly answer his question.

[Prosecutor]: So, in terms of the picture of Mr. Hoff in state's exhibit number 1, does that resemble the person that was in your house?

[Mr. Clayton]: Well, he had his hood on and all. When I throwed (sic) that gun on him, he probably turned a little bit whiter than what he is there.

[Prosecutor]: And you say how he looked in October of 2010 is different than how is today sitting in the courtroom. Is that right?

[Mr. Clayton]: Yes.

[Prosecutor]: And you can identify that you've seen and looked at this picture before, state's exhibit number 1, is Mr. Hoff?

[Mr. Clayton]: Yes.

Although this testimony is far from clear, taken in the light most favorable to the State, it could be understood that Mr. Clayton identi-

STATE v. HOFF

[224 N.C. App. 155 (2012)]

fied defendant as the man in his house on the night in question.² The prosecutor asked, “Is the defendant’s appearance from his picture back in October of 2010 consistent with the person you saw in your house?” Mr. Clayton responded, “Well, he’s a little bit heavier now than he was then.” Implied in this answer is that defendant was the man in Mr. Clayton’s home, though some details of his appearance at trial differed both from the booking photograph taken of defendant in October 2010 and from that of the man Mr. Clayton saw in his house.

Defendant points to Mr. Clayton’s testimony on cross examination as indicating that Mr. Clayton could not, in fact, identify defendant as the burglar. Defense counsel attempted to clarify Mr. Clayton’s earlier testimony and challenged his ability to positively identify defendant as the perpetrator:

[Defense Counsel]: And did you hear the statement of [the prosecutor] about the fact that, if that’s the case, that you are not absolutely sure that that individual is my client. Is that fair to say, Mr. Clayton?

[Mr. Clayton]: Well, I’m not sure. Nah. It’s a big difference. A year from now a person will change.

[Defense Counsel]: But the person that was in your home that you allegedly had a conversation with, you can’t positively identify that person as my client, can you?

[Mr. Clayton]: No.

On the whole, Mr. Clayton’s testimony was convoluted and self-contradictory. “As a general rule, the credibility of witnesses and the proper weight to be given their identification testimony is a matter for jury determination.” *State v. Turner*, 305 N.C. 356, 362, 289 S.E.2d 368, 372 (1982) (citations omitted). Juries are given this vital role because, like other fact finders, they are able “to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.” *Balawejder v. Balawejder*, ___ N.C. App. ___, ___, 721 S.E.2d 679, 689 (2011) (citation and quotation marks omitted). “This rule does not apply, however, where the only evidence identifying

2. Defendant does not raise any argument that the pretrial identification procedures used, if any, were impermissibly suggestive. See *State v. Green*, 296 N.C. 183, 187-89, 250 S.E.2d 197, 200-201 (1978) (discussing the different rules applicable to pre-trial and in-court identifications).

STATE v. HOFF

[224 N.C. App. 155 (2012)]

defendant is inherently incredible because of undisputed facts, clearly established by the state's evidence, as to the physical conditions under which the alleged observation occurred." *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967).

In *Miller*, the witness was more than 286 feet from the perpetrator during a nighttime encounter. *Id.* at 732, 154 S.E.2d at 905. Although the area was well-lit, the Supreme Court noted that "it is apparent that the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the guilty of such person to the jury." *Id.*

Here, the undisputed facts regarding the physical conditions of the encounter between Mr. Clayton and the intruder do not render his identification inherently incredible. Although it is unclear how far away Mr. Clayton was, the entire interaction between him and the intruder took place in the space between his bedroom and bathroom—certainly not the 286 feet found in *Miller*. There is no evidence that the burglar's face was entirely covered with a mask, although he was wearing a hooded jacket. Further, after shooting once, Mr. Clayton turned on his light and had a brief conversation with the intruder, giving Mr. Clayton a clear opportunity to see the intruder. Thus, although his testimony was not clear and unequivocal, we hold that Mr. Clayton's testimony identifying defendant as the man he saw in his house in October 2010 is not inherently incredible.

Therefore, Mr. Clayton's in-court identification of defendant as the intruder constitutes some evidence other than defendant's fingerprints identifying him as the perpetrator and the *Irick* rule is inapplicable. *See Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841 ("Fingerprint evidence, *standing alone*, is sufficient to withstand a motion to dismiss . . ." (emphasis added)). Taken in the light most favorable to the State, the eyewitness identification, Mr. Clayton's testimony that defendant had never been permitted access to the home, and the fingerprint evidence together constitute substantial evidence identifying defendant as the perpetrator. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss.

III. Ineffective Assistance of Counsel

[2] Defendant next argues that he received prejudicial ineffective assistance of counsel when his trial counsel did not move to exclude the fingerprint evidence against him or cross examine the State's fingerprint expert on the reliability of his methodology. We disagree.

STATE v. HOFF

[224 N.C. App. 155 (2012)]

A. Standard of Review

“To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed. 2d 116 (2006).

B. Analysis

Defendant argues that there was a sound basis to object to the admissibility of the fingerprint evidence because the reliability of the “ACE-V” methodology used has been questioned in a report by the National Academy of Science (“NAS”) and that failure to object or cross-examine the State’s expert using that report constitutes prejudicial ineffective assistance of counsel.

Our Supreme Court has long recognized the validity of fingerprint analysis. *See Irick*, 291 N.C. at 488-89, 231 S.E.2d at 839. “The only limitation [the Supreme Court] has imposed on the admissibility of fingerprint comparisons to prove the identity of the perpetrator of a crime is a requirement that the testimony be given by an expert in fingerprint identification.” *Id.* at 488. This well-established precedent is controlling on defendant’s admissibility argument.

Here, the State’s fingerprint expert was an experienced fingerprint analyst who had undergone substantial training in the field and had collected over a thousand latent prints. The expert testified about his methodology in detail and explained how he compared defendant’s fingerprints with those found on Mr. Clayton’s window. Further, although defendant’s trial counsel did not cross-examine the fingerprint expert regarding the reliability of his methodology, he did cross-examine the State’s expert on the completeness of his investigation.

STATE v. HOFF

[224 N.C. App. 155 (2012)]

We find both of defendant's arguments unconvincing. Given our Supreme Court's long-standing acceptance of the reliability of fingerprint evidence, defendant would not have been entitled to exclude the expert testimony and defendant cannot show prejudice from the failure of trial counsel to object. *See Irick*, 291 N.C. at 488, 231 S.E.2d at 839. Further, "[t]he decisions on what witnesses to call, whether and *how to conduct cross-examination*, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." *State v. Montford*, 137 N.C. App. 495, 503, 529 S.E.2d 247, 253 (2000) (citation, quotation marks, and ellipses omitted) (emphasis in original). We cannot say that failure to cross-examine an expert using one particular report constitutes ineffective assistance of counsel.

There is no reasonable probability that the outcome of the trial would have been different had counsel objected to the admission of the fingerprint evidence or cross-examined the expert using the NAS report. Defendant therefore cannot show that he received prejudicial ineffective assistance of counsel. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

IV. Conclusion

We hold that the trial court did not err in denying defendant's motion to dismiss the charge of first degree burglary for insufficient evidence identifying defendant as the perpetrator. We also hold that defendant did not receive prejudicial ineffective assistance of counsel.

NO ERROR.

Judges ELMORE and BEASLEY concur.

STATE v. JAMES

[224 N.C. App. 164 (2012)]

STATE OF NORTH CAROLINA

v.

JOHNNY LEE JAMES

No. COA12-540

Filed 4 December 2012

1. Evidence—opinion testimony—weight of chair—sufficient support—helpful—province of jury not invaded

The trial court did not err in an assault with a deadly weapon case by overruling defendant's objection to the opinion testimony of Deputy Causey as to the weight of the chair alleged to be a deadly weapon. Deputy Causey's observation of the wooden kitchen table chairs and of defendant throwing one chair in an overhand motion, "like a baseball," was sufficient to support Deputy Causey's opinion that the chair weighed approximately ten pounds. The testimony was likely helpful and did not impermissibly intrude upon the province of the jury.

2. Assault—deadly weapon—chair—attained character of deadly weapon

The trial court did not err in an assault with a deadly weapon case by denying defendant's motion to dismiss for insufficient evidence. There was sufficient evidence to determine that the chair defendant wielded attained the character of a deadly weapon based upon the manner of its use.

Appeal by defendant from judgment entered 14 October 2011 by Judge Robert T. Sumner in Rowan County Superior Court. Heard in the Court of Appeals 9 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly A. D'Arruda, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where opinion testimony on the weight of a chair at the crime scene was likely helpful and did not impermissibly intrude upon the province of the jury, the trial court did not err in overruling defendant's objection. Also, where there was sufficient evidence to determine that the chair attained the character of a deadly weapon based

STATE v. JAMES

[224 N.C. App. 164 (2012)]

upon the manner of its use, we find no error in the trial court's denial of defendant's motion to dismiss the charge of assault with a deadly weapon on a government official.

On 28 August 2010, Deputy Matthew Causey of the Rowan County Sheriff's Department responded to a call reporting a domestic disturbance near the intersection of Woodsdale Street and Crystal Crossing. Arriving at the scene, the deputy was on the lookout for a woman being chased by a man, when he observed the victim hiding in the bushes. The victim exited the bushes, walking toward the law enforcement officer until she observed a van appear several blocks away. "[S]he said that's him and jumped from the roadway back into the bushes." After the van turned off on a side street, the victim again exited the bushes. Deputy Causey described her as having red marks across her neck and on her arms. The victim stated that she had been choked and that her assailant had hit and chased her. Deputy Causey took the victim back to her residence to retrieve some clothes. While the victim was inside gathering her things, Deputy Causey stood just outside the front door. Deputy Causey observed a man, defendant Johnny James, walking quickly toward the residence, yelling: "oh hell no"; and "effing police." When he reached a point twenty feet from the residence, Deputy Causey smelled alcohol. Upon reaching the deputy, defendant, outweighing the deputy by one hundred pounds, shoved the deputy out of the way and ran into the residence. Deputy Causey engaged defendant just outside of the kitchen area.

Deputy Causey informed defendant that he was under arrest for assaulting an officer. Deputy Causey testified that defendant stated, "F you. You're going to have to effing kill me, mother effer." At that point, Deputy Causey and defendant engaged in a physical altercation. During the altercation, Deputy Causey was able to set off an alarm indicating that he was in need of assistance. At one point, defendant and Deputy Causey stood on opposite sides of a kitchen table. Defendant placed his hand in the front pocket of his pants and said, "I got something for you M effer. I'm going to blow your brains out right here and you better kill me or I'm going to kill you M effer, yeah." Despite defendant's threat, Deputy Causey determined that based on the lack of a bulge in defendant's pants, defendant was not carrying a gun. Holstering his own gun, Deputy Causey pulled out his taser. Defendant approached, picked up a chair from the kitchen table and threw it in an overhand motion at Deputy Causey. Deputy Causey was able to evade the chair and again engaged defendant in a physical confrontation. Soon after striking defendant with his baton, defendant surrendered.

STATE v. JAMES

[224 N.C. App. 164 (2012)]

On 27 September 2010, indictments were entered against defendant in Rowan County Superior Court on charges of first-degree kidnapping, assault inflicting physical injury by strangulation, assault on a government officer, and assault with a deadly weapon on a government officer. A trial before a jury was commenced during the 10 October 2011 criminal session in Rowan County Superior Court before presiding Judge Robert T. Sumner. Following the trial, the jury found defendant guilty of false imprisonment, assault on a government officer, and assault with a deadly weapon on a government officer. Defendant appeals.

On appeal, defendant questions whether the trial court erred by (I) overruling defendant's objection to the opinion testimony of Deputy Causey; and (II) denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government officer.

I

Defendant argues that the trial court erred by overruling his objection to the opinion testimony of Deputy Causey as to the weight of the chair alleged to be a deadly weapon. Defendant contends that there was a lack of foundation to support any inference that Deputy Causey had personal knowledge of the weight of the chair thrown at him and that Deputy Causey's testimony as to the chair's weight impermissibly invaded the province of the jury to make that determination. We disagree.

"The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (citation and quotations omitted). But, "[e]ven if the admission of [evidence] was error, in order to reverse the trial court, the appellant must establish the error was prejudicial. If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred." *Bodden*, 190 N.C. App. at 510, 661 S.E.2d at 26 (citing N.C. Gen. Stat. § 15A-1443(a) (2007) (defendant must show there is a reasonable possibility a different result would have occurred but for the error)).

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or infer-

STATE v. JAMES

[224 N.C. App. 164 (2012)]

ences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-701 (2011); *see State v. Barnhill*, 166 N.C. App. 228, 232, 601 S.E.2d 215, 218 (2004) (“Absolute accuracy, however, is not required to make a witness competent to testify” (citation and quotations omitted)).

The chair was not presented as evidence at trial, but pictures of the kitchen chairs taken at the crime scene were introduced into evidence and published to the jury. Deputy Causey testified as follows:

A. [W]hen I was pulling my Taser out he was coming around this side of the table (indicating) and grabbed one of these chairs (indicating) by the top. You know, just reaching his hand over there and grab it. So as soon as I shot my Taser he threw the chair right at me.

. . .

Q. So what part of your body was the chair coming at?

A. My head.

. . .

Q. But you’re sure one of those chairs, those wooden chairs is what was thrown at you?

A. Oh, yes.

Q. And you say he picked it up I guess with his hand underneath the arch?

A. Right, yeah. Right underneath this arch (indicating), you know, you can just slide your hand under there and grab a hold of the top rail and slung it over his shoulder.

Q. Threw it overhanded like a baseball?

A. Right.

Q. And at the point that he threw the chair at you how far away were you from him approximately?

A. I wouldn’t give it any more than 15 feet. Probably weren’t any closer than 10 feet. So I’d say 10, 15 feet.

STATE v. JAMES

[224 N.C. App. 164 (2012)]

Deputy Causey further provided the following responses.

Q. Let's talk about the chair. Would you estimate about how much that chair weighs?

A. Probably about ten pounds.

[Defense counsel]: Well, I'm going to object unless he has a foundation for that.

THE COURT: Overruled.

[Defense counsel]: Might we be heard at the bench?

THE COURT: Yes.

(Counsel approached the bench.)

[The State]: Is that overruled, Your Honor?

THE COURT: Yes, objection overruled.

Q. Could you repeat that, sir?

A. I estimated about ten pounds.

Q. And it looks like it's a wooden chair.

A. That's correct.

Q. And actually you're able to see that the chair, one of the chairs is broken, correct?

A. Yes, sir.

Q. What was it internally composed of?

A. Wood. It was splintered.

We hold that Deputy Causey's observation of the wooden kitchen table chairs and of defendant throwing one chair in an overhand motion, "like a baseball," was sufficient to support Deputy Causey's opinion that the chair weighed approximately ten pounds. Furthermore, as the chair was not introduced at trial, Deputy Causey's testimony in conjunction with the photo of the kitchen chairs published to the jury, was likely helpful to the jury in reaching their result and did not impermissibly intrude upon the province of the jury. Accordingly, defendant's argument is overruled.

STATE v. JAMES

[224 N.C. App. 164 (2012)]

II

Defendant argues that the trial court erred in failing to grant his motion to dismiss the charge of assault with a deadly weapon on a government officer for insufficient evidence that the chair amounted to a deadly weapon. We disagree.

“It is well settled that in ruling on a motion to dismiss, the trial court must 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. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007) (citation and quotations omitted). “Substantial evidence is evidence which a reasonable mind could conclude to be adequate to support a conclusion.” *State v. Batchelor*, 167 N.C. App. 797, 800-01, 606 S.E.2d 422, 424 (2005) (citation omitted). “[I]n ruling on a motion to dismiss[] [t]he evidence is to be considered in the light most favorable to the State[, and] the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom” *State v. Patino*, 207 N.C. App. 322, 327, 699 S.E.2d 678, 682 (2010) (citation omitted).

North Carolina General Statutes, section 14-34.2 provides that “an individual is guilty of felony assault with a deadly weapon on a government official where the individual: (i) commits an assault; (ii) with a firearm or other deadly weapon; (iii) on a government official; (iv) who is performing a duty of the official’s office.” *State v. Smith*, 186 N.C. App. 57, 65, 650 S.E.2d 29, 35 (2007) (brackets omitted). Defendant challenges only that there was insufficient evidence to support the finding that the kitchen table chair was a deadly weapon within the context of section 14-34.2.

The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use . . . its alleged deadly character is one of fact to be determined by the jury.

Batchelor, 167 N.C. App. at 800, 606 S.E.2d at 424 (citation omitted). See *State v. Lane*, 1 N.C. App. 539, 162 S.E.2d 149 (1968) (holding no

STATE v. JAMES

[224 N.C. App. 164 (2012)]

error in the denial of the defendant's motion for nonsuit on the charge of assault with a deadly weapon, where the defendant threw a liquor bottle at the victim from a distance of twenty-five feet striking him in the face. "In order to be a deadly weapon . . . it is sufficient if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the weapon is used." (citation omitted)).

Here, the jury was presented with evidence that defendant outweighed Deputy Causey by over one hundred pounds. When he attempted to arrest defendant and take him into custody, Deputy Causey testified that defendant stated, "F" you. You're going to have to effing kill me, mother effer." Deputy Causey testified that shortly thereafter, defendant stated, "I got something for you M effer. I'm going to blow your brains out right here and you better kill me or I'm going to kill you M effer, yeah." As Deputy Causey prepared to fire a taser, defendant came around the kitchen table, picked up a table chair and from a distance of ten to fifteen feet, threw it with an overhand motion at Deputy Causey's head, almost hitting him. After, subduing defendant, placing him under arrest, and confining him to the back of a law enforcement vehicle, Deputy Causey was able to survey the damage to the residence. Though he could not identify the exact chair that was thrown at him, Deputy Causey noted that there were several broken chairs and one that was smashed. Photos of the crime scene were published to the jury.

We hold that given the manner of its use, the jury had sufficient evidence to determine that the kitchen table chair defendant wielded attained the character of a deadly weapon. *Batchelor*, 167 N.C. App. at 800, 606 S.E.2d at 424. Therefore, the trial court did not err in denying defendant's motion to dismiss. And, accordingly, defendant's argument is overruled.

No error.

Judges McGEE and THIGPEN concur.

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

STATE OF NORTH CAROLINA

v.

GARLAND CHRISTOPHER MITCHELL

No. COA12-499

Filed 4 December 2012

1. Search and Seizure—search of automobile—probable cause—passenger’s marijuana

The discovery of marijuana on a passenger in a vehicle supported the belief that the automobile could contain contraband and supplied probable cause for a search of the vehicle. The trial court’s conclusion that the officers’ search of the rental car after a traffic stop did not violate defendant’s Fourth Amendment rights was correct.

2. Constitutional Law—effective assistance of counsel—failure to move to dismiss—no prejudice

Defendant received effective assistance of counsel in a prosecution for possession of a firearm by a felon where his trial counsel did not move for a dismissal at the close of all the evidence. The firearm was found in a purse in the glovebox of the car defendant was driving rather than in defendant’s actual possession, but there was evidence that defendant controlled the vehicle and that he was aware of its contents. Defendant did not meet his burden of showing prejudice.

3. Evidence—officer’s identification of marijuana—visual and olfactory

The trial court did not err in a felonious possession of marijuana prosecution by admitting an officer’s visual and olfactory identification of the marijuana. Marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification.

4. Evidence—prior crimes or bad acts—admission of prior convictions—not plain error

There was no plain error in a prosecution for felonious possession of marijuana, possession of a firearm by a felon, and other offenses where the prosecutor was allowed to ask defendant’s witnesses about defendant’s prior misdemeanor assault convictions. Defendant’s prior conviction for armed robbery, a felony,

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

had already been properly admitted into evidence; it is highly improbable that mention of his prior misdemeanor assaults changed the jury's verdict.

Appeal by defendant from judgments entered 4 October 2011 and order entered 14 October 2011 by Judge J.B. Allen, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 14 November 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amanda P. Little, for the State.

James N. Freeman, Jr., for defendant-appellant.

STROUD, Judge.

I. Factual Background

On 31 May 2011, Garland Mitchell (“defendant”) was indicted for felonious possession of marijuana, possession of a firearm by a felon, being a habitual felon, and misdemeanor possession of drug paraphernalia. Defendant pleaded guilty to possession of drug paraphernalia, but took the remaining charges to a jury trial. The trial court bifurcated the trial, separating the habitual felon charge from the other two. The jury returned verdicts of guilty as to both the felonious marijuana possession charge and possession of a firearm by a felon.

The evidence presented by the state showed that on 26 March 2011, defendant and Ms. Harris, his girlfriend, were traveling in a rental car along Interstate 85/40 near Graham. Officer Lovett, a K-9 Officer of the Graham Police Department, stopped defendant for speeding. When he asked defendant for his license, defendant produced an identification card, not a driver's license. After looking up defendant's information, Officer Lovett discovered that defendant's license was revoked. At that point, Officer Lovett asked defendant and Ms. Harris to step out of the car. Officer Lovett informed them that he intended to write defendant a ticket for driving with a revoked license and let them go, but would walk his K-9 around the car first to verify that they had no contraband. Defendant then told Ms. Harris to take the “blunt” out of her pants, which Officer Lovett identified as a burnt marijuana cigarette.

After retrieving the blunt, Officer Lovett began to search the defendant's vehicle. Officer Edwards, who had responded to the scene, kept watch over defendant and Ms. Harris. Defendant indi-

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

cated to him that there was a gun in the glove compartment of the vehicle and then Officer Edwards informed Officer Lovett of that fact. Officer Lovett discovered a handgun in a purse in the passenger-side glove compartment and discovered 79.3 grams of marijuana inside a piece of luggage filled with men's clothing located in the trunk.

While Officer Lovett searched the car, Officer Edwards received defendant's consent to search his person. During that search, Officer Edwards found a small black scale with flakes of marijuana on it in defendant's vest pocket and approximately \$2,320 in U.S. currency in his pants pocket.

Defendant moved to suppress the marijuana found in the car's trunk and exclude any opinion testimony identifying the substance found in the car and in Ms. Harris' "blunt" as marijuana. The trial court denied defendant's motion to suppress by an order entered 14 October 2011 and, at trial, denied defendant's motion to exclude testimony identifying the substance as marijuana. Defendant's trial counsel renewed her objections to each piece of evidence when the State moved to admit it at trial. After the jury returned verdicts of guilty to both felonious possession of marijuana and possession of a firearm by a felon, defendant pleaded guilty to being a habitual felon and was sentenced to 58-79 months in the Department of Correction. Defendant gave timely notice of appeal in open court.

II. Search of Defendant's Vehicle

[1] Defendant first challenges the police officers' search of the rental car's trunk, claiming that because defendant and Ms. Harris were not under arrest and not threatening the officers, there was no "exigency" to justify the warrantless search. As the State notes in its brief and the trial court noted in its suppression hearing, this search was not a search incident to arrest, to which defendant's arguments might be better suited, but rather was a warrantless search of a motor vehicle for which the State claims the officers had probable cause.

A. Standard of Review

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. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Eaton, ___ N.C. App. ___, ___, 707 S.E.2d 642, 644-45 (quotation marks and citation omitted), *disc. rev. denied*, 365 N.C. 202, 710 S.E.2d 25 (2011).

B. Analysis

Defendant does not challenge any of the trial court's factual findings, so they are binding on appeal. *Id.* The only question before us on this issue is whether the trial court's conclusion that the officers' search of the rental car did not violate defendant's Fourth Amendment rights was correct.

The trial court found the following as fact: Officer Lovett stopped defendant for speeding.¹ When Officer Lovett told defendant and Ms. Harris that his dog would walk around the vehicle quickly to ensure that they were not transporting drugs defendant indicated to police that Ms. Harris had a "blunt", i.e. a marijuana cigarette rolled in tobacco, which she then removed from her pants. After discovering the marijuana, Officer Lovett searched the rental car and found 79.3 grams of marijuana in the trunk. The trial court concluded that the above gave Officer Lovett probable cause to search the car. We agree.

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825, 72 L.Ed.2d 572, 594 (1982) (quotation marks and citation omitted). One such exception is the automobile exception. *See State v. Isleib*, 319 N.C. 634, 638-39, 356 S.E.2d 573, 576-77 (1987) (laying out the automobile exception to the normal warrant requirement). "A police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials." *State v. Holmes*, 109 N.C. App. 615, 621, 428 S.E.2d 277, 280 (quotation marks, citation, and ellipses omitted), *disc. rev. denied*, 334 N.C.

1. Defendant does not challenge the initial stop. Therefore, we consider any objection thereto abandoned. N.C.R. App. P. 28(a).

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

166, 432 S.E.2d 367 (1993). “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Ross*, 456 U.S. at 825, 72 L.Ed.2d at 594.

Here, the discovery of marijuana on Ms. Harris, a passenger in the vehicle, “support[s] a reasonable belief that the automobile carries contraband materials.” *Holmes*, 109 N.C. App. at 621, 428 S.E.2d at 280. We have held that the mere odor of marijuana or presence of clearly identified paraphernalia constitutes probable cause to search a vehicle. *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) (holding that the Court of Appeals properly concluded that the odor of marijuana emanating from defendant’s vehicle constituted probable cause to search the vehicle); *State v. Martin*, 97 N.C. App. 19, 28, 387 S.E.2d 211, 216 (1990) (finding probable cause based on apparent drug paraphernalia seen between the front seats). Clearly if the odor of marijuana alone is sufficient to constitute probable cause, seeing marijuana constitutes probable cause as well. Therefore, Officer Lovett could legally search wherever marijuana might reasonably be found, including the trunk and the luggage therein. *See Ross*, 456 U.S. at 825, 72 L.Ed.2d at 594; *Martin*, 97 N.C. App. at 28, 387 S.E.2d at 216 (finding probable cause as to drug offense based only on paraphernalia “justified the search of defendant’s car trunk and its contents.”). Defendant’s argument is therefore without merit.

III. Ineffective Assistance of Counsel

[2] Defendant next argues that he received ineffective assistance of counsel when his trial counsel failed to make a motion to dismiss at the close of all evidence. He contends that he was prejudiced by this error because there was insufficient evidence of possession to go to the jury on the charge of possession of a firearm by a felon. We disagree.

The United States Supreme Court has set forth the test for determining whether a defendant received constitutionally ineffective assistance of counsel, which our Supreme Court expressly adopted in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to the two part test,

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

State v. Blackmon, 208 N.C. App. 397, 400, 702 S.E.2d 833, 836 (2010).

To show that he was prejudiced by trial counsel's failure to move for dismissal at the close of all evidence, defendant must show that he would have been entitled to a dismissal had the motion been made. *See id.*

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (quotation marks and citations omitted).

Defendant was charged with possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1 (2009). There are two elements to 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, *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). It is uncontested that defendant

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

had been convicted of a felony prior to the date in question. Therefore, the only element we must consider is 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). Here, defendant did not actually possess the firearm because it was not found in his physical custody, but in a purse in the glovebox of the car he was driving. Therefore, the State was required to prove that defendant had the “power and intent to control its disposition.” *Id.*

[A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury.

Best, ___ N.C. App. at ___, 713 S.E.2d at 562 (citation and quotation marks omitted; emphasis added).

Here, the evidence showed that defendant was driving the rental car when Officer Lovett initiated the traffic stop. Further, defendant’s interactions with the police showed that he was aware of the contents of the vehicle. He pointed the officers to the marijuana “blunt” in Ms. Harris’ pants and stated to Officer Edwards that there was a gun in the glovebox, indicating he was aware of its presence, despite the fact that it was found in Ms. Harris’ purse.

Defendant highlights Ms. Harris’ testimony that defendant had only been driving a short time and that the gun was hers and argues that he never actually mentioned the gun to Officer Edwards.² However, in reviewing a motion to dismiss, the court resolves all

1. We note that there was no evidence that the gun in question was registered to Ms. Harris.

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

“contradictions or conflicts in the evidence . . . in favor of the State” and does not consider “evidence unfavorable to the State.” *Miller*, 363 N.C. at 98, 678 S.E.2d at 594 (quotation marks and citations omitted). Therefore, the trial court could not consider this evidence in deciding a motion to dismiss.

Defendant argues that this case is controlled by *State v. Alston*. In *Alston*, the defendant was convicted of possession of a firearm by a felon. *Alston*, 131 N.C. App. at 515, 508 S.E.2d at 316. The defendant was a passenger in a car being driven by his wife. *Id.* The police found a gun, registered to his wife, on the center console in between the defendant and his wife. *Id.* at 515-16, 508 S.E.2d at 316-17. The only evidence linking the defendant to the gun was a statement by one of the children in the car that “Daddy’s got a gun.” *Id.* at 515, 508 S.E.2d at 316. That statement was not admitted for the truth of the matter asserted, so the court could not consider it. *Id.* at 519, 508 S.E.2d at 319 n.1. This Court found that because the evidence showed no more than mere presence, there was insufficient evidence to support an inference of possession. *Id.* at 519, 508 S.E.2d at 319.

The present case is different from *Alston* in one important respect. Defendant was driving the vehicle here, whereas the defendant in *Alston* was only a passenger. *See id.* at 515, 508 S.E.2d at 316. A driver generally has power to control the vehicle he is driving, even if it not owned by the driver. *Best*, ___ N.C. App. at ___, 713 S.E.2d at 562. “[P]ower to control” the vehicle is sufficient evidence from which it is reasonable to infer possession. *Id.* Further, defendant told Officer Edwards that there was a gun in the glovebox. Thus, there was evidence before the trial court that defendant controlled the vehicle and that he was aware of the contents thereof. Unlike in *Alston*, there is other sufficient incriminating evidence here from which to reasonably infer constructive possession.

As a result, defendant cannot meet his burden to show prejudice from his trial counsel’s failure to move to dismiss the possession of a firearm by a felon charge. *See Blackmon*, 208 N.C. App. at 400, 702 S.E.2d at 836. This argument is also overruled.

IV. Visual Identification of Substance as Marijuana

[3] At trial, Officer Lovett identified the substance found in the trunk of defendant’s rental car and in the “blunt” handed over by Ms. Harris as marijuana based on his visual and olfactory assessment, over the objection of defendant. Defendant’s trial counsel objected to the introduction of this evidence without scientific testing. Defendant

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

argues on appeal that the trial court erred in admitting this opinion testimony without scientific testing. “The trial court’s decision regarding what expert testimony to admit will be reversed only for an abuse of discretion.” *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005).³

Our decision in this case is governed by this Court’s prior decision in *State v. Ferguson*, 204 N.C. App. 451, 694 S.E.2d 470 (2010). In *Ferguson*, we addressed precisely the same argument that defendant makes here—that our Supreme Court’s holding in *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), and this Court’s decision in *State v. Ward*, 199 N.C. App. 1, 681 S.E.2d 354 (2009), *aff’d*, 364 N.C. 133, 694 S.E.2d 738 (2010), requiring scientific testing for cocaine and prescription pills respectively, applies to marijuana as well. *Ferguson*, 204 N.C. App. at 457, 694 S.E.2d at 475.⁴ We specifically noted that marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification. *Id.* In keeping with a long line of cases, we held in *Ferguson* that the State is not required to submit marijuana for chemical analysis. *Id.* We are bound by this Court’s prior decision and apply it here. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Officer Lovett testified at trial that he had served as a police officer for six years, been involved in numerous marijuana investigations, and received training in the identification of marijuana both in basic law enforcement training and in specialized training as a K-9 officer. He then identified the substance found in both the “blunt” and in the rental car’s trunk as marijuana based on its smell and appearance. Such an opinion is proper and the trial court did not abuse its discretion in allowing Officer Lovett’s opinion testimony identifying the substance as marijuana. *See Ferguson*, 204 N.C. App. at 457, 694 S.E.2d at 475.

3. We note that in this case Officer Lovett was not proffered as an expert. However, where “a defendant fails to request that a witness be properly qualified as an expert, such a finding is deemed implicit in the trial court’s admission of the challenged testimony.” *State v. Ferguson*, 204 N.C. App. 451, 456-57, 694 S.E.2d 470, 475 (2010) (citation and quotation marks omitted).

4. At the time this Court was considering *Ferguson*, *Ward* had not yet been reviewed by our Supreme Court. *See Ferguson*, 204 N.C. App. at 457, 694 S.E.2d at 475 (citing *Ward*, 199 N.C. App. 1, 681 S.E.2d 354 (2009)). However, this Court’s holding in *Ward*—that prescription pills identified by expert opinion must be subjected to chemical analysis—was affirmed by the Supreme Court. *Ward*, 364 N.C. at 148, 694 S.E.2d at 747-48.

STATE v. MITCHELL

[224 N.C. App. 171 (2012)]

V. Mention of Defendant's Prior Convictions

[4] Finally, defendant contends that it was plain error for the trial court to allow the prosecutor to ask defendant's witnesses whether they were aware of his prior misdemeanor convictions for assault by pointing a gun and assault with a deadly weapon before he testified and when the defendant's witnesses did not testify as to his character for being law-abiding or non-violent on direct examination.⁵

"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. Rollins*, ___ N.C. App. ___, ___, 725 S.E.2d 456, 463 (quotation marks and citation omitted), *app. dismissed*, ___ N.C. ___, 731 S.E.2d 415 (2012). Here, defendant's conviction for armed robbery, a felony, had already been properly admitted into evidence through introduction of the record of his conviction. We find it highly improbable that mention of his prior misdemeanor assaults changed the jury's verdict when evidence of greater crimes also involving use of a weapon was already properly before them. Thus, even assuming that it was error to admit that testimony, we find no plain error as to this issue.

VI. Conclusion

We affirm the trial court's order denying defendant's motion to suppress because the police officers had probable cause to search the entirety of the vehicle, including the trunk. We hold that defendant did not receive ineffective assistance of counsel, find no error in the trial court's decision to allow the police officers to identify the marijuana by visual identification, and find no plain error in the mention of defendant's prior convictions at trial.

ORDER AFFIRMED; NO ERROR IN JUDGMENT.

Judges ELMORE and BEASLEY concur.

5. There was some confusion at trial as to whether the defense witnesses had testified to defendant's character on direct. In fact, Ms. Harris did testify that the defendant was "wonderful", but his character for non-violence was first brought up by the State on cross-examination of Ms. Harris.

STATE v. REID

[224 N.C. App. 181 (2012)]

STATE OF NORTH CAROLINA

v.

DANIEL JOSEPH REID

No. COA12-340

Filed 4 December 2012

1. Constitutional Law—right to counsel—private counsel—appointed counsel

The trial court did not err in a trafficking in cocaine by possession case by allegedly failing to advise defendant of his right to private counsel. The trial court informed defendant of his right to be represented by counsel, including appointed counsel. Additionally, the trial court made thorough inquiry into defendant's concerns with his appointed counsel and appointed counsel's preparedness for trial. After this inquiry, the trial court appropriately determined appointed counsel was "reasonably competent" to represent defendant.

2. Criminal Law—jury instruction—entrapment

The trial court did not err in a trafficking in cocaine by possession case by failing to instruct the jury concerning entrapment. The entrapment defense was not a material aspect of the case because defendant pointed to no credible evidence that: (1) he would not have committed the crime except for law enforcement's persuasion, trickery or fraud, or (2) that the crime was the creative production of law enforcement authorities.

3. Appeal and Error—preservation of issues—no plain error review—not instructional or evidentiary error

Although defendant contended the trial court erred in a trafficking in cocaine by possession case by denying defendant's motion for disclosure of information about the confidential informants, this argument was not preserved at trial. Since it did not involve instructional or evidentiary error, it was not reviewed for plain error on appeal.

4. Search and Seizure—denial of motion to suppress—cocaine—warrantless stop and frisk—probable cause—plain feel doctrine

The trial court did not commit plain error in a trafficking in cocaine by possession case by denying defendant's motion to sup-

STATE v. REID

[224 N.C. App. 181 (2012)]

press cocaine. An officer had reasonable suspicion to conduct a warrantless stop and frisk of defendant after he received information from two reliable informants who provided information about defendant's criminal activity, location, and appearance. Further, the officer's search of defendant created probable cause for seizure of the cocaine under the "plain feel" doctrine.

Appeal by Defendant from judgment entered 28 January 2011 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 13 September 2012.

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

William D. Spence, for Defendant-appellant.

HUNTER, JR., Robert, N., Judge.

Daniel Joseph Reid ("Defendant") appeals from a judgment entered after a jury convicted him of trafficking in cocaine by possession pursuant to N.C. Gen. Stat. § 90-95(h)(3)(a) (2011). Defendant contends the trial court erred by (1) failing to advise him of his right to hire a private attorney; (2) denying his request for a jury instruction concerning entrapment; (3) failing to disclose the names of the confidential informants involved in the investigation and their communications with law enforcement officials; and (4) denying his motion to suppress evidence. Upon review, we find no error.

I. Facts & Procedural History

On 19 July 2010, Detective Pete McKeon ("McKeon"), a Raleigh Police detective, received a phone call from "Jim," a confidential informant who had in the past provided McKeon with reliable information leading to several drug arrests ("Jim" is a pseudonym used for reading clarity). Jim told McKeon that Defendant was obtaining cocaine in Winston-Salem and Greensboro and "purchasing large amounts of cocaine" to bring to the Raleigh area. Jim also gave McKeon Defendant's address in Raleigh and told him Defendant drove a white Ford pick-up truck. Following this tip, McKeon began surveillance of Defendant's residence. McKeon also searched DMV records. This search revealed a Ford pick-up truck was registered in Defendant's name. Over the next several weeks, McKeon observed Defendant at his residence. He also observed Defendant's pick-up truck in the driveway.

STATE v. REID

[224 N.C. App. 181 (2012)]

On 6 August 2010, McKeon received a phone call from “Ned,” a second informant who had also provided McKeon with reliable information in the past (“Ned” is a pseudonym used for reading clarity). Ned corroborated Jim’s information.

McKeon and Jim planned a fictitious drug deal during which Defendant would use Jim’s vehicle to obtain cocaine in Winston-Salem, meet at Jim’s hotel room in Durham, and then return to Raleigh with Jim to sell one ounce of cocaine to Jim’s friend. McKeon testified he planned to arrest Defendant with the cocaine prior to sale. McKeon asked Jim’s permission to place a GPS unit on Jim’s vehicle, and Jim consented.

Around noon on 9 August 2010, Jim called McKeon and told him Defendant was on his way to Jim’s Durham hotel room. Two hours later, Jim told McKeon that Defendant was now on his way to Winston-Salem in Jim’s vehicle. McKeon tracked Defendant’s trip to Winston-Salem via GPS. As planned, Defendant obtained cocaine in Winston-Salem and returned to Jim’s hotel room, where he showed Jim the cocaine.

However, Defendant suddenly decided to abandon the pre-arranged drug sale. Instead, he drove his pick-up truck to a friend’s apartment at 1301 Durlain Drive in Raleigh. Jim followed Defendant and gave the address to McKeon. He also told McKeon that Defendant’s pick-up truck was parked on the side of the apartment building.

Detective McKeon, Sergeant Core (“Core”), and Detective E. Gibney (“Gibney”) drove to 1301 Durlain Drive without a search warrant. As Jim predicted, they saw Defendant’s white Ford pickup truck parked at the side of the building. The officers waited, watching the truck. Twenty to thirty minutes after their arrival, Defendant exited the building and walked toward his truck. Once Defendant opened the truck’s door, McKeon, Core, and Gibney identified themselves as police officers and approached Defendant. Gibney detained Defendant and immediately smelled a very strong odor of marijuana. McKeon then began to frisk Defendant for weapons.

During the search, McKeon felt a “large bulge” in Defendant’s pocket. He testified that given his “training and experience,” he “knew exactly what it was once [he] felt it.” He said “[i]t was packaged like narcotics would be packaged.” He removed a white plastic grocery bag that contained two smaller plastic bags. The smaller bags were vacuum-sealed, which Gibney testified is a common technique

STATE v. REID

[224 N.C. App. 181 (2012)]

in the drug trade to mask the smell of drugs from police dogs. Gibney photographed the bag and placed it inside an evidence folder. McKeon then arrested Defendant for possession of cocaine and took him to the police station.

At the police station, Gibney and Detective Patchin packaged the evidence. The Raleigh Police Department then delivered the sealed package to the Wake County City-County Bureau of Identification (CCBI) laboratory. Irvin Lee Allcox, a forensic drug chemist with the CCBI, determined one of the bags contained 49.9 grams of cocaine and the other contained 32.5 grams of cocaine.

On 27 September 2010, Defendant was indicted for trafficking in cocaine by possession of 28 grams or more but less than 200 grams. N.C. Gen. Stat. § 90-95(h)(3)(a) (2011). Defendant was declared indigent and received court-appointed counsel. On 23 November 2010, Defendant filed motions to suppress the cocaine and to reveal the identity of the confidential informants. The trial court denied both of Defendant's motions on 21 January 2011.

Defendant was tried during the 27 January 2011 Criminal Session of the Superior Court of Wake County. Before the jury was impaneled, Defendant told the court he disapproved of his appointed counsel's trial strategy. The court inquired into these concerns:

[THE COURT:] Mr. Reid, you understand that you have a right to counsel. You've been found indigent. [Appointed counsel] has been appointed to represent you. What is going on now?

THE DEFENDANT: Well, you know, the motion hearing was a disaster. Unfortunately, [appointed counsel] didn't even bother to come talk to me about what our strategy was or anything like that.

...

THE COURT: . . . [A]s you know, indigent defendants do not have the right to select their lawyer. I do understand that you are dissatisfied with the ruling.

...

THE COURT: Are there any other issues that you want to bring to my attention that you feel like are reasons [appointed counsel] cannot represent you?

STATE v. REID

[224 N.C. App.]

THE DEFENDANT: Well, you know, he wants to move forward with no witnesses on my behalf, you know, no documentation, nothing, okay?

. . . .

THE COURT: Let me understand. Where we are is, you are unhappy with what [appointed counsel] has done so far?

THE DEFENDANT: Uh-huh.

THE COURT: And let me tell you where we're going to go from here. I'm going to talk to him and I'm going to decide whether we've got any issue that would cause me to appoint new counsel, if you want new counsel. If we don't—that is, if I don't find there's a conflict of interest or ineffective assistance of counsel, there are often disagreements between defendant and lawyer, and that doesn't—if I don't find a reason to substitute a new lawyer, then you'll be faced with a choice whether to proceed with [appointed counsel] or to proceed without a lawyer, okay?

THE DEFENDANT: Yes, Your Honor.

. . . .

THE COURT: Is there anything else we should talk about before I talk to [appointed counsel]?

THE DEFENDANT: I think that pretty much summed up that I'm unhappy with his services, didn't do any investigation at all, zero investigation was done.

. . . .

THE COURT: . . . I'm going to talk to [appointed counsel] and decide whether we've got any issue that would cause me to appoint new counsel. . . . if I don't find a reason to substitute a new lawyer, then you'll be faced with a choice whether to proceed with [appointed counsel] or to proceed without a lawyer.

The trial court then asked appointed counsel about his communications with Defendant and his preparation for the case. Appointed counsel responded he had met with Defendant, gave him copies of discovery materials and relevant case law, and discussed trial strat-

STATE v. REID

[224 N.C. App. 181 (2012)]

egy with him. Appointed counsel then stated he was prepared to go to trial. The court ruled appointed counsel was reasonably competent to present the case.

Defendant then moved to proceed *pro se*. The trial court engaged in the following colloquy:

THE COURT: Okay. I need to ask you some questions. You understand that you have the right to a lawyer?

[DEFENDANT]: Yes, Your Honor.

THE COURT: And that your lawyer is [appointed counsel]?

[DEFENDANT]: At this point, yes, Your Honor.

THE COURT: Okay. You understand that this case is going to trial today?

[DEFENDANT]: Yes, Your Honor.

THE COURT: All right. Based on our colloquy this far, it's clear that you can hear and understand me.

[DEFENDANT]: Yes.

THE COURT: Are you under the influence -- have you been taking any narcotics, pills?

[DEFENDANT]: I'm on prescription for my back, muscle relaxers and painkillers.

. . . .

THE COURT: How does it affect your thinking?

[DEFENDANT]: I don't think it has any bearing.

THE COURT: It does not. How old are you?

[DEFENDANT]: I am 41 years old.

THE COURT: What level of education did you finish?

[DEFENDANT]: High school.

THE COURT: You finished high school?

[DEFENDANT]: Uh-huh.

THE COURT: You know how to read and write?

STATE v. REID

[224 N.C. App. 181 (2012)]

[DEFENDANT]: Yes.

THE COURT: Do you have any physical or mental handicaps?

[DEFENDANT]: No.

THE COURT: And, as we discussed, you have the right to be represented by a lawyer. And if you can't afford one, one's been appointed for you. You know, if you elect to forgo representation, you have to follow the same rules of evidence and procedure that a lawyer in this court must follow.

[DEFENDANT]: Yes, ma'am.

THE COURT: You understand that the Court -- no one in this Court can give you legal advice concerning jury instructions or any other legal issues that would be raised at trial; you are on your own as if you did not have a lawyer?

[DEFENDANT]: Yes, I understand.

THE COURT: I won't be able to offer legal advice. If you ask me any question, I would treat you the same as I would treat a lawyer.

[DEFENDANT]: That's fine, Your Honor.

THE COURT: Do you understand that?

[DEFENDANT]: Yes, I understand that, Your Honor.

THE COURT: All right. So you are charged with trafficking cocaine; is that correct?

[DEFENDANT]: That's correct, Your Honor.

....

THE COURT: Do you have any questions about anything that I have said to you?

[DEFENDANT]: Not at this point, Your Honor.

THE COURT: Okay. Do you now waive your right to the assistance of a lawyer and voluntarily and intelligently decide to represent yourself in this case in which you face a minimum of 35 months, maximum 42 [months], and not less than a \$50,000 fine?

STATE v. REID

[224 N.C. App. 181 (2012)]

[DEFENDANT]: Yes, Your Honor.

THE COURT: As I said at the beginning of this hearing, we're outside the presence of the jury, and I find that the defendant has knowingly, intelligently, and voluntarily waived any right to a lawyer.

The court presented Defendant with a waiver of counsel form and Defendant signed it. Defendant then pled not guilty.

On 28 January 2011, the jury found Defendant guilty of trafficking in cocaine. The judge sentenced Defendant to a minimum prison term of 35 months and a maximum term of 42 months. Defendant gave timely notice of appeal on 28 January 2011.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case under N.C. Gen. Stat. § 7A-27(b) (2011) and § 15A-1444(a) (“A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.”).

Defendant’s arguments regarding (1) the adequacy of the advice to Defendant concerning his right to counsel, and (2) denial of a jury instruction on entrapment, involve questions of law. We review questions of law *de novo*. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468 (2009). “ ‘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 Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Defendant’s argument regarding (3) the denial of his motion to disclose the informants’ identities was not preserved at trial. Since it does not involve instructional or evidentiary error, it will not be reviewed for plain error on appeal. *See State v. Laurence*, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (“[P]lain error review in North Carolina is normally limited to instructional and evidentiary error.”).

Defendant’s argument regarding (4) the denial of his motion to suppress also was not preserved at trial. Since it involves evidentiary error, we review for plain error. *See id.*

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.

To show that an error was fundamental, a defendant

STATE v. REID

[224 N.C. App. 181 (2012)]

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.

Id. at ___, 723 S.E.2d at 334 (internal citations and quotation marks omitted).

III. Analysis

On appeal, Defendant makes four arguments: (1) the trial court erred in failing to advise him of his right to hire a private attorney; (2) the trial court erred in denying his request for a jury instruction concerning entrapment; (3) the trial court erred in denying his motion for disclosure of the names of the confidential informants and the substance of their communications with law enforcement; and (4) the trial court erred in denying his motion to suppress evidence gathered from a warrantless search and seizure.

A. Advice Concerning Right to Hire Counsel

[1] Defendant argues he did not make a knowing and intelligent waiver of counsel under N.C. Gen. Stat. § 15A-1242 (2011) because the trial court did not inform him of his right to hire a private attorney. We disagree.

“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. Frederick*, ___ N.C. App. ___, ___, 730 S.E.2d 275, 279 (2012) (citation and quotation marks 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.* (citation and quotation marks omitted).

“It is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceeding without making the inquiry required by N.C. Gen. Stat. 15A-1242.” *Id.* at ___, 730 S.E.2d at 281.

Under N.C. Gen. Stat. § 15A-1242, the trial court must engage in a “thorough” waiver inquiry to determine the defendant:

STATE v. REID

[224 N.C. App. 181 (2012)]

- (1) [h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) [u]nderstands and appreciates the consequences of this decision; and
- (3) [c]omprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2011). Defendant's waiver of counsel must be "knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

"When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986).

Our Supreme Court has offered a fourteen-question checklist "designed to satisfy requirements of N.C.G.S. § 15A-1242:"

1. Are you able to hear and understand me?
2. Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
3. How old are you?
4. Have you completed high school? college? If not, what is the last grade you completed?
5. Do you know to read? write?
6. Do you suffer from any mental handicap? physical handicap?
7. Do you understand that you have the right to be represented by a lawyer?
8. Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?

STATE v. REID

[224 N.C. App. 181 (2012)]

9. Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?

10. Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?

11. Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?

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.)

13. With all of these things in mind, do you now wish to ask me any questions about what I have just said to you?

14. Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

State v. Moore, 362 N.C. 319, 327–28, 661 S.E.2d 722, 727 (2008) (citing 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)).

In the present case, because Defendant signed a written waiver, a presumption arises that his waiver is “knowing, intelligent, and voluntary.” *See Warren*, 82 N.C. App. at 89, 345 S.E.2d at 441. The transcript previously quoted further illustrates the court examined Defendant on each of the issues mentioned in N.C. Gen. Stat. § 15A-1242. In fact, the trial court scrupulously adhered to the fourteen-question checklist provided in *Moore*, 362 N.C. at 327–28, 661 S.E.2d at 727. Although Defendant refused to let appointed counsel represent him even after extensive questioning, the trial court still asked appointed counsel to remain in court as stand-by counsel in case Defendant subsequently changed his mind.

STATE v. REID

[224 N.C. App. 181 (2012)]

In addition, “[i]n the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense.” *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981) (internal citations and quotation marks omitted). As the trial transcript indicates, the trial court questioned appointed counsel and determined there was no “substantial reason” to replace him because he was “reasonably competent” to represent Defendant.

Defendant relies primarily on *State v. Jones*, No. COA 11–287, 2012 WL 121229 (N.C. Ct. App. Jan. 17, 2012), to argue the trial court should have informed him of his right to *private* counsel. Because *Jones* is an unpublished opinion under North Carolina Rule of Appellate Procedure 30(e), it is only persuasive and not controlling authority. Nonetheless, we find *Jones* distinguishable from the present case.

In *Jones*, the criminal defendant moved to proceed *pro se*. *Id.* at *1. During the waiver inquiry, the trial court “failed to adequately inform Defendant of his right to retain *private* counsel.” *Id.* at *4 (emphasis added). In reaching this conclusion, this Court focused on the fact that (i) the trial court failed to inform the defendant of his right to *any* counsel, including appointed counsel, and (ii) the trial court failed to “explore[] Defendant’s claim that his court appointed attorney never met with him and was thus not prepared for trial.” *Id.*

Unlike in *Jones*, here the trial court did inform Defendant of his right to be represented by counsel, including *appointed* counsel, using language quite similar to that approved in *Moore*. *See Moore*, 362 N.C. at 327–28, 661 S.E.2d at 727. Additionally, the trial court made thorough inquiry into Defendant’s concerns with his appointed counsel and appointed counsel’s preparedness for trial. After this inquiry, the trial court appropriately determined appointed counsel was “reasonably competent” to represent Defendant.

Consequently, we find the trial court did not err by failing to inform Defendant of his right to hire private counsel.

B. Jury Instruction on Entrapment

[2] Defendant next argues the trial court erred in denying his request that the court use the pattern jury instruction on entrapment provided to him by the court. *See N.C.P.I.-Crim. 309.10* (2011).

“Assignments of error challenging the trial court’s decisions regarding jury instructions are reviewed *de novo*, by this Court.” *State*

STATE v. REID

[224 N.C. App. 181 (2012)]

v. Osorio, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). In North Carolina, “[w]here the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient.” *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988). “Before a Trial Court can submit [the entrapment defense] to the jury there must be *some credible evidence* tending to support the defendant’s contention that he was a victim of entrapment, as that term is known to the law.” *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955) (emphasis added).

The entrapment defense consists of two elements: “(1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, [and] (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.” *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978) (citing *Sherman v. United States*, 356 U.S. 369 (1958)). “It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of governmental inducement and influence.” *State v. Hageman*, 307 N.C. 1, 29, 296 S.E.2d 433, 449 (1982). “Predisposition may be shown by a defendant’s ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime.” *Id.* at 31, 296 S.E.2d at 450.

Here, the entrapment defense is not a “material aspect of the case” because Defendant can point to no “credible evidence” that (1) he would not have committed the crime except for law enforcement’s persuasion, trickery or fraud, or (2) that the crime was the creative production of law enforcement authorities. *See Walker*, 295 N.C. at 513, 246 S.E.2d at 750.

First, Defendant has presented no evidence he would not have committed the crime but for the police’s influence. *See State v. Martin*, 77 N.C. App. 61, 67, 334 S.E.2d 459, 462–63 (1985) (holding that when law enforcement simply “gave defendant the money and asked him to obtain the cocaine[,]” there was no evidence of “persuasion, trickery or fraud”); *State v. Rowe*, 33 N.C. App. 611, 614, 235 S.E.2d 873, 875 (1977) (“Merely asking defendant to sell drugs to her or telling him she was interested in buying some drugs did not con-

STATE v. REID

[224 N.C. App. 181 (2012)]

stitute an inducement to defendant to commit a crime he did not otherwise contemplate committing.”).

Second, there is no evidence the “criminal design” to purchase cocaine originated with law enforcement. At trial, Defendant testified he “was spending money on coke like there was no tomorrow. [He] knew six coke dealers in [the] neighborhood, could get whatever [he] wanted.” Also, Defendant was already moving large quantities of cocaine into the Raleigh area prior to the police investigation. Thus, Defendant was “predisposed” to commit the crime independent of government influence. *See Hageman*, 307 N.C. at 29, 296 S.E.2d at 449.

For these reasons, we conclude the trial court did not err in denying a jury instruction on entrapment.

C. Identity of Confidential Informants

[3] Defendant next argues the trial court erred by denying his pre-trial motion to disclose the names of the informants and their communications with law enforcement. Since Defendant did not preserve this issue at trial, he requests plain error review.

However, plain error review is not available because the decision to withhold the identities of confidential informants does not involve jury instructions or the admission of evidence. *See Lawrence*, ___ N.C. at ___, 723 S.E.2d at 333 (2012) (“[P]lain error review in North Carolina is normally limited to instructional and evidentiary error.”); *see also State v. Miles*, ___ N.C. App. ___, ___, 727 S.E.2d 375, 378 (2012) (declining to address the defendant’s argument that the trial court committed plain error by requiring him to wear a prison uniform during trial); *State v. Carpenter*, 147 N.C. App. 386, 396–97, 556 S.E.2d 316, 323 (2001) (declining to address the defendant’s argument “that the trial court committed plain error by entering the jury room with the jury after the verdict was recorded, but before the sentencing hearing”).

Furthermore, Defendant does not request that we suspend the North Carolina Rules of Appellate Procedure to allow us to exercise our discretion to correct an injustice as provided by N.C. R. App. P. 2. Even if we were to review the trial court’s decision under N.C. R. App. P. 2, given controlling case law, it is unlikely the trial court erred or that there was an injustice. *See State v. Cameron*, 283 N.C. 191, 194, 195 S.E.2d 481, 483–84 (1973).

Consequently, we decline to review the trial court’s decision to withhold the identities of the confidential informants.

STATE v. REID

[224 N.C. App. 181 (2012)]

D. Search and Seizure and Motion to Suppress

[4] Defendant's final argument on appeal consists of two parts: (i) the trial court erred by finding the information Jim and Ned provided to Detective McKeon established sufficient grounds for the search and seizure, and (ii) the trial court erred in denying Defendant's motion to suppress the cocaine as evidence and in allowing this evidence to be admitted before the jury. Because Defendant did not preserve this argument by objection at trial, we review for plain error. *See Lawrence*, ___ N.C. at ___, 723 S.E.2d at 330. We find no plain error occurred.

"*Terry v. Ohio* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity. An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability. . . . [A] tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *State v. Hughes*, 353 N.C. 200, 206–07, 539 S.E.2d 625, 630 (2000) (internal citations omitted). Moreover, "a tip from an informant 'known to [the officer] personally and [who] had provided him with information in the past' is sufficient to provide reasonable suspicion for a stop." *State v. McRae*, 203 N.C. App. 319, 324, 691 S.E.2d 56, 60 (2010) (alterations in original) (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

"According to the plain feel doctrine, when conducting a *Terry* frisk for weapons, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *State v. Williams*, 195 N.C. App. 554, 560, 673 S.E.2d 394, 398 (2009). The officer may seize the object if he or she has probable cause to believe it is contraband. *Id.* "Probable cause exists if the facts and circumstances within the knowledge of the officer were sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense." *State v. Bowman*, 193 N.C. App. 104, 109, 666 S.E.2d 831, 834–35 (2008) (citation and quotation marks omitted).

Here, the trial court did not commit plain error in concluding "McKeon had reasonable suspicion to conduct a warrantless stop and frisk[.]" McKeon received information from two informants who had in the past provided him with reliable information that led to several

STATE v. REID

[224 N.C. App. 181 (2012)]

arrests. The informants provided information about Defendant's criminal activity, location, and appearance. *See McRae*, 203 N.C. App. at 325, 691 S.E.2d at 60 (finding reasonable suspicion based on an informant's tip where the informant had previously given reliable information to the arresting officer and had accurately described the defendant, his vehicle, and his location). McKeon's search of Defendant created probable cause for seizure of the cocaine under the "plain feel" doctrine. *See Williams*, 195 N.C. App. at 560, 673 S.E.2d at 398. While searching Defendant, McKeon "felt a large bulge in [Defendant's] cargo pants' pocket. . . . [He] knew exactly what it was once [he] felt it. . . . It was packaged like narcotics would be packaged." Consequently, when McKeon identified the bag as containing narcotics, he had probable cause to arrest Defendant. *See State v. Benjamin*, 124 N.C. App. 734, 740, 478 S.E.2d 651, 655 (1996) ("Given the officer's experience, narcotics training, the size[,] shape and mass of the objects, and defendant's response to [the officer's] question, it became immediately apparent to [the officer] that the objects contained contraband. It was at that moment that [the officer] had probable cause to seize the objects."); *State v. Turner*, 94 N.C. App. 584, 586, 380 S.E.2d 619, 620 (1989) (holding the "[t]he size, shape, and position of the bulge [the detective] observed in defendant's pants" gave him probable cause to arrest).

Defendant relies on *Hughes*, 353 N.C. 200, 539 S.E.2d 625, to argue McKeon did not have reasonable suspicion to stop and search Defendant. *Hughes* involved an informant who told police "a dark-skinned Jamaican [male] . . . who weighs over three hundred pounds and is approximately six foot" was arriving by bus in Jacksonville that day in possession of marijuana and cocaine. *Id.* at 201–02, 539 S.E.2d at 627. The detective in *Hughes* had not previously interacted with the informant. *Id.* at 204, 539 S.E.2d at 628. The police stopped the defendant, who matched the informant's description, searched him with his consent, found marijuana, and arrested him. *Id.* at 202–03, 539 S.E.2d at 628. At the jail, the police also found cocaine on the defendant's person. Our Supreme Court held the informant's information was not sufficient to establish reasonable suspicion to stop and detain the defendant. *See id.* at 209, 539 S.E.2d at 631.

The facts in the present case differ significantly from those in *Hughes*. First, Jim and Ned had previously provided McKeon with reliable information in other investigations. In *Hughes*, on the other hand, "[t]here was no indication that the informant had been previously used and had given accurate information[.]" *Id.* at 204, 539

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

S.E.2d at 628. The *Hughes* Court thus treated the tip as one from an anonymous informant. See *McRae*, 203 N.C. App. at 325, 691 S.E.2d at 60–61 (citing *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631)).

Second, unlike in *Hughes*, McKeon had additional corroborating evidence beyond the informants' identification of Defendant. For instance, McKeon tracked Defendant to Winston-Salem via GPS and later identified Defendant at Durlain Drive in Raleigh, verifying Jim's story. Moreover, on the day Defendant was arrested, Jim actually saw cocaine in Defendant's possession. Lastly, when McKeon and his team approached Defendant, Gibney testified Defendant exuded a strong odor of marijuana. Given these facts, we determine McKeon and his team had reasonable suspicion to detain Defendant.

Consequently, we find no plain error occurred.

IV. Conclusion

We conclude the trial court did not err by: (1) failing to advise Defendant of his right to private counsel; (2) failing to instruct the jury concerning entrapment; (3) denying Defendant's motion for disclosure of information about the confidential informants; or (4) denying Defendant's motion to suppress. Consequently, we find

No error.

Judges ERVIN and McCULLOUGH concur.

STATE OF NORTH CAROLINA

v.

DEMARIO JAQUINTA ROLLINS

No. COA12-259

Filed 4 December 2012

Criminal Law—motion for appropriate relief—general allegations—juror misconduct

The trial court did not abuse its discretion in a common law robbery and misdemeanor assault inflicting serious injury case by failing to hold an evidentiary hearing pursuant to defendant's motion for appropriate relief. There was insufficient evidence to

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

determine whether juror misconduct occurred as defendant's motion and the affidavit merely contained general allegations and speculation.

Judge HUNTER, Robert C., dissenting.

Appeal by defendant from order entered 29 June 2010 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Stuart M. Saunders, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not abuse its discretion in failing to hold an evidentiary hearing pursuant to defendant's motion for appropriate relief, we hold no error.

Facts and Procedural History

On 19 May 2010, defendant Demario Jaquinta Rollins was convicted of common law robbery and misdemeanor assault inflicting serious injury. On 28 May 2010, defendant filed a motion for appropriate relief ("MAR") pursuant to section 15A-1414 of the North Carolina General Statutes. Defendant alleged that he was entitled to a new trial because he "did not receive a fair trial as a result of a juror watching irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations." Defendant also prayed for an evidentiary hearing on the claim set forth in his MAR. On 12 July 2010, the trial denied defendant's MAR by concluding that it was without merit and that an evidentiary hearing was not required. The trial court's order stated that

[n]othing in the motion or affidavit indicates which news broadcast the juror supposedly viewed, the degree of attention the juror paid to the news story about the defendant's case, or the extent of any information the juror actually received or remembered from the news broadcast. There is nothing in the motion or affidavit to indicate that the juror shared any of the contents of the

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

news story with other jurors during the trial or the jury's deliberations. In his affidavit, Mr. Bossard[, a fellow juror,] speculates that the juror must have been influenced by the news broadcast because she was "very outspoken" and "certain of her beliefs" during the jury's deliberations. In his motion, defendant assumes that the juror must have viewed a news broadcast on News 14 Carolina which contained a reference to other crimes the defendant is alleged to have committed after the robbery for which defendant was convicted in this case.

The undersigned judge concludes that the defendant's motion is without merit and does not require an evidentiary hearing.

Defendant appeals from this order.

Defendant's sole issue on appeal is whether the trial court erred in denying his MAR without holding an evidentiary hearing in violation of section 15A-1420 of the North Carolina General Statutes and according to the holding in *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998).

N.C.G.S. § 15A-1420 states that "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." N.C.G.S. § 15A-1420(c)(1) (2011). However, defendant's MAR was filed pursuant to N.C.G.S. § 15A-1414 which provides that a defendant may file a MAR asserting that he did not receive a fair and impartial trial within 10 days after entry of judgment. N.C.G.S. § 15A-1414 (2011). We note that "[a]n evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (2011). Therefore, "we review the trial court's order denying an evidentiary hearing for abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (citation and quotations omitted).

Defendant argues that his MAR demonstrated "sufficient particularity to require a hearing on his claim" and that pursuant to the Supreme Court's holding in *McHone*, the trial court erred by denying

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

him an evidentiary hearing. Defendant's MAR asserted that defendant "did not receive a fair trial as a result of a juror watching irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations." Defendant's contentions of juror misconduct were based on the affidavit of Tom Bossard, a juror on defendant's jury. Tom Bossard stated in his affidavit the following:

2. [A]fter the trial was over, while we were in the elevator on the way out of the building, a fellow juror asked me and a couple other jurors whether we had seen the news broadcast on Monday evening. She said there was something related to the case on the news broadcast that she had seen. The other jurors and I responded that we had not seen the news broadcast.

3. This juror had been fairly quiet . . . throughout the proceedings. It was ironic because she became very outspoken and certain of her beliefs during the deliberations.

4. She was basically going "head to head" with me throughout our deliberations. . . . Once I heard her mention the news broadcast in the elevator, it made sense to me that that was why she became so adamant. It seemed to me that she was basing everything on that news broadcast.

In *McHone*, the defendant was convicted of two counts of first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant was sentenced to death for each murder and 10 years imprisonment for the assault conviction. *McHone*, 348 N.C. at 255, 499 S.E.2d at 761-62. The *McHone* defendant filed an initial MAR and thereafter, a supplemental MAR, which was denied without an evidentiary hearing by the trial court. *Id.* at 256, 499 S.E.2d at 762. The MAR alleged that the State had sent to the trial court, a proposed order denying defendant's MAR without providing defendant a copy—a contention which the State acknowledged. Accordingly, the *McHone* defendant alleged that the State had engaged in an improper *ex parte* communication with the trial court in violation of his rights to due process under the state and federal constitutions. *Id.* at 258, 499 S.E.2d at 763. The *McHone* defendant argued that he was entitled to an evidentiary hearing "because some

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

of his asserted grounds for relief required the trial court to resolve questions of fact” and the *McHone* Court agreed, holding that the trial court was presented with a question of fact—whether an *ex parte* communication did, in fact, occur—which it was required to resolve through an evidentiary hearing. *Id.* The *McHone* Court concluded that pursuant to N.C.G.S. § 15A-1420, “an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law[.]” *Id.*

The instant case is distinguishable from *McHone*. Based on the record, defendant’s evidence was insufficient to “show the existence of the asserted ground for relief.” N.C.G.S. § 15A-1420(c)(6). There is insufficient evidence to determine whether juror misconduct occurred as defendant’s motion and Bossard’s affidavit merely contained general allegations and speculation. *See State v. Harris*, 338 N.C. 129, 143, 449 S.E.2d 371, 377 (1994) (holding that the trial court did not err by failing to hold an evidentiary hearing where the MAR contained a general allegation and “[t]here were no specific contentions that required an evidentiary hearing to resolve questions of fact.”)

In *State v. Elliot*, 360 N.C. 400, 628 S.E.2d 735 (2006), the defendant filed a MAR alleging juror misconduct occurred when two jurors met and prayed outside of the jury room during a recess from deliberations. *Id.* at 417, 628 S.E.2d at 747. The trial court denied the defendant’s MAR without an evidentiary hearing. *Id.* The *Elliot* court held that even assuming the individual jurors’ prayers constituted misconduct, defendant’s documentary evidence was insufficient to show the required prejudice. *Id.* at 419, 629 S.E.2d at 748.

Although [the] defendant could have sought affidavits from potential witnesses to support his claim of juror misconduct raised in the [MAR], [the] defendant presented nothing save a few newspaper accounts which shed very little light on the alleged discussions between the two jurors concerning the case, and certainly failed to shed light on any prejudice to defendant which arose from discussions, if any, surrounding the prayer.

Id.

A review of the record reveals that defendant’s MAR failed to specify: which news broadcast the juror in question had seen besides

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

a possible broadcast summary from the News 14 Carolina website¹; the degree of attention the juror in question had paid to the broadcast; the extent to which the juror in question received or remembered the broadcast; whether the juror in question had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct. Bossard's affidavit raised speculation, not specific contentions requiring an evidentiary hearing. Furthermore, defendant speculated on the possible effect of the alleged juror misconduct by stating things such as "it was reasonable to believe that the news broadcast influenced her opinion and the deliberations of the jury" and "[i]n Mr. Bossard's opinion, the juror based her decisions during deliberations on the news broadcast." Defendant's speculation based on Bossard's speculation long after jury deliberations ended, is insufficient to merit an evidentiary hearing. Therefore, we are unable to conclude that the trial court abused its discretion by failing to hold an evidentiary hearing. Defendant's argument is overruled.

No error.

Judge STEELMAN concurs.

Judge HUNTER, Robert C., dissents by separate opinion.

HUNTER, Robert C., Judge, dissenting.

I conclude that defendant's motion for appropriate relief ("MAR") and supporting documentation presented issues of fact that required an evidentiary hearing, and the trial court's denial of his MAR without holding an evidentiary hearing was an abuse of discretion. *See State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (concluding that where the defendant's MAR is filed pursuant to N.C. Gen. Stat. § 15A-1414, "the decision of whether an evidentiary hearing is held is within the sound discretion of the trial court"). Accordingly, I respectfully dissent.

1. The dissenting opinion includes a detailed summary of a news broadcast relating to defendant that was printed on a website. However, there is nothing in Mr. Bossard's affidavit to indicate what broadcast the jury may have seen, nor does it mention a website. Therefore, defendant's showing in support of an evidentiary hearing contains mere speculation as to the content and effect of the broadcast Mr. Bossard alleges the juror must have seen.

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

Defendant was convicted by a jury of common law robbery and assault inflicting serious injury related to the 11 May 2009 robbery of a retail clothing store owned by Old Navy, Inc. located in Mecklenburg County, North Carolina. During the robbery, the perpetrator assaulted one of the store's employees, Teresa Gillespie, by punching her in the face when she asked the perpetrator to leave the store. Approximately three weeks after the robbery, Ms. Gillespie saw defendant's photograph on a television news broadcast from which she identified defendant as the perpetrator of the assault and robbery. After using the Internet to view defendant's photographs a second time, Ms. Gillespie called the police and told them of her identification of defendant.

Defendant's charges came on for a jury trial during the 17 May 2010 Criminal Session of Mecklenburg County Superior Court before Judge Nathaniel J. Poovey. Before the jury was impaneled, the State and defendant's counsel informed the trial court that the parties had agreed that the State's witness could testify that she had seen a news broadcast about defendant, but that the content of the news broadcast, the evidence of defendant's prior arrest, and the arrest photos were to be excluded from the trial. When the jury was impaneled, the trial court asked the jurors twice if any of them had read or heard anything about the case, such as a report in the newspaper or other news media. The trial court then instructed the jury on the rules each juror was to obey during the trial in order to ensure that the verdict was based solely upon the evidence presented in the courtroom and not on any "outside evidence or influences." Included in these rules was a specific prohibition from reading or listening to any news reports related to the trial, regardless of whether such reports were in a newspaper or broadcast on television or radio. The trial court confirmed that each juror understood and agreed to abide by these rules. During the trial, the trial court reminded the jurors of their duty to obey these rules. On 17 May 2011, the jurors were reminded before their lunch recess and before their overnight recess: "During the overnight recess don't talk about the case. Do not allow your minds to be formed. Remember all the other rules that are given to you."

On 19 May 2011, the jury returned a guilty verdict for common law robbery and assault inflicting serious injury. Defendant was sentenced to a term of 15 to 18 months imprisonment for the robbery conviction and 75 days imprisonment for the assault conviction. Eight days after the entry of judgment, defendant filed his MAR pursuant to N.C. Gen. Stat. § 15A-1414 alleging that he did not receive a

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

fair trial. In his MAR, defendant specifically alleged that after the trial, while the jurors were leaving the courthouse, a female juror admitted to several other jurors that during the trial she watched a television news broadcast that was related to the trial. In support of his MAR, defendant attached an affidavit from a juror, Mr. Tom Bossard, who averred that an unnamed female juror admitted to him and two other jurors that during the trial she had watched a news broadcast related to the trial. Defendant identified the specific news broadcast viewed by the juror and attached to his MAR a printed summary of the broadcast that was posted to the television channel's website. The printed summary contained details of the charges for which defendant was being tried—as well as details of unrelated robbery charges and an unrelated charge of second degree murder:

Suspect in chase, deadly accident appears in court

By: Aaron Mesmer

CHARLOTTE—A man accused of second-degree murder in connection with a fatal wreck is on trial Monday in uptown Charlotte for a separate crime.

Demario Rollins is charged with robbery and assault inflicting serious injury after police say he robbed a Mecklenburg County Old navy [sic] store on May 11, 2009.

Eleven days after that Rollins was involved in a police chase that begin in Concord—he was suspected of robbing as tore [sic] at Concord Mills Mall—and ended in Mallard Creek Church Road in northeast Charlotte.

Rollins' [sic] car plowed head-on into a car driven by 84-year old Docia Barber. He is set to appear on second-degree murder charges in late June.

Following the crash, questions arose about police department chase policies but no one was found to have acted against policy.

It was revealed [sic] in court Monday that Rollins has a history of robbery-related charges. This trail [sic] is expected to wrap up by Wednesday.

Defendant argued that he did not receive a fair trial before an impartial jury as the female juror's conduct was in violation of the trial court's rules to refrain from watching news about the trial and

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

circumvented the State's agreement to exclude incompetent and prejudicial information of defendant's unrelated criminal charges. Defendant sought an evidentiary hearing as to the allegation of juror misconduct and a new trial. On 29 June 2010, Judge Richard D. Boner found, in part, that "[n]othing in the [MAR] or affidavit indicates which news broadcast the juror supposedly viewed[,]" concluded that defendant's MAR was without merit, and denied defendant's motion without holding an evidentiary hearing.

In reaching its decision that the trial court did not err in denying defendant's MAR without an evidentiary hearing, the majority states that defendant's MAR provided no more than general allegations and speculation of juror misconduct. I cannot agree. Indeed, the trial court's conclusion that defendant did not identify the news broadcast that the juror watched is clearly contradicted by the record. Defendant specifically alleged in his MAR that defendant's "prior arrests were made known to a juror during the course of the trial through a news broadcast that aired on the evening of Monday, May 17th, the first day of the trial." In support, defendant provided a summary of the news broadcast in the body of his MAR. Additionally, defendant attached to his MAR a copy of the news story as it appeared on the news station's website (reproduced above) as well as affidavit testimony that a juror admitted to watching a news broadcast during the trial. In light of the specificity of defendant's MAR and the highly prejudicial nature of the allegations in the news broadcast, which were explicitly excluded from the trial, I conclude the trial court abused its discretion by denying defendant an evidentiary hearing for the purpose of determining whether the juror in question viewed this prejudicial information. As the Supreme Court of the United States has stated, "[t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures." *Marshall v. United States*, 360 U.S. 310, 312-13, 3 L. Ed. 2d 1250, 1252 (1959) (concluding the defendant deserved a new trial where jurors were exposed to newspaper reports of the defendant's criminal record, which the trial court had excluded from evidence) (citation omitted).¹

1. I note that the holding of *Marshall* is not controlling with regard to state court proceedings, see *Murphy v. Florida*, 421 U.S. 794, 798, 44 L. Ed. 2d 589, 593 (1975), however, the *Marshall* Court's admonition of the danger of extraneous prejudicial information is appropriate here.

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

The specificity and force of defendant's MAR is similar to that seen in *State v. McHone*, 348 N.C. 254, 258-59, 499 S.E.2d 761, 763-64 (1998), which supports my conclusion. In *McHone*, the defendant alleged that the State engaged in an *ex parte* communication with the trial court when the State sent a proposed order dismissing the defendant's supplemental MAR without providing a copy of the proposed order to the defendant. *Id.* at 258, 499 S.E.2d at 763. The State acknowledged that it did send a proposed order to the trial court, which the trial court signed. *Id.* Yet, the trial court denied the defendant's supplemental MAR without an evidentiary hearing. *Id.* On review, the Supreme Court of North Carolina concluded that the defendant's allegations presented a question of fact that it was required to resolve with an evidentiary hearing. *Id.* at 259, 499 S.E.2d at 764.

The cases on which the majority relies are distinguishable. In *State v. Harris*, 338 N.C. 129, 143, 449 S.E.2d 371, 377 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995), our Supreme Court concluded the defendant's MAR alleging ineffective assistance of counsel lacked specific allegations that would require an evidentiary hearing to resolve questions of fact. Significantly, however, the trial judge in *Harris* that denied the defendant's MAR was the same judge that presided over the defendant's trial. *Id.* This placed the trial judge in a position to determine the effect of the specific acts the defendant alleged to amount to ineffective assistance of counsel and left no other specific allegations that required an evidentiary hearing. *Id.* Here, in contrast, the judge that denied defendant's MAR was not the same judge that presided over defendant's trial. Moreover, defendant's allegation was of juror misconduct occurring outside of the courthouse and resulting in prejudice during jury deliberations, not in-courtroom proceedings. Thus, unlike *Harris*, the trial judge was not in a position to determine the effect of the alleged misconduct without an evidentiary hearing.

In *Elliott*, 360 N.C. at 417, 628 S.E.2d at 747, the defendant filed a MAR alleging that juror misconduct occurred when two jurors prayed outside of the jury room during a recess from deliberations and that after the prayer the two jurors voted to impose a death sentence. Our Supreme Court concluded that the trial court did not abuse its discretion in denying the MAR without an evidentiary hearing because the defendant failed to provide sufficient evidentiary support to show grounds for relief or the prejudice required by N.C. Gen. Stat. § 15A-1420(c)(6) (2005). *Elliott*, 360 N.C. at 419-20, 628 S.E.2d at 748. While the defendant alleged two jurors had prayed together, the

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

Court noted the absence of any authority prohibiting jurors from praying together or even contacting one another outside of the jury room. *Id.* at 418, 628 S.E.2d at 747. Thus, the conduct alleged in the defendant's MAR did not violate the only limitation relevant to the conduct alleged: that jurors not discuss the case except after deliberations have begun and then only in the jury room. *Id.* (citing N.C. Gen. Stat. § 15A-1236(a)(1) (2005)); see N.C. Gen. Stat. § 15A-1236(a)(1) (2011) (providing that jurors have a duty "[n]ot to talk among themselves about the case except in the jury room after their deliberations have begun"). Here, unlike *Elliot*, defendant's affidavit alleged that a juror violated her duty to refrain from watching television news reports about the trial, and that defendant was prejudiced by the juror's conduct. See N.C. Gen. Stat. § 15A-1236(a)(4) (providing that the trial court must admonish the jurors that it is their duty "[t]o avoid reading, watching, or listening to accounts of the trial"). Additionally, while the defendant in *Elliot* failed to provide any affidavits from jurors regarding the allegation of misconduct, 360 N.C. at 419, 628 S.E.2d at 748, defendant provided evidence to support his allegations in the form of an affidavit from a juror, Mr. Bossard, as well as a summary of the news broadcast.

Another factor distinguishing *Elliot* from this case is the admissibility of evidence that could support the claims of juror misconduct. The Court in *Elliot* noted that had the trial court conducted an evidentiary hearing, the defendant would not have been able to introduce any evidence to support the claims made in his MAR. *Id.* at 420, 628 S.E.2d at 748. This is because the type of juror misconduct alleged in *Elliot* did not fall into either category of information or activity about which a juror may testify to impeach the jury's verdict. *Id.* at 420, 628 S.E.2d 748-49.

The matters about which a juror is permitted to testify for the purpose of impeaching the jury's verdict include: "(1) *Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him*; or (2) Bribery, intimidation, or attempted bribery or intimidation of a juror." N.C. Gen. Stat. § 15A-1240(c)(1)-(2) (2011) (emphasis added). Similarly, Rule 606(b) of our Rules of Evidence provides that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." N.C. Gen. Stat. § 8C-1, Rule 606(b); *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359,

STATE v. ROLLINS

[224 N.C. App. 187 (2012)]

363 (1988) (interpreting Rule 606's reference to "extraneous information" as meaning "information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence"). Yet, the defendant in *Elliot* did not allege that any extraneous information was brought to the attention of any juror, or that someone bribed or intimidated, or attempted to bribe or intimidate any juror. 360 N.C. at 420, 628 S.E.2d at 749. Thus, the jurors in *Elliot* would not have been able to testify in an evidentiary hearing about the allegations in the defendant's MAR. *Id.*

Here, defendant specifically alleged juror misconduct involving extraneous prejudicial information, and the limitations of N.C. Gen. Stat. § 15A-1240(c)(1) and § 8C-1, Rule 606(b) would not prohibit testimony regarding the alleged misconduct. Testimony in support of defendant's allegations that (1) during the trial a juror watched a television news broadcast about defendant that contained information about pending murder and robbery charges that was explicitly excluded from the trial, and that (2) the juror admitted to this misconduct after the trial, would fall squarely within the type of testimony permitted by these statutes. *See Elliot*, 360 N.C. at 420, 628 S.E.2d at 749. As we concluded in *State v. Lyles*, 94 N.C. App. 240, 246, 380 S.E.2d 390, 394 (1989), "it is clear that jurors may testify regarding the *objective events* listed as exceptions in [N.C. Gen. Stat. § 15A-1240(c)(1) and § 8C-1, Rule 606(b)], but are prohibited from testifying to the *subjective effect* those matters had on their verdict."

While I make no conclusion as to the effect of the alleged juror misconduct, I conclude defendant's MAR and supporting documentation presented an issue of fact that the trial court was required to resolve through an evidentiary hearing. N.C. Gen. Stat. § 15A-1240(c)(1) and § 8C-1, Rule 606(b) do not prohibit testimony as to the objective events alleged by defendant: that a juror was presented with highly prejudicial information through a news broadcast about defendant, in contravention of the trial court's mandate and the parties' agreement to exclude the information from the trial. The decision not to hold an evidentiary hearing was an abuse of discretion, and I would reverse the trial court's order.

STATE v. SHAW

[224 N.C. App. 209 (2012)]

STATE OF NORTH CAROLINA

v.

ERIC LAMONT SHAW

No. COA12-545

Filed 4 December 2012

Sentencing—habitual felon status—habitual misdemeanor assault not a prior underlying felony

The trial court erred in a misdemeanor possession of stolen property and an uttering a forged instrument case by sentencing defendant as an habitual felon. The clear intent of the habitual misdemeanor assault statute prevented it from being used as a prior underlying felony to achieve habitual felon status. The judgment entered against defendant was vacated and remanded to the superior court for resentencing.

Appeal by defendant from judgment entered 2 December 2009 by Judge Paul Gessner in Durham County Superior Court. Heard in the Court of Appeals 8 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Peggy S. Vincent, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III, for Defendant-appellant.

ERVIN, Judge.

Defendant Lamont Eric Shaw appeals from a judgment sentencing him to 101 to 131 months imprisonment based upon his convictions for misdemeanor possession of stolen property, uttering a forged instrument, and having attained the status of an habitual felon. In his brief, Defendant contends that the trial court erroneously sentenced him as an habitual felon given that one of the predicate felonies used to enhance his sentence could not be lawfully used for that purpose. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be vacated and that this case should be remanded to the Durham County Superior Court for resentencing.

STATE v. SHAW

[224 N.C. App. 209 (2012)]

I. Factual Background

On 25 March 2008, a warrant for arrest was issued charging Defendant with obtaining property by false pretenses, forging an endorsement, and uttering a forged endorsement. On 2 June 2008, the Durham County grand jury returned bills of indictment charging Defendant with identity theft, misdemeanor possession of stolen property, obtaining property by false pretenses, forgery, uttering a forged instrument, and having attained habitual felon status, with the last of these charges based upon two prior felonious larceny convictions and a conviction of possession of a firearm by a convicted felon. On 17 November 2008, the Durham County grand jury returned superseding indictments charging Defendant with identity theft, misdemeanor possession of stolen property, obtaining property by false pretenses, forgery, uttering a forged instrument, and having attained the status of an habitual felon, with the habitual felon allegation resting on two of the same prior convictions specified in the original indictment, as well as a felonious drug possession conviction.¹ On 16 March 2009, the Durham County grand jury returned a new set of superseding indictments charging Defendant with identity theft, misdemeanor possession of stolen property, attempting to obtain property by false pretenses, forgery, uttering a forged instrument, and having attained the status of an habitual felon, with the habitual felon allegation resting upon Defendant's prior convictions for felonious larceny, possession of a firearm by a convicted felon, and habitual misdemeanor assault.²

The charges against Defendant came on for trial before the trial court and a jury at the 30 November 2009 criminal session of Durham County Superior Court.³ At the conclusion of the State's evidence, the trial court granted Defendant's motion to dismiss the identity theft charge. On 1 December 2009, the jury returned verdicts convicting Defendant of misdemeanor possession of stolen property, attempting to obtain property by false pretenses, and uttering a forged instrument.

1. The 17 November 2008 superseding habitual felon indictment corrected the offense date of the felony larceny conviction carried over from the initial indictment.

2. The only difference between the first and second substantive superseding indictments was that the nature of the false pretense allegedly employed by Defendant was spelled out in the second superseding indictment, thereby establishing that Defendant was being charged with an attempt rather than committing a completed offense.

3. Prior to trial, the State voluntarily dismissed the forgery charge.

STATE v. SHAW

[224 N.C. App. 209 (2012)]

On 1 December 2009, the trial court convened a hearing for the purpose of determining whether Defendant should be sentenced as an habitual felon. At that point, the prosecutor informed the trial court that the State would be proceeding based upon the superseding indictment that had been returned on 16 March 2009. As a result, the trial court dismissed the 2 June 2008 and 17 November 2008 habitual felon indictments. After the presentation of the State's evidence, Defendant moved to dismiss the habitual felon indictment on the grounds that habitual misdemeanor assault could not be used as a predicate felony for the purpose of establishing that Defendant had attained habitual felon status. Before the trial court ruled on this dismissal motion, Defendant agreed to admit to having attained habitual felon status. After the execution of a transcript of plea and the completion of a proper plea colloquy, the trial court accepted Defendant's plea of guilty to having attained habitual felon status.

At the ensuing sentencing hearing, the trial court arrested judgment in the attempting to obtain property by false pretenses case. In addition, the trial court determined that Defendant had amassed twenty-five prior record points and should be sentenced as a Level VI offender. Finally, the trial court found as a mitigating factor that Defendant had cooperated with law enforcement officers at the time of his arrest, so that Defendant should be sentenced in the mitigated range. As a result, the trial court consolidated Defendant's remaining substantive convictions for judgment and entered a judgment sentencing Defendant to a minimum of 101 months and a maximum of 131 months imprisonment. Defendant did not note an appeal from the trial court's judgment.

On 20 May 2011, Defendant filed a petition for the issuance of a writ of *certiorari*. On 6 June 2011, this Court "allowed [Defendant's *certiorari* petition] for the purpose of reviewing the judgments entered 2 December 2009." On 1 June 2012, Defendant filed a motion for appropriate relief, which has been referred to the present panel for decision, in which he advanced the same issues that have been discussed in his brief on appeal, and argued that he had been sentenced as an habitual felon in violation of his federal and state constitutional rights.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant argues that "the clear intent of the habitual misdemeanor assault statute prevents it from being used as a prior underlying felony to

STATE v. SHAW

[224 N.C. App. 209 (2012)]

achieve habitual felon status,” so that the superseding habitual felon indictment returned against Defendant did not suffice to provide the trial court with jurisdiction to sentence Defendant as an habitual felon. Defendant’s argument has merit.

N.C. Gen. Stat. § 14-33.2 provides that:

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of [N. C. Gen. Stat. §] 14-33 and causes physical injury, or [N.C. Gen. Stat. §] 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation. A conviction under this section shall not be used as a prior conviction for any other habitual offense statute. A person convicted of violating this section is guilty of a Class H felony.

“This Court has previously held [N.C. Gen. Stat.] § 14-33.2, ‘the habitual misdemeanor statute[,] to be a substantive offense.’” *State v. Holloway*, ___ N.C. ___, ___, 720 S.E.2d 412, 413 (2011) (quoting *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 520, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000)). As a result, a defendant may be sentenced as an habitual felon in the event that he or she is convicted of habitual misdemeanor assault, since, in that instance, the offense of habitual misdemeanor assault is not being “used as a prior conviction” for purposes of establishing that the defendant is an habitual felon. *Holloway*, ___ N.C. at ___, 720 S.E.2d at 413 (holding that a defendant who has been convicted of habitual misdemeanor assault may be sentenced as an habitual felon based upon prior convictions for second-degree kidnapping, possession of cocaine, and felonious restraint).

A prior habitual misdemeanor assault conviction may not, on the other hand, be utilized as a predicate felony for the purpose of establishing that a convicted defendant has attained habitual felon status. As we have already noted, N.C. Gen. Stat. § 14-33.2 specifically provides that “[a] conviction under this section shall not be used as a prior conviction for any other habitual offense statute.” Thus, as this Court stated in *State v. Banks*, 191 N.C. App. 611, 664 S.E.2d 77, 2008 N.C. App. LEXIS 1421 (unpublished), *disc. review denied*, 362 N.C. 683, 670 S.E.2d 565 (2008):

STATE v. SHAW

[224 N.C. App. 209 (2012)]

The plain language of the statute prohibits the use of an habitual misdemeanor assault conviction as a *prior conviction* to enhance a felony to habitual felon status. N.C. Gen. Stat. § 14-33.2 (emphasis added). Nothing in the language of [N.C. Gen. Stat.] § 14-33.2 indicates the legislature intended the term “prior conviction” to refer to the use of an habitual misdemeanor assault conviction as the *principal* felony upon which to base an habitual felon status charge.

Banks, 2008 N.C. App. LEXIS 1421, *9-*10 (citing *State v. Artis*, 181 N.C. App. 601, 641 S.E.2d 314, *disc. review denied*, 361 N.C. 430, 648 S.E.2d 846, *cert. denied*, 552 U.S. 1014, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007)). Thus, Defendant’s prior conviction for misdemeanor habitual assault could not, given the literal language of N.C. Gen. Stat. § 14-33.2, serve as one of the predicate felonies needed to support a decision to sentence him as an habitual felon following his conviction for some other substantive offense.

The language upon which we rely in reaching this conclusion was added to N.C. Gen. Stat. § 14-33.2 as part of a significant revision, set out in 2004 N.C. Sess. L. c. 186, s. 10.1, to the statutory provisions governing the offense of habitual misdemeanor assault. According to N.C. Sess. L. c. 186, s. 10.2, the revisions to N.C. Gen. Stat. § 14-33.2 worked by N.C. Sess. L. c. 186, s. 10.1 were “effective December 1, 2004 and applie[d] to offenses committed on or after that date,” with “[p]rosecutions for offenses committed before the effective date of this part . . . not abated or affected by this part” and with “the statutory provisions that would be applicable but for this part [to] remain applicable to those prosecutions.” As a result of the fact that the misdemeanor habitual felon conviction upon which the State relied in seeking to have Defendant sentenced as an habitual felon rested on conduct that occurred in 2001 and a judgment which was entered in 2003, we must consider whether the use of this conviction to support the enhancement of the sentence imposed upon Defendant for committing a substantive offense in 2008 would be permissible in light of the effective date provision applicable to the 2004 amendments to N.C. Gen. Stat. § 14-33.2 set out in N.C. Sess. L. c. 186, s. 10.2. The answer to that question, in turn, depends upon whether the reference to “offenses committed before the effective date of this part” in 2004 N.C. Sess. L. c. 186, s. 10.2 should be understood, in instances in which the State seeks to have a sentence imposed based upon post-1 December 2004 conduct enhanced based, at least in part, upon a pre-

STATE v. SHAW

[224 N.C. App. 209 (2012)]

1 December 2004 conviction for habitual misdemeanor assault, as referring to the substantive offense for which the defendant is being sentenced or the habitual misdemeanor assault conviction which the State seeks to use as a predicate felony.

Although we have not directly addressed this question in a published opinion, we believe that a consistent line of authority in this Court suggests that the effective date language in question should be understood as referring to the substantive conduct for which the defendant is being sentenced rather than to the defendant's prior conviction for habitual misdemeanor assault. In *Artis*, the defendant, who had been "convict[ed] of malicious conduct by a prisoner and habitual misdemeanor assault" based upon an incident that occurred on 4 December 2003 and "sentence[ed] as an habitual felon based upon two prior convictions for misdemeanor habitual felon and one prior conviction for felonious eluding arrest, argued "that, under [recent] United States Supreme Court[] decisions . . . the habitual felon and habitual misdemeanor assault statutes can no longer be considered sentence-enhancing statutes." *Artis*, 181 N.C. App at 601-02, 641 S.E.2d at 314. In the course of resolving this issue in favor of the State, we noted that the amendment to N.C. Gen. Stat. § 14-33.2 prohibiting the use of a conviction for habitual misdemeanor assault "as a prior conviction for any other habitual offense statute" was effective for offenses committed on or after 1 December 2004 and stated that, "[b]ecause the offenses at issue took place prior to 1 December 2004, the State was not barred from prosecuting a habitual felon charge against defendant based on his prior conviction for habitual misdemeanor assault." *Artis*, 181 N.C. App. at 602, n.1, 641 S.E.2d at 315, n.1. Similarly, in *State v. McGee*, 176 N.C. App. 191, 625 S.E.2d 916, 2006 N.C. App. LEXIS 387 *3-*4 (unpublished) (2006), this Court rejected the defendant's contention that he could not be sentenced as an habitual felon for habitual misdemeanor assault, with a prior habitual misdemeanor assault conviction being used as one of the predicate felonies, because the "[d]efendant committed the [assault which led to his conviction for habitual misdemeanor assault] on 27 September 2004, which is two months before the 1 December 2004 effective date of the 2004 amendments." Finally, in *State v. Stephens*, 178 N.C. App. 393, 631 S.E.2d 235, 2006 N.C. App. LEXIS 1466 (unpublished) (2006), we rejected the defendant's challenge to the indictment upon which the trial court predicated its decision to sentence him as an habitual felon for possession of marijuana with the intent to sell or deliver based upon a set of predicate felonies that included

STATE v. SHAW

[224 N.C. App. 209 (2012)]

a prior conviction for habitual misdemeanor assault. In reaching this conclusion, we noted that the defendant had been convicted of habitual misdemeanor assault on 1 December 1998, that the conduct which led to the defendant's habitual misdemeanor assault conviction occurred on 10 April 1998, and that the "[d]efendant was indicted on 8 November 2004 as an habitual felon with an offense date of 15 June 2004." *Stephens*, 2006 N.C. App. LEXIS 1466 *23-*24. Although these decisions constitute persuasive, rather than binding, authority, we believe that they reflect a consistent tendency to apply the effective date provision set out in 2004 N.C. Sess. L. c. 186, s. 10.2 based on the date of the substantive offense for which the defendant is being prosecuted rather than on the date of the defendant's prior assaultive conduct or prior habitual misdemeanor assault conviction. Such an outcome strikes us as consistent with the literal language of 2004 N.C. Sess. L. c. 186, s. 10.2, which appears to focus upon current offenses and current prosecutions rather than upon events which occurred at some point in the past, and with the well-established principle that attaining habitual felon status is not a separate offense. *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) (stating that "[t]he habitual criminal act . . . does not create a new and separate criminal offense for which a person may be separately sentenced, but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than would ordinarily be considered") (quoting *State v. Tyndall*, 187 Neb. 48, 50, 187 N.W.2d 298, 300, cert. denied sub nom *Gorham v. Nebraska*, 404 U.S. 1004, 92 S. Ct. 561, 30 L. Ed. 2d 558 (1971)). As a result, since the present case involves a substantive offense that was committed after the effective date of the 2004 amendments to N.C. Gen. Stat. § 14-33.2, we conclude that Defendant was simply not subject to being sentenced as an habitual felon based, at least in part, upon his prior conviction for habitual misdemeanor assault.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted).

"[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time." . . . In the instant case, . . . the habitual felon indictment did not set forth three predicate felony offenses as required pursuant to N.C. Gen. Stat. § 14-7.1, and defendant did

STATE v. SHAW

[224 N.C. App. 209 (2012)]

not attain habitual felon status. Because defendant did not attain habitual felon status, the indictment did not set forth the necessary requirements specified in N.C. Gen. Stat. § 14-7.3, and the indictment failed to confer jurisdiction upon the trial court.

State v. Moncree, 188 N.C. App. 221, 232-33, 655 S.E.2d 464, 471-72 (2008) (quoting *State v. McGee*, 175 N.C. App. 586, 587-88, 623 S.E.2d 782, 784 (citation omitted), *disc. review denied and appeal dismissed*, 360 N.C. 542, 634 S.E.2d 891 (2006)). In view of the fact that the superseding habitual felon indictment upon which the State relied for the purpose of enhancing Defendant's sentence in this case utilized Defendant's prior conviction for habitual misdemeanor assault as one of the predicate felonies necessary to support the trial court's decision to sentence Defendant as an habitual felon and the fact that an habitual misdemeanor assault conviction cannot be utilized for that purpose consistently with the literal language of N.C. Gen. Stat. § 14-33.2 as interpreted above, we conclude, consistently with the State's concession that "the indictment appears to present a jurisdictional issue," that the superseding habitual felon indictment upon which Defendant's sentence was based failed to adequately allege that Defendant had attained habitual felon status and that this fact deprived the trial court of jurisdiction to sentence Defendant as an habitual felon in this case. As a result, the judgment entered against Defendant must be vacated and this case must be remanded to the Durham County Superior Court for resentencing. *Moncree*, 188 N.C. App. at 234, 655 S.E.2d at 472. (stating that since, "as a matter of law, defendant's habitual felon indictment did not set forth three predicate felonies as required under N.C. Gen. Stat. § 14-7.1" and since "the fact that defendant stipulated to three predicate felonies set out in the indictment has no bearing on whether the indictment is valid," "we remand for resentencing"). Having vacated the trial court's judgment and remanded this case for resentencing, we need not address the issues raised in Defendant's motion for appropriate relief and conclude that it should be denied on mootness grounds.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge STEELMAN concur.

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

THE GLENS OF IRONDUFF PROPERTY OWNERS ASSOCIATION, INC.

v.

JOHN E. DALY AND CONSTANCE V. DALY

No. COA12-52

Filed 4 December 2012

Statutes of Limitation and Repose—failure of subdivision road—statute of repose—last act or omission—purpose of road—Planned Community Act

The trial court did not err by granting summary judgment for defendant developers based on the statute of repose in an action arising from the failure of a farm road that was eventually paved where plaintiff property owners association contended that the action was within the statute of repose based on the paving. Plaintiff presented no evidence that paving the road was necessary for the road's undisputed intended purpose (to allow vehicular traffic access); failed to present evidence connecting the erosion of a bank to the paving; did not meet its burden of showing that the paving was the last specific act or omission giving rise to its claims; and N.C.G.S. § 47F-3-111, by its plain language, indicates that it only applies to toll statutes of limitation. Statutes of repose are fundamentally distinct from statutes of limitation.

Appeal by plaintiff from order entered 28 September 2011 by Judge Gary E. Trawick in Haywood County Superior Court. Heard in the Court of Appeals 10 May 2012.

The Dungan Law Firm, P.A., by Robert E. Dungan, for plaintiff-appellant.

Cannon Law, P.C., by William E. Cannon, Jr. and Michael W. McConnell, for defendants-appellees.

GEER, Judge.

Plaintiff The Glens of Ironduff Property Owners Association, Inc. (“the Association”) appeals from an order granting summary judgment to defendants John E. Daly and Constance V. Daly (“the Dalys”). Based on our review of the record, we hold that the trial court properly determined that the Association’s claims were barred by the statute of repose, and we accordingly affirm the summary judgment order.

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

Facts

The Dalys were the developers of The Glens of Ironduff (“The Glens”), a planned community in Haywood County, North Carolina. The Dalys purchased the land that became The Glens in September 2001. At that time, there was an existing unpaved farm road that ultimately became part of Coyote Hollow Road. The road ran approximately parallel to a stream that was about 10 feet below the road. The slope from the road down to the stream was at a 65 to 70 degree angle.

The farm road had been compacted with stones and rocks embedded in the ground. At some point before March 2004, the Dalys widened the farm road for use by lot owners in The Glens. During that process, the stones and rocks were removed by a bulldozer and replaced with packed dirt. Upon completion of the widening of the road, the Dalys began using the road for construction traffic to build two houses. The road continued to be used for construction and by individuals who purchased lots accessed by the road.

In 2005, the Dalys paved the road. Custom Paving placed six inches of stone and two inches of hotmix asphalt on the roadway. The paving did not, however, involve any change in the grade of the road, the width of the road, or the slope of the stream bank.

In the fall of 2009, a portion of the stream bank adjacent to the road eroded and slid down to the stream. At this point in the roadway, there ceased to be any shoulder to the road. The Association hired Alpha Environmental Sciences, Inc. to evaluate the roadway embankment. The consultant determined that “[b]oth the steepness of the slope and the undercutting from the creek appear to be causing the ongoing slope failure.”

On 15 January 2010, the Association, a homeowners association including all of the property owners within The Glens, wrote Mr. Daly regarding the erosion of the bank, which could eventually render the road impassable. The Association requested that Mr. Daly either fix the road or agree to reimburse the Association for the cost of eliminating the hazard.

On 30 March 2010, the Association filed suit against the Dalys asserting claims for breach of the warranty of workmanship, negligent construction, contribution and indemnification, and violation of the Sedimentation Pollution Control Act of 1973. The complaint alleged that the Dalys had negligently designed and constructed the road and that negligence was the proximate cause of the road slip-

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

ping and falling into the adjacent creek. The complaint sought damages in the amount of \$36,500.00.

Subsequently, the Association filed an amended complaint and a second amended complaint. The second amended complaint asserted only a claim for breach of implied warranty of workmanship and fitness for purpose and a claim for negligent construction. The second amended complaint sought damages in excess of \$10,000.00. The Dalys denied the material allegations of the complaint and alleged that the Association's claims were barred by the statute of limitations and statute of repose.

The Dalys subsequently filed a motion for summary judgment supported by an affidavit from John E. Daly and the Association's discovery responses. The Association opposed the motion with the affidavits of William Allen, Secretary of the Association and a property owner whose only access to his home was over the eroded road, and Francis D. Brown, the person who sold the land to the Dalys. The Association also provided the trial court with the Dalys' discovery responses, a report from a consultant who had evaluated the eroded bank, and the response to a subpoena served on an engineer retained by the Association to remedy the hazardous road condition.

At the hearing on the motion for summary judgment, defendants contended that the Association's claims were barred by the three-year statute of limitations and the six-year statute of repose, that the Association lacked standing to assert a claim of implied warranty, that the Association was contributorily negligent, and that the damages in the case were not reasonably foreseeable. On 28 September 2011, the trial court entered an order concluding, based on its review of the evidence, that "there is no genuine issue as to any material fact and that Defendants are entitle[d] to judgment as a matter of law." The court, therefore, entered summary judgment in favor of the Dalys and against the Association. The Association timely appealed to this Court.

Discussion

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

We first address whether summary judgment was appropriate based on the statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5) (2011). *See Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861 (2006) (holding that N.C. Gen. Stat. § 1-50(a)(5) “is a statute of repose and provides an outside limit of six years for bringing an action coming within its terms”). N.C. Gen. Stat. § 1-50(a)(5)(a) provides: “No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.”

“Whether a statute of repose has run is a question of law.” *Mitchell v. Mitchell’s Formal Wear, Inc.*, 168 N.C. App. 212, 215, 606 S.E.2d 704, 706 (2005). “Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired.” *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001).

Here, the Association points to the paving of the road in 2005 and argues that the road was not substantially completed until paved and, in any event, the paving was the last act or omission giving rise to its causes of action. Since this action was filed on 30 March 2010, under the Association’s analysis of the facts, the action would be timely for purposes of the statute of repose.

The statute defines “substantial completion” as “that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended.” N.C. Gen. Stat. § 1-50(a)(5)(c). Here, it is undisputed that the purpose of the road was to allow vehicular traffic to access lots in The Glens. The evidence is also uncontroverted that following the widening and grading of the road prior to March 2004, the road was adequate for and was used by vehicles traveling to construct houses on lots. The road continued to be used, without change, by lot owners and construction traffic prior to the paving of the road in 2005. Because the road could be used for its intended purpose, it was substantially complete prior to March 2004. *See Moore v. F. Douglas Biddy Constr., Inc.*, 161 N.C. App. 87, 90, 587 S.E.2d 479, 482 (2003) (“A house is substantially completed when it can be used for its intended purposes as a residence.”).

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

The Association, however, argues that part of the overall scheme of the development was that the roads would be paved. Regardless, the Association has presented no evidence that paving was necessary for the road to be used for its intended purpose or that the lack of paving prior to 2005 interfered with the road's use. Without that evidence, the Association has failed to show a genuine issue of material fact as to the date of substantial completion of the road. *See Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76-77, 518 S.E.2d 789, 791-92 (1999) (in rejecting plaintiff's argument that substantial completion occurred upon completion of house's punch list and not upon issuance of certificate of compliance, noting that "[t]here is no evidence in this record that the items on the punch list prevented or materially interfered with plaintiff using the house as a residence").

Alternatively, the Association argues that the 2005 paving constituted "the specific last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-50(a)(5)(a). Review of the evidence submitted by the Association in support of its claims of defective construction of the road indicates that the Association is contending that the collapse of the shoulder and stream bank was due to the widening of the road bringing it closer to the stream and making the stream bank steeper. Although the Association points to evidence that the Dalys had placed six inches of stone covered by two inches of asphalt on the road in 2005, it has not shown that this paving gave rise to its causes of action for defective construction of the road.

The Association's interrogatory answers asserted that the road was improperly constructed because it "was placed or was left too near the stream bed, contrary to the intent of NCGS 113A-57(1)" and that "to comply with the intent of 57(2), Defendants Daly would have had to build the road even farther to the southwest so that the angle of the slope below the road surface would not have been so steep as it was left after construction. The steepness of the slope was a direct cause of the subsequent, severe erosion." The Association then asserted that if the Dalys elected to "use the routing of the pre-existing road close to the stream and not to widen the road any further," the Dalys should have then built a retaining wall or used another means to stabilize the shoulder and the stream bank.

The affidavit of William Allen submitted by the Association, although filled with hearsay, asserts that the slope should not have been left so steep. He reports that other witnesses told him that when the Dalys widened the farm road in 2002, they removed rocks that had

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

previously stabilized the road. Mr. Allen also claimed that when widening the road, the Dalys could have removed large rocks from the uphill side of the road and noted that a witness saw equipment working to break rocks during 2002. Mr. Allen also contended that the Dalys could have pushed fill dirt over the creek-side edge of the road, as it appears was done in some places. Ultimately, Mr. Allen asserted as evidence of the Dalys' defective construction that the Dalys had not shown "how much widening [they] accomplished by moving rocks from the uphill side" of the road and gave no "explanation of why [they] did not remove more rock on the side opposite the creek so as to make space for a sustainable slope on the creek side of the road."

In short, the Association's evidence indicates that the conduct giving rise to its claims was the placement and grading of the road—it is undisputed that those acts occurred prior to March 2004. The Association's evidence makes no reference to the 2005 paving as contributing to the cause of the erosion of the stream bank. Mr. Daly's affidavit remained uncontroverted that "the paving of the road at a later date did not involve any change in the grade of the road, the width of the road or the creek bank or slope of the creek bank that is the subject of this civil action."

The Association argues in its brief on appeal that the eight inches of added material to the surface of the road "most certainly added significant weight to the Roadway itself, which could easily be found to have contributed to the failure of the underlying slope." The brief cites to no evidence supporting this assertion, and we have found none. The Association had the burden of "establish[ing] a direct connection between the harm alleged and that last specific act or omission." *Nolan*, 135 N.C. App. at 77, 518 S.E.2d at 792. Because the Association failed to present evidence connecting the erosion of the bank to the paving, it has not met its burden of showing that the 2005 paving was the last specific act or omission giving rise to its claims.

Consequently, the Association has not shown that this action was filed less than "six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5)(a). The Association further argues, however, that under the North Carolina Planned Community Act, the statute of repose does not apply to its claims. Specifically, the Association points to N.C. Gen. Stat. § 47F-3-111 (2011), which provides:

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

(c) Any *statute of limitation* affecting the association's right of action under this section is tolled until the period of declarant control terminates. A lot owner is not precluded from bringing an action contemplated by this section because the person is a lot owner or a member of the association.

(Emphasis added.)

By its plain language, N.C. Gen. Stat. § 47F-3-111 only tolls statutes of limitation. Contrary to the Association's contention, a statute of repose is not merely a type of statute of limitation that is encompassed by any reference to statutes of limitation. Our Supreme Court has explained how fundamentally distinct a statute of repose is from a statute of limitation:

The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws.

Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. The statute of repose, on the other hand, acts as a condition precedent to the action itself. Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized. If the action is not brought within the specified period, the plaintiff literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. For this reason we have previously characterized the statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights.

Boudreau v. Baughman, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (internal citations and quotation marks omitted).

The Association has pointed to nothing indicating that the General Assembly, although referencing only statutes of limitation, also intended to toll statutes of repose. The Association cites only *Bryant v. Adams*, 116 N.C. App. 448, 456-57, 448 S.E.2d 832, 836 (1994), as support for its position. *Bryant* addressed whether N.C. Gen. Stat. § 1-17, a tolling provision for the claims of minors, applied

THE GLENS OF IRONDUFF PROP. OWNERS ASS'N, INC. v. DALY

[224 N.C. App. 217 (2012)]

to toll a statute of repose as well as statutes of limitation. *Bryant*, 116 N.C. App. at 455-56, 448 S.E.2d at 835-36. N.C. Gen. Stat. § 1-17 did not, however, specifically refer to a “statute of limitation,” and, therefore, this Court was not asked to construe the phrase “statute of limitation” to include a “statute of repose.” Moreover, the Court based its conclusion on the fact that the General Assembly had specifically stated in the Act creating the statute of repose that nothing in the Act should be construed as amending or repealing the provisions of N.C. Gen. Stat. § 1-17. *Bryant*, 116 N.C. App. at 457, 448 S.E.2d at 836. Because of that express statement of intent, the Court held that N.C. Gen. Stat. § 1-17 tolled both statutes of limitation and statutes of repose. *Bryant*, 116 N.C. App. at 457, 448 S.E.2d at 836.

Indeed, in other contexts, when the General Assembly has intended to toll a statute of repose, it has specifically said so. *See* N.C. Gen. Stat. § 1-15.1(a) (2011) (providing that “if a defendant is convicted of a criminal offense and is ordered by the court to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose, except as established herein, are tolled”); N.C. Gen. Stat. § 58-48-100(b) (2011) (providing that “[a]s to any person under a disability described in G.S. 1-17, the Association may not invoke the bar of the period of repose provided in subsection (a) of this section unless the Association has petitioned for the appointment of a guardian ad litem for such person and the disposition of that petition has become final”).

Therefore, the plain language of N.C. Gen. Stat. § 47F-3-111 indicates that it only applies to toll statutes of limitation. It does not toll statutes of repose. The Association failed to meet its burden of showing that this action was timely under N.C. Gen. Stat. § 1-50(a)(5)(a), and, therefore, the trial court properly granted summary judgment to the Dalys. Because the action is barred by the statute of repose, we do not address the parties’ other contentions.

Affirmed.

Judges ELMORE and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 DECEMBER 2012

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| CRUZ v. DMSI STAFFING, LLC No. 12-438 | Indus. Comm. (W64612) | Affirmed |
| DOLAN v. DICKSON PROPERTIES, INC. No. 12-681 | Durham (11CVS4843) | Affirmed in part, reversed and remanded in part |
| IN RE C.M.C. No. 12-598 | Rockingham (09JT74) | Affirmed |
| IN RE J.B.L.J. No. 12-778 | Lincoln (10JT49) | Affirmed |
| IN RE K.A.M.L.P. No. 12-627 | Davidson (11JT69) | Affirmed |
| IN RE R.D. No. 12-605 | Vance (09JT10-12) (09JT7-8) | Affirmed |
| IN RE T.L.T. No. 12-826 | New Hanover (11JB292) | Reversed and remanded in part; affirmed in part |
| ISABEAU DAKOTA INC. v. HAGLER No. 12-504 | Cumberland (10CVS9863) | Dismissed |
| LEEUWENBURG v. HARMON No. 12-629 | Onslow (11CVD3869) | Dismissed |
| MARTIN v. MOREAU No. 12-591 | Wake (11CVS15808) | Reversed and Remanded |
| OCHOA v. NOAH'S ANGELS, LLC No. 12-713 | Indus. Comm. (W87635) (X00966) (X21932) | Affirmed |
| REED v. OLSON No. 12-547 | Orange (03CVD863) | Affirmed in part, vacated in part |
| SMITH v. DRUMM No. 12-492 | Mecklenburg (10CVS21087) | No Error |

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| STATE v. BRACKETT No. 12-550 | Cleveland (10CRS893) (10CRS894) | Affirmed; remanded for correction of clerical errors. |
| STATE v. BRINK No. 12-797 | New Hanover (11CRS52484) | Affirmed |
| STATE v. BULGER No. 12-535 | Forsyth (11CRS337) (11CRS51614) | No Error |
| STATE v. COX No. 12-500 | Buncombe (11CRS54845) | Reversed and remanded for resentencing |
| STATE v. DODGEN No. 12-724 | Cleveland (11CRS2598) | Affirmed |
| STATE v. DOYAL No. 12-686 | Pasquotank (09CRS50745) | No Error |
| STATE v. FOWLER No. 12-281 | Caldwell (93CRS3641) | Affirmed |
| STATE v. GATTIS No. 12-456 | Durham (08CRS44532) | No Error |
| STATE v. GREEN No. 12-601 | Wake (10CRS18846-47) | Dismissed in part, affirmed in part |
| STATE v. HARDY No. 12-586 | Guilford (11CRS84274) | New Trial |
| STATE v. HARPER No. 12-524 | Edgecombe (08CRS52296) (08CRS52326) | Reversed and remanded for a new probation revocation hearing. |
| STATE v. HILL No. 12-498 | Nash (11CRS4975-76) | No Error |
| STATE v. HOLMES No. 12-789 | Pitt (10CRS59393) (11CRS3141) | Affirmed |
| STATE v. JACKSON No. 12-457 | Wake (10CRS229944) | No Error |

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| STATE v. LONG No. 12-571 | Craven (06CRS54370) (06CRS9752-53) | No error in defendant's trial; no prejudicial error in defendant's sex offender registration and SBM hearing; affirmed in part |
| STATE v. MCKEY No. 12-215 | Forsyth (10CRS62288) | No Error |
| STATE v. MCLAURIN No. 12-919 | Sampson (11CRS53060) (11CRS53061) | No Error |
| STATE v. MCLAWHORN No. 12-622 | Edgecombe (10CRS54210) | No Error |
| STATE v. MCSPADDEN No. 12-576 | Davidson (11CRS52116) | No Error |
| STATE v. MOBLEY No. 12-668 | Mecklenburg (09CRS23095) (09CRS35626) | No Error |
| STATE v. MORENO No. 12-530 | Stanly (11CRS50255) (11CRS50256) | Affirmed |
| STATE v. NUNEZ-GARCIA No. 12-746 | Wake (10CRS210138) | No Error |
| STATE v. OAKLEY No. 12-325 | Guilford (10CRS24667) (10CRS84056) | No Error in part; Vacated in part; and Remanded |
| STATE v. PETTICE No. 12-850 | Mecklenburg (10CRS230842) (10CRS230845) | No Error |
| STATE v. ROBESON No. 12-511 | Cabarrus (10CRS53075-77) | No Error |
| STATE v. STANDRIDGE No. 12-546 | Cherokee (08CRS51503) (11CRS198) | No Error |
| STATE v. WINCHESTER No. 12-580 | Mecklenburg (10CRS214084) | No Error |
| TATE v. CALLOWAY No. 12-501 | Mecklenburg (10CVS16753) | Affirmed |

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

CITY OF ROCKINGHAM, NORTH CAROLINA AND AMERICAN RIVERS, PETITIONERS

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF WATER QUALITY, AND NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENTS

AND

PROGRESS ENERGY CAROLINAS, INC., RESPONDENT-INTERVENOR

No. COA12-763

Filed 18 December 2012

1. Administrative Law—judicial review of agency decision—standard of review

Even though the trial court may have applied a *de novo* standard to an issue that should be reviewed under the whole record test, the trial court's review was not improper since *de novo* review was more beneficial for petitioners and the trial court still upheld respondent Environmental Management Commission's decision.

2. Environmental Law—hydroelectric power-generating facility—biological integrity

The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by affirming the final agency decision of respondent Environmental Management Commission because the whole record showed that the ALJ considered the biological integrity of the aquatic life and properly concluded that the certified flow rate would maintain and not degrade the aquatic life.

3. Environmental Law—hydroelectric power-generating facility—no practical alternatives

The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by affirming the final agency decision of respondent Environmental Management Commission because there was substantial evidence that no practical alternatives were available when retrofitting was offered as a hypothetical by an expert who had never visited the dam and would provide relatively little additional improvement in biological integrity.

4. Environmental Law—hydroelectric power-generating facility—minimizing adverse impacts—Clean Water Act

The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by affirming the final

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

agency decision of respondent Environmental Management Commission because there was substantial evidence that aquatic life would not be adversely impacted by the Section 401 certification under the Clean Water Act.

5. Environmental Law—hydroelectric power-generating facility—exemption from mitigation requirements—Clean Water Act

The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by concluding that a discharge of water was not regulated by the Clean Water Act and that this project was exempt from mitigation requirements because existing uses would not be removed or degraded by the Clean Water Act Section 401 certification.

6. Environmental Law—hydroelectric power-generating facility—land preservation as mitigation—mootness

Although petitioners argued in the alternative that the trial court erred by not evaluating whether the land preservation plan was sufficient mitigation and that respondent Environmental Management Commission (EMC) erred in upholding a land preservation plan that did not comply with EMC's rules, this argument was moot given the Court of Appeals' interpretation that mitigation was unnecessary.

Appeal by Petitioners from order entered 12 January 2012 by Judge Dennis J. Winner in Richmond County Superior Court. Heard in the Court of Appeals 14 November 2012.

Southern Environmental Law Center, by Amelia Y. Burnette and Julia F. Youngman, and Pro Hac Vice, Water & Power Law Group PC, by Richard Roos-Collins, for Petitioners-Appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley and Assistant Attorney General Donald W. Laton, for Respondents-Appellees.

Hunton & Williams LLP, by William D. Dannelly and Matthew F. Hanchey, and Daniel W. Kemp, Associate General Counsels for Progress Energy Service Company, LLC, for Respondent-Intervenor-Appellee.

BEASLEY, Judge.

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

The City of Rockingham and American Rivers (Petitioners) appeal from an order affirming the final agency decision of Respondent Environmental Management Commission (EMC). For the reasons stated herein, we affirm.

I. Facts

Progress Energy Carolinas (Intervenor) operates a hydroelectric power-generating facility at the Tillery Dam on the Yadkin-Pee-Dee River. The Tillery Dam was constructed in the early 1900s. The Federal Energy Regulatory Commission (FERC) issued the license for this facility on 19 May 1958. This fifty-year license expired on 30 April 2008, and FERC has issued annual licenses to Intervenor to continue operations on the same terms as the 1958 license. Intervenor began the relicensing process in 2003 using a collaborative approach. Intervenor solicited information and comments from several state and federal agencies as well as other groups as “stakeholders.” The Division of Water Resources (DWR), Respondent Division of Water Quality (DWQ), Wildlife Resources Commission (WRC), and Petitioners participated in the stakeholder process. DWR and DWQ are divisions of Respondent North Carolina Department of Environment and Natural Resources (NCDENR).

Intervenor submitted its final application for a new license to FERC on 25 April 2006. On 30 July 2007, Intervenor submitted a proposed Comprehensive Settlement Agreement (CSA) for the Yadkin-Pee-Dee River Project to FERC. Petitioner American Rivers originally signed the CSA but later withdrew its support. Petitioner City of Rockingham never signed the CSA. The CSA proposed a minimum flow rate of 330 cubic feet of water per second (cfs). The minimum flow rate would increase to 725 cfs for an eight-week period beginning in mid-March for the American shad spawning season. The minimum flow rate under the original license is 40 cfs.

Section 401(a)(1) of the Clean Water Act (CWA) requires that a state certify that a discharge subject to federal licensing will comply with all applicable water quality standards. 33 U.S.C. § 1341(a)(1) (2006). Intervenor submitted its Section 401 Application to DWQ on 11 May 2007. The application incorporated the CSA and FERC application. DWQ solicited public comment on the application, and Petitioners submitted comments.

DWQ issued the initial Section 401 Certification (Certification) on 11 February 2008. DWQ later amended the Certification to add addi-

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

tional conditions but essentially maintained the 330/725 cfs minimum flow rate.

Petitioners filed a Petition for a Contested Case Hearing on 11 April 2008 and amended the Petition on 24 October 2008. Intervenor filed a Motion to Intervene on 22 May 2008. The motion was granted on 1 July 2008. The Administrative Law Judge (ALJ) upheld the Certification on 23 March 2011. EMC¹ issued the final agency decision on 22 July 2011 adopting the ALJ's findings and conclusions. Petitioners filed a Petition for Judicial Review of Final Agency Decision on 18 August 2011. The Richmond County Superior Court judge affirmed EMC's decision on 30 December 2011 and filed an order to that effect on 12 January 2012. The trial court did not specify which standard of review it applied since it opined that the result under either standard was the same for all issues in this case. Petitioners filed their notice of appeal on 10 February 2012. Additional facts and findings are developed below as necessary to resolve Petitioners' appeal.

II. Standard of Review

[1] In reviewing the agency's decision, the Superior Court may reverse or modify the decision if it finds that the decision is

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (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, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2011). An appellate court's review proceeds in two steps: (1) examining whether the trial court applied the correct standard of review and (2) whether the trial court's review was proper. *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007).

1. EMC administers the State's authority under the CWA. N.C. Gen. Stat. § 143B-282(a)(1)(u) (2011).

CITY OF ROCKINGHAM v. N.C. DEPT' OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

When the appellant challenges the agency's decision under § 150B-51(b)(1)-(4), the standard of review is *de novo*. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004). The trial court may substitute its own judgment for that of the agency under *de novo* review. *Id.* at 660, 599 S.E.2d at 895. As a general matter, an agency's interpretation is entitled to some deference. See *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998)("[T]he interpretation of a regulation by an agency created to administer that regulation is traditionally accorded some deference by appellate courts.").

The standard of review is the whole record test for a challenge under § 150B-51(b)(5)-(6). *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895. "The 'whole record' test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cty Bd. of Ed.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). The court's task is to determine whether substantial evidence supports the agency's decision after considering the evidence that tends to detract from the decision and the evidence that tends to support decision. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895; *Thompson*, 292 N.C. at 410, 233 S.E.2d at 541. " 'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2011).

Since the trial court did not specify the standard of review for each issue and merely opined that the result was the same regardless, the trial court essentially reviewed all issues *de novo* but nonetheless upheld EMC's decision. Even though the trial court may have applied a *de novo* standard to an issue that should be reviewed under the whole record test, the trial court's review was not improper since *de novo* review is more beneficial for Petitioners and the trial court still upheld EMC's decision.² We have applied the standard of review applicable to each of Petitioners' issues and affirm the trial court's order.

III. Biological Integrity

[2] First, Petitioners argue that EMC³ failed to assess whether biological integrity is "attained" and assert that the record as a whole

2. The better practice, of course, is for the trial court to specifically note the standard of review applied to each issue.

3. The ALJ's decision is essentially EMC's decision since it was adopted in full by EMC, so there is no difference in referring to the decision as the ALJ's decision or EMC's decision.

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

shows that the minimum flow rate will not “attain” biological integrity. For Petitioners’ first argument on this issue, the standard of review is *de novo*. Petitioners’ second argument on this issue is reviewed under the whole record test. We reject both arguments.

Rule 506 of Title 15A, Subchapter 2H sets forth the requirements for the Director of DWQ to issue a certification.

(b) The Director shall issue a certification upon determining that existing uses are not removed or degraded by a discharge to classified surface waters for an activity which:

(1) has no practical alternative under the criteria outlined in Paragraph (f) of this Rule;

(2) will minimize adverse impacts to the surface waters based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions under the criteria outlined in Paragraph (g) of this Rule; . . .

[and]

(6) provides for replacement of existing uses through mitigation as described at Subparagraphs (h)(1) of this Rule.

15A N.C. Admin. Code 2H.0506(b) (2012).

“Biological integrity means the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions.” 15A N.C. Admin Code 2B.0202(11) (2012). Reference conditions are not defined in the Code. As a Class B surface water, Tillery Reach must meet both the Class B and Class C requirements. *See* 15A N.C. Admin. Code 2B.0219 (2012). Class C surface waters “shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture.” 15A N.C. Admin. Code 2B.0211(2)(2012).

The heart of Petitioners’ argument is that the reference condition for measuring the biological integrity of the Tillery Reach is its original condition prior to the construction of the dam. Though Petitioners and Intervenor disagree about the use of the term “attain,” the disagreement is irrelevant since the record shows that the ALJ compared the effects of the Certification with “[p]re-project natural’

CITY OF ROCKINGHAM v. N.C. DEPT OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

conditions.” The ALJ’s findings demonstrate a comparison of the effects of the Certification and the “habitat that would be available to aquatic organisms if the Tillery Dam was not present, and flows were unaltered by the hydro project operations.” Since the ALJ engaged in the comparison advanced by Petitioners, there is no legal error.

As to Petitioners’ argument that the whole record shows that biological integrity will not be attained, there is substantial evidence in the record supporting the conclusion that biological integrity would be maintained and not degraded. The trial court’s order, incorporating the ALJ’s decision, noted that findings of fact 80 through 158 and conclusions of law 12 through 19 considered the biological diversity in the Tillery Reach. The evidence Petitioners point to regarding the depressed mussel population refers to the current state of the population under the current flow rate rather than any effect the Certification would have. The ALJ considered the evidence on both sides, including some evidence that the higher flow rate proposed by Petitioners would benefit some species living in the Tillery Reach. However, the ALJ found, considering all the evidence, little difference between the certified flow rate and the flow rate proposed by Petitioners. The ALJ concluded that the “water flows allowed under the Amended 401 Certification would enhance, and not impair or remove aquatic life habitat and, therefore, improve opportunities for aquatic life.” The whole record shows that ALJ considered the biological integrity of the aquatic life and properly concluded that the certified flow rate would maintain and not degrade the aquatic life.

IV. Practical Alternatives

[3] Second, Petitioners disagree with the trial court’s interpretation of how the agency should determine whether an activity “has no practical alternative” and claim that EMC did not evaluate the alternatives and assess the impacts on recreation and aquatic life. The standard of review is *de novo* for the former argument and the whole record test for the latter argument. We disagree with both arguments.

Intervenor argues that a finding that an activity has no practical alternative is not required in this case since the ALJ found that the activity did not remove or degrade existing uses. Petitioners’ reply brief argues that this is an improper cross-appeal. Petitioners’ assertion is moot given our resolution of their substantive argument below.

The ALJ found that there was an absence of a practical alternative. The trial court stated that the agency considered the alterna-

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

tives, as shown in findings of fact 58 and 59, and concluded that the minimum flow adopted by DWQ was “the only practical one.” The trial court found that the evidence was sufficient to support this conclusion. The trial court also concluded that “there is nothing in the law finding that [the agency] must find all alternatives impractical but, rather it is the duty of the Department, under the law, to consider alternatives and to determine that the alternative which they choose [sic] is practical.” It is this final conclusion that Petitioners argue is legal error.

The ALJ’s conclusion and trial court’s conclusion that there are no practical alternatives track Rule 506(b)’s language and do not rely on the trial court’s interpretation that the agency need not find each alternative impractical. Any legal error in the interpretation of how the agency should determine whether an activity “has no practical alternative” is harmless since it did not form the basis for the agency’s and trial court’s decisions and therefore would not change the outcome.

Petitioners point to two alternatives that they claim EMC did not evaluate: the higher minimum flow rate Petitioners proposed and retrofitting the dam.

A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration or density of the proposed activity and all alternative designs the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters or wetlands.

15A N.C. Admin. Code 2H.0506(f).

As to the proposed higher minimum flow rate, Intervenor argues that the higher minimum flow rate is not an “alternative” under the Rules. Regardless, the ALJ considered it as an alternative.

Mr. Dorney, the Wetland Program Development Unit Supervisor for DWQ, testified that he and Intervenor agreed that a higher minimum flow rate was not economically practical based on the information Intervenor provided. Mr. Dorney stated that the practicality assessment is “a weighing of cost versus benefit, cost in terms of what it would cost the applicant to provide more environmental protection as opposed to the benefit achieved from that environmental protection. And the basic question is what is economically practical

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

in terms of the amount of impact.” The evidence showed that an increased minimum flow rate would cost Intervenor about \$700,000 per year because Intervenor would not be able to generate as much energy. It was the agency’s conclusion that a higher minimum flow rate was not practical given the additional operating loss of \$700,000. Combined with the evidence that a higher minimum flow rate had little additional positive impact on biological integrity, there is substantial evidence supporting the ALJ’s conclusion that there was no practical alternative to the Certification.

Petitioners also point to the alternative of retrofitting the dam. Intervenor concedes that there are no specific findings or mention of retrofitting the dam as an alternative. Nonetheless, there was evidence before the agency regarding the proposed retrofitting of the dam. Petitioners argue that this evidence was “[u]nrebutted expert testimony” that a hypothetical retrofit could recoup its costs within six years. However, examination of the record shows that this testimony was not entirely unrebutted. Dr. Michael Sale testified to cost/benefit analysis for retrofitting the dam. Dr. Sale had not visited the Tillery Reach Dam. Dr. Sale also admitted that he had not accounted for a wide variety of potential costs, including the cost of shutting down Intervenor’s power plants to retrofit the dam. Further, Petitioners’ counsel stated that he offered this evidence only to show that the calculations were possible and not as a fact that the retrofit could be paid off within six years. Considering Mr. Dorney’s testimony regarding the agency’s practicality assessment, there is substantial evidence that no practical alternatives were available when the retrofitting was offered as a hypothetical by an expert who had never visited the Tillery Dam and would provide relatively little additional improvement in biological integrity compared with the Certification despite a capital investment that may or may not pay for itself in six years’ time.

V. Minimizing Adverse Impacts

[4] Next, Petitioners argue that EMC erroneously interpreted Rule 506(b)(2) regarding adverse impacts and that the whole record demonstrates that the Certification will not minimize adverse impacts on primary and secondary recreation and aquatic life. We disagree. The former argument receives *de novo* review and the latter argument receives whole record review.

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

Petitioners argue that minimization of adverse impacts requires more than an incremental improvement or maintenance of the status quo from the issuance of the original license. Rule 506(b)(2) states that the Director must find that the activity “will minimize adverse impacts to the surface waters based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions under the criteria outlined in Paragraph (g) of this Rule.” Paragraph (g) states that “[m]inimization of impacts may be demonstrated by showing that the surface waters or wetlands are able to continue to support the existing uses after project completion.” 15A N.C. Admin. Code 2H.0506(g).

These rules require some degree of comparison, and Petitioners, Respondent, and Intervenor disagree regarding what time period is used as the baseline. Though Petitioners are correct that the definition of “existing uses” in 15A N.C. Admin. Code 2B.0202(30) does *not* confine itself to uses that were attainable only after 1975, neither does it require looking to the condition and uses of the surface water prior to the installation of the dam at issue. Petitioners argue that not looking to the pre-dam state of the waters is absurd in holding Intervenor to an arguably lesser standard because the dam was licensed prior to the CWA, but it is more absurd to read this statute to require the agency to compare the water quality to the state it was in the early 1900s prior to the dam’s construction. Subparagraph (g) states that minimization *may* be shown by comparing the pre-project uses with the uses that will be available after completion of the project. This comparison is permissive, and such a comparison makes little sense in this case since the project, i.e., the dam, was completed in the early 1900s. The logical reading of these rules is that the certified activity must minimize the adverse impacts it may have, for example, by continuing to support the existing uses, but not necessarily by a comparison to the pre-dam condition of the waters. The ALJ’s interpretation of this provision is entitled to some deference and is not erroneous. *See Britt*, 348 N.C. at 576, 501 S.E.2d at 77.

As to Petitioners’ argument that the whole record shows that adverse impacts on primary recreation will not be minimized, Petitioners fail to cite any contrary evidence in the record showing that the Certification will adversely affect the primary recreation in the area, which is defined as swimming or body contact with water, 15A N.C. Admin. Code 2B.0202(52). Essentially, what Petitioners cite in the record is evidence that the primary recreation in the area was already minimal under the current flow rate. Petitioners do not

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

respond to or attempt to contradict finding of fact 69 that “[a]ll parties agreed that the increased 330/725 cfs minimum flows . . . would improve recreational conditions.”

As to Petitioners’ argument that the whole record shows that adverse impacts on secondary recreation will not be minimized, Petitioners fail to cite any contrary evidence in the record showing that the Certification will adversely affect the secondary recreation in the area, which is defined as boating and activities requiring infrequent body contact with the water, 15A N.C. Admin. Code 2B.0202(57). Again, what Petitioners argue and cite in the record is that a higher minimum flow rate would be better than the Certification for secondary recreation. The requirement to minimize adverse impacts, however, does not require that the Certification further enhance secondary recreation if it has been determined that the Certification will not adversely impact the existing secondary recreation uses. Again, Petitioners do not respond to or attempt to contradict finding of fact 69 that “[a]ll parties agreed that the increased 330/725 cfs minimum flows . . . would improve recreational conditions.” Though Petitioners point out that the City of Rockingham would benefit from increased eco-tourism on the Tillery Reach and that another river in South Carolina is more frequently used for secondary recreation activities, despite being shorter and less attractive than the Tillery Reach, those are not factors in issuing the Certification.

As to Petitioners’ argument that the whole record shows that adverse impacts on aquatic life will not be minimized, this argument is similar to their argument above regarding attainment of biological integrity and can be refuted on similar grounds. The ALJ compared the effects of the Certification with the pre-dam habitat for the aquatic life in the area and found that aquatic life would be improved under the Certification.

Different from their attainment of biological integrity argument, however, they argue that Index C was not a valid scientific method to assess the effects of the Certification because the Tillery Reach does not have a constant flow rate. Mr. Mead from DWR testified that the Certification would have a positive impact on fifteen out of twenty-three species in the Tillery Reach based on calculations using Index C. Petitioners admitted in their Memorandum of Fact and Law in Support of Exceptions to the Administrative Law Judge’s Recommended Decision that Weighted Usable Area (WUA), employed by FERC, is a valid methodology in this case. They contended, though,

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

that the WUA results were misrepresented. FERC concluded that there was little additional benefit gained from Petitioners' proposed flows using WUA.

In an administrative proceeding, it is the prerogative and duty of that administrative body, once all the evidence has been presented and considered, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness."

Little v. N.C. State Bd. of Dental Exam'rs, 64 N.C. App. 67, 68-69, 306 S.E.2d 534, 536 (1983)(quoting *Comm'r. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980)) (citations omitted).

Here, the evidence that Index C may have been an imperfect method goes toward the weight of the evidence, and the ALJ was within her province to give the testimony of Mr. Mead greater weight. Petitioners accepted the validity of WUA, though arguing that the results were misrepresented. FERC's conclusions were also before the agency in addition to DWR's conclusions using Index C; thus, there was substantial evidence that aquatic life would not be adversely impacted by the Certification.

VI. Mitigation

[5] Petitioners argue that the trial court erred in concluding that a discharge of water is not regulated by the CWA and that this project was exempt from mitigation requirements. We reject both arguments under *de novo* review.

The ALJ concluded that mitigation was unnecessary given that all parties agreed that recreation and aquatic life would be improved by the Certification. The trial court likewise concluded

as a matter of law that mitigation is only required when "existing uses are removed or degraded by a discharge to classified surface water". [sic] There has been no evidence brought forth by Petitioners to show that existing uses were removed or that anything was degraded by the increase of the minimum water flow from the dams and that there is no evidence of any discharge by anyone to classified surface waters.

CITY OF ROCKINGHAM v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 228 (2012)]

Here, none of the parties ever contested the need for certification to discharge water from the dam. The trial court appears to be confused about what “discharge” means in the context of the CWA. The release of water from the dam is a discharge covered by the CWA that requires certification by the State. *See* 33 U.S.C. § 1341(a)(1). Though the trial court committed error in making this statement, it was only one of two reasons for its ultimate conclusion that mitigation was unnecessary. The trial court concluded, as the ALJ did, that mitigation is unnecessary in this case since existing uses were not removed or degraded. The trial court’s error in stating that there was no evidence of any discharge is harmless since we find that this interpretation is reasonable and supported by the evidence that no existing uses are degraded or removed.

In arguing that the trial court erred in concluding that this project was exempt from mitigation requirements, Petitioners again rely on their reading of minimization of adverse impacts and that the baseline for the comparison is the status of the Tillery Reach prior to constructing the dam.

Intervenor argues that the ALJ and trial court properly concluded that mitigation is not required in this case. Intervenor argues that paragraph (b) of Rule 506 should be read like paragraph (c) of Rule 506 regarding wetlands. When it is determined that the certification “would not remove or degrade existing uses,” review is limited to the criteria in subparagraph (c)(2)-(5), eliminating the necessity of reviewing the criteria in subparagraph (c)(1) and (c)(6). 15A N.C. Admin. 2H.0506(a). The criteria in subparagraph (c)(1)-(6) are similar to the criteria in subparagraph (b)(1)-(6), but paragraph (a) does not limit the criteria to be reviewed for surface waters under paragraph (b).

Though there is some tension within Rule 506 in that it does not necessarily limit the review under paragraph (b) to the criteria in subparagraphs (2)-(5), a logical reading of these provisions comports with the ALJ’s decision and the trial court’s decision that mitigation is unnecessary where it is shown that existing uses will not be degraded or removed by the Certification. It would be impossible for the Director to issue a certification if the agency must evaluate the replacement of existing uses when the agency has already determined that no existing uses will be lost or degraded, meaning they do not need replacing since they have not been lost in the first place. Additionally, the agency’s interpretation is to be accorded some deference. *See Britt*, 348 N.C. at 576, 501 S.E.2d at 77. We find no legal error in the ALJ’s and trial court’s interpretation of this Rule.

CONE v. WATSON

[224 N.C. App. 241 (2012)]

VII. Land Preservation as Mitigation

[6] Finally, Petitioners argue in the alternative that the trial court erred in not evaluating whether the land preservation plan was sufficient mitigation and that EMC erred in upholding a land preservation plan that does not comply with EMC's rules. Petitioners' argument is moot given our interpretation that mitigation is unnecessary when the agency has determined that existing uses will not be removed or degraded by the Certification.

For the reasons stated above, we affirm the trial court's decision upholding EMC's final decision.

Affirmed.

Judges ELMORE and STROUD concur.

JORDICE CONE, PLAINTIFF

v.

KATHY WATSON INDIVIDUALLY AND D/B/A KATHY'S COUNTRY CUTS, DEFENDANT

No. COA12-670

Filed 18 December 2012

Negligence—summary judgment—material issues of fact—contributory negligence

The trial court erred by granting defendant's motion for summary judgment because there were issues of material fact both as to whether defendant was negligent and as to whether plaintiff was contributorily negligent.

Appeal by plaintiff from order entered 25 July 2012 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 29 November 2012.

Newton & Lee, PLLC by E. S. "Buck" Newton, III, for plaintiff-appellant.

Poyner Spruill LLP by Timothy W. Wilson, for defendant-appellee.

STROUD, Judge.

CONE v. WATSON

[224 N.C. App. 241 (2012)]

I. Background

On 18 March 2010, Jordice Cone (“plaintiff”) filed a complaint against Kathy Watson individually and as the sole proprietor of Kathy’s Country Cuts in Nash County (“defendant”), alleging that plaintiff was injured when defendant negligently failed to provide sufficient lighting for her front steps. Defendant filed a motion for summary judgment on 28 March 2011. The trial court held a summary judgment hearing on 18 July 2011 and granted defendant’s motion by order entered 25 July 2011. Plaintiff filed timely written notice of appeal to this Court on 11 August 2011.

The evidence forecast at the summary judgment hearing showed the following:

On 16 December 2008, plaintiff went to defendant’s salon to get her hair cut. It was approximately 6:30 P.M. when she arrived and already dark. Plaintiff entered the salon through a ramp along the side of defendant’s building. There were also a set of stairs in front of defendant’s building. Plaintiff had been to defendant’s salon on numerous occasions previously, but her prior visits were normally in the daytime.

After having her hair cut, plaintiff paid and left the salon. When she got outside, she noticed that both the stairs and the ramp were dark. It had been drizzling and plaintiff was concerned that she would slip if she took the ramp, so she chose instead to try the stairs. Still concerned about the slickness of the steps, she slowly descended the stairs while holding on to the handrail. There was no light shining on the bottom part of the staircase, though some light from the interior of the salon illuminated the top few steps. It was so dark that plaintiff could not see where she was stepping. When she thought she had reached the bottom of the stairs, she stepped down with her left foot, missing the last step, and landed with most of her weight on that foot. As a result, plaintiff suffered a broken left ankle and a severely sprained right ankle.

II. Summary Judgment

A. Standard of Review

We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court’s order focused on determining whether there is a genuine issue of material fact

CONE v. WATSON

[224 N.C. App. 241 (2012)]

and whether either party is entitled to judgment as a matter of law. As a part of that process, we view the evidence in the light most favorable to the nonmoving party.

Cox v. Roach, ___ N.C. App. ___, ___, 723 S.E.2d 340, 347 (2011) (citation and quotation marks omitted).

B. Common law negligence

Plaintiff claims that she made out a *prima facie* claim for negligence *per se* and common law negligence. For the following reasons, we hold that plaintiff has established a *prima facie* claim for common law negligence and therefore do not reach her negligence *per se* argument.

North Carolina landowners . . . are required to exercise reasonable care to provide for the safety of all lawful visitors on their property. Whether a landowner's care is reasonable is judged against the conduct of a reasonably prudent person under the circumstances. There is no duty to protect a lawful visitor from dangers which are either known to him or so obvious and apparent that they may reasonably be expected to be discovered.

Kelly v. Regency Centers Corp., 203 N.C. App. 339, 343, 691 S.E.2d 92, 95 (2010) (citations omitted). It is undisputed that plaintiff was a lawful guest at defendant's salon at the time of her injury. The question is whether, taken in the light most favorable to plaintiff, the forecast evidence fails to show, as a matter of law, that defendant did not exercise reasonable care.

As a general rule, issues of negligence are not ordinarily susceptible to summary disposition. It is only in the exceptional negligence case that summary judgment is appropriate, because the rule of the prudent man or other standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.

Hockaday v. Morse, 57 N.C. App. 109, 112, 290 S.E.2d 763, 766 (citation omitted), *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 209 (1982).

The mere fact that the plaintiff fell and suffered injuries when she stepped from the higher to the lower level raises no inference of negligence against the defendant. Generally, in the absence of some unusual condition,

CONE v. WATSON

[224 N.C. App. 241 (2012)]

the employment of a step by an owner of a building because of a difference between levels is not a violation of any duty to invitees. Different floor levels in public and private buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location, or surrounding circumstances a reasonably prudent person would not be likely to expect or see it.

York, 264 N.C. at 455, 141 S.E.2d at 868-69 (citation, ellipses, and quotation marks omitted).

Plaintiff argues that the lack of lighting would be one such surrounding circumstance. Defendant argues that plaintiff's claim fails as a matter of law because she did not show that the steps at defendant's store were otherwise defective.

Our Supreme Court has said that "[i]f [a] step is properly constructed, but poorly lighted, and by reason of this fact one entering the store sustains an injury, recovery may be had." *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 159, 108 S.E.2d 461, 467 (1959) (citation and quotation marks omitted). Thus, even assuming that there were no other defects with the stairs, defendant could be liable if she negligently failed to provide sufficient lighting.¹ The question is whether plaintiff presented a *prima facie* case for negligence, including evidence that defendant breached her duty to plaintiff in failing to provide adequate lighting on the step. In this context, a defendant breaches her duty to a lawful visitor if she fails to provide adequate lighting such that a reasonably prudent person would be likely to expect or see the step. See *York*, 264 N.C. at 455, 141 S.E.2d at 868-69.

Here, the evidence forecast by the parties showed that the light emanating from the store did not reach the bottom of the stairs. There were no other lights outside of defendant's store near the stairs. Plaintiff testified that the bottom of the stairs was so dark that she could not tell if she was at the bottom or not and that as a result

1. Defendant cites *Harrison v. Williams*, 260 N.C. 392, 132 S.E.2d 869 (1963) for the opposite proposition. The Supreme Court in *Harrison*, however, merely held that in that case the evidence was too vague to sustain the plaintiff's claim. *Harrison*, 260 N.C. at 397, 132 S.E.2d at 873. The plaintiff in *Harrison* failed to produce evidence regarding the location of the steps and lighting conditions at the time the plaintiff fell. *Id.*, 132 S.E.2d at 872. As a result, the Supreme Court upheld the trial court's judgment of involuntary nonsuit. *Id.*, 132 S.E.2d at 873. The Court did not hold that the plaintiff was required to show some defect in the construction of the step.

CONE v. WATSON

[224 N.C. App. 241 (2012)]

she stepped off the second-to-last stair not knowing that there was another level. Because “[t]he word dark[] [is] a relative term,” *Harrison*, 260 N.C. at 397, 132 S.E.2d at 872, and failure to properly illuminate a step can constitute negligence, we cannot say as a matter of law that a reasonable person under the factual circumstances presented by the parties, taken in the light most favorable to plaintiff, “would . . . be likely to expect or see” the last step. *York*, 264 N.C. at 455, 141 S.E.2d at 868-69. Therefore, there is a genuine issue as to whether defendant was negligent in not providing sufficient lighting.

C. Contributory Negligence

Defendant claims that even if she was negligent, plaintiff is barred from recovery because plaintiff was also negligent and her negligence was a proximate cause of her own injuries. Plaintiff argues that there is a genuine issue of material fact as to whether she was negligent or not. For the following reasons, we hold that there is a genuine issue of material fact as to whether plaintiff was negligent.

Plaintiff cannot recover if she, too, was negligent where that negligence was a proximate cause of her injuries. *Muteff v. Invacare Corp.*, ___ N.C. App. ___, ___, 721 S.E.2d 379, 384 (2012). “[C]ontributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.” *Duval v. OM Hospitality*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) (citation and quotation marks omitted). “The existence of contributory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff’s negligence so clearly that no other reasonable conclusion may be reached.” *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002) (citation omitted). “Contradictions or discrepancies in the evidence even when arising from plaintiff’s evidence must be resolved by the jury rather than the trial judge.” *Duval*, 186 N.C. App. at 395, 651 S.E.2d at 265 (citation and quotation marks omitted).

Defendant contends that this case is similar to that of *Gordon v. Sprott*, 231 N.C. 472, 57 S.E.2d 785 (1950). In *Gordon*, the plaintiff, along with her daughter and husband, went to a movie theater with a balcony for additional seating. *Id.* at 472, 57 S.E.2d at 785-86. Before the movie started, the plaintiff walked down the side aisle, stepped up onto the balcony, and took her seat. *Id.*, 57 S.E.2d at 786. After the movie finished, the plaintiff started to leave the theater and edged her

CONE v. WATSON

[224 N.C. App. 241 (2012)]

way to the end of the balcony, which was not lighted. *Id.* at 472-73. There was only one step between the balcony and the aisle, but plaintiff testified that she fell because she was unaware that the step was there. *Id.* The Supreme Court reversed the trial court's order denying defendant's motion for judgment of involuntary nonsuit because the plaintiff "knew or by the exercise of ordinary care . . . should have known that as she approached the end of the row, she was approaching the place of the elevation of which she knew." *Id.* at 476, 57 S.E.2d at 788.

Gordon is, however, distinguishable from the present case in two ways. First, in *Gordon* there was only one step and the plaintiff should have been aware of some change in elevation, given that she had traversed that same step two hours previously in similar lighting conditions. Here, there was evidence that plaintiff had been to defendant's salon before and had even used those stairs previously, but there was no evidence that she had used them recently or otherwise should have been aware of the number of steps in front of defendant's salon. Second and most significantly, unlike in *Gordon*, a jury could reasonably conclude that plaintiff used the stairs with "the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury," *Duval*, 186 N.C. App. at 395, 651 S.E.2d at 265, by proceeding slowly down the stairs, holding on to the handrail.

We find *Duval v. OM Hospitality* more analogous to the case *sub judice*. In *Duval*, the plaintiff and her husband were descending a dark staircase at their hotel. *Id.* at 391-92, 651 S.E.2d at 263. When she thought she was at the bottom, she stepped off and fell because she was in fact still one step from the ground. *Id.* The plaintiff knew that the staircase was dark and that she would have to be careful, but was not aware of another way out. *Id.* at 392. We held that "a jury could also find that plaintiff acted reasonably in using the stairwell since she was not aware of another way out and because she used proper care in descending the dark stairs, carefully and slowly, holding the railing, and having her husband ahead of her feeling for the steps, but fell nonetheless." *Id.* at 396, 651 S.E.2d at 265.

As in *Duval*, defendant argues

that plaintiff was fully aware that the stairwell was so dark that she could not see the steps, so that she was contributorily negligent by using the stairwell under these conditions and by her failure to seek another way out[.]

CONE v. WATSON

[224 N.C. App. 241 (2012)]

Id. It is undisputed that plaintiff knew that the stairs were dark and that she would have to be careful. Plaintiff attempted to be careful by descending the stairs slowly while holding on to the handrail.

Here, unlike in *Duval*, plaintiff had another potential exit – the side ramp. “If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence.” *Dunnevent v. Southern Ry. Co.*, 167 N.C. 232, 233, 83 S.E. 347, 348 (1914). Plaintiff stated that she knew that the side ramp was an option, and in fact had ascended the ramp safely when she arrived. Plaintiff chose not to use that route because she was concerned that it was dark like the stairs, but more likely to be slippery after the recent light rain. Where both known ways may be dangerous, we cannot say that choosing one over the other “establishes a plaintiff’s negligence so clearly that no other reasonable conclusion may be reached.” *Martishius*, 355 N.C. at 479, 562 S.E.2d at 896.

[While] [i]t is certainly possible that a jury may agree with defendant[,] . . . considering the evidence in the light most favorable to the plaintiff, as we must for the non-moving party, a jury could also find that plaintiff . . . used proper care in descending the dark stairs, carefully and slowly, holding the railing[,] . . . but fell nonetheless.

Duval, 186 N.C. App. at 396, 651 S.E.2d at 265. We cannot say that plaintiff was negligent as a matter of law in descending the stairs, given the caution with which she did so, nor that her choice to use the stairs rather than the ramp was negligent as a matter of law, given that both paths were dark and that plaintiff was concerned that the ramp might be wet and slippery.

D. Conclusion

We hold that the trial court erred in granting defendant’s motion for summary judgment because there are issues of material fact both as to whether defendant was negligent and as to whether plaintiff was contributorily negligent. Therefore, we reverse the trial court’s order and remand for further proceedings.

REVERSED and REMANDED.

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

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

JACQUES A. DALLAIRE AND FERNANDE DALLAIRE, PLAINTIFFS

v.

BANK OF AMERICA, N.A., HOMEFOCUS SERVICES, LLC, AND LANDSAFE
SERVICES, LLC, DEFENDANTS

No. COA12-626

Filed 18 December 2012

1. Appeal and Error—preservation of issues—argument abandoned

Appeal from a summary judgment for defendant Homefocus Services, LLC (later Landsafe Services, LLC) was abandoned where the entirety of plaintiffs' brief was dedicated to allegations against defendant Bank of America.

2. Mortgages and Deeds of Trust—refinanced home mortgage—first priority loan—duty of borrower and lender

The trial court did not err by granting summary judgment for Bank of America (defendant) where there was no genuine issue of fact as to whether defendant owed plaintiffs a contractual duty to provide a first mortgage loan. The terms of the contract designated to plaintiffs the affirmative duty to assure that the lien had and maintained first priority and plaintiffs could establish no affirmative duty on the part of defendant to inform plaintiffs that the lien held second priority status.

3. Fiduciary Relationship—lender and borrower—interaction prior to loan—summary judgment not proper

Summary judgment should not have been granted for defendant Bank of America in an action arising from a refinanced home mortgage where plaintiffs alleged breach of fiduciary duty. While uncommon, North Carolina law does leave room for the recognition of a fiduciary relationship between lender and borrower. In this case, plaintiffs did not receive outside advice and, when the facts are viewed in the light most favorable to plaintiffs, there is a question of fact as to whether the circumstances of the parties' interaction prior to signing the loan gave rise to a fiduciary relationship.

4. Fraud—negligent misrepresentation—home refinancing—summary judgment

Summary judgment should not have been granted for defendant Bank of America on the issue of whether defendant negligently misrepresented the priority a home refinancing loan would receive.

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

5. Mortgages and Deeds of Trust—home refinancing—statute not retroactive

The trial court properly granted summary judgment for Bank of America (defendant) on a claim that defendant violated the Secure and Fair Enforcement Mortgage Licensing Act, N.C.G.S. § 53-244.110 (2011), where plaintiffs' claims arose from negotiations and a contract executed prior to the enactment of the statute. The legislature expressed a clear intent that the statute be applied prospectively.

6. Appeal and Error—preservation of issues—argument not sufficient

Plaintiffs abandoned an argument concerning the Mortgage Lending Act (MLA), N.C.G.S. § 53-243.01 to -543.18 (2001) (repealed 2009), the predecessor to the current statute, by not arguing what the statutory standard was or how it was violated.

Appeal by Plaintiffs from judgment entered 14 February 2012 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 29 November 2012.

Ferguson, Scarbrough, Hayes, Hawkin & DeMay, P.A., by James E. Scarbrough, for the Plaintiff-Appellants.

McGuire Woods, LLP, by Lia A. Lesner and Robert A. Muckenfuss, for Defendant-Appellees.

Jerome N. Frank Legal Services Organization, by J.L. Pottenger, Jr., Amicus Curiae.

BEASLEY, Judge.

Jacques and Fernande Dallaire (Plaintiffs) appeal from the trial court's entry of summary judgment in favor of Defendants. For the following reasons, we affirm in part and reverse and remand in part.

In 2005, Plaintiffs filed Chapter 7 bankruptcy to relieve their personal liability on their debts. Through the bankruptcy proceedings, Plaintiffs were relieved of their personal liability on three mortgage liens held by two lenders against Plaintiffs' home. Defendant Bank of America held two of these liens: one, a deed of trust on a mortgage note in first priority status, in the original amount of \$138,900 and a second, an equity line deed of trust in second priority status, in the

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

original amount of \$25,000. The third lien secured a business loan and was held by Branch Banking & Trust (BB&T) in the original amount of \$241,449.37 in third priority status. All liens remained valid as against the property.

In July 2007, Plaintiffs responded to Defendant's mailing solicitations for refinancing home mortgages and went to Defendant Bank of America's local branch to discuss a refinance mortgage for their home. Plaintiffs allege that they informed Defendant's agent fully with respect to their bankruptcy and remaining liens. Plaintiffs also allege that Defendant Bank of America's agent repeatedly assured them that a new refinancing loan would receive first priority status and advised them to increase the amount of the loan to pay off two car notes. Relying on this assurance and advice, and without seeking outside counsel, Plaintiffs applied for a refinancing loan in the amount of \$166,000. They were approved and received roughly \$24,000 in cash from the loan to repay their car notes. Overall, their monthly expenses were reduced.

The Plaintiffs' loan application was for a first-mortgage lien. On the application, Plaintiffs disclosed that they had "been obligated on [a] loan which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment[.]" However, Plaintiffs checked "No" next to the disclosure asking whether they had "been declared bankrupt within the past 10 years[.]"

Following the application and in accordance with general procedure, Defendant Bank of America ordered a "title search" from its subsidiary, Defendant HomeFocus (now Landsafe Services).¹ This "title search" showed the three liens held against Plaintiffs home. Defendant Bank of America employed LSI Title Agency (LSI), upon which Defendant employed to do "curative title work[.]" to assess the validity of the BB&T lien. LSI gathered information from Plaintiffs and noted that Plaintiffs advised LSI that the BB&T lien was discharged. LSI advised Defendant Bank of America that it was secure in moving forward with the loan. Defendant Bank of America did not have an attorney review the information and handled the full refinance process itself.

1. In their briefs, both parties refer to the research performed by Defendant HomeFocus (now LandSafe Services) as a "title search." We have placed this language in quotations because a title search in North Carolina is an act which constitutes the practice of law as defined by N.C. Gen. Stat. § 84-2.1 (2011). We also note that corporations are prohibited from practicing law. *See* N.C. Gen. Stat. § 84-5 (2011).

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

In 2010, Plaintiffs attempted to sell their home and conducted a title search. The search revealed the priority status of the liens on the home: the BB&T lien now held first priority and the new Bank of America lien held second priority.

On 15 December 2010, Plaintiffs filed the instant action. Plaintiffs alleged negligent misrepresentation, negligent title search, breach of contract, breach of fiduciary duty, and statutory violations. On 18 January 2011, Defendants filed a motion to dismiss for failure to state a claim. The trial court denied this motion on 21 February 2011. On 19 December 2011, Plaintiffs moved to join LSI Title Agency as an additional defendant. On 29 December 2011, Defendants filed a motion for summary judgment. On 14 February 2012, the trial court heard both motions and granted Defendants' motion for summary judgment but dismissed the action without prejudice as to the non-party LSI Title Agency. Plaintiffs appeal the dismissal.

“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)).

[1] We first note that Plaintiffs attribute no breach of duty, negligent act, or legal wrong to Defendant Landsafe Services (formerly HomeFocus Services). The entirety of Plaintiffs' brief is dedicated to allegations against Defendant Bank of America. Consequently, we affirm summary judgment with respect to Landsafe Services (formerly HomeFocus Services).² We also note that Plaintiffs did not argue that the trial court erred in granting summary judgment on the claim of negligent title search. “Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). This argument is thus abandoned.

I. Breach of Contract Claim

[2] Plaintiffs first argue that the trial court erred in granting Defendants' motion for summary judgment because a genuine issue of material fact exists as to whether Defendant Bank of America owed Plaintiffs a contractual duty to provide a first mortgage loan. We disagree.

2. Because this leaves only Defendant Bank of America as a defendant in this action, this opinion will use the term “Defendant” moving forward to reference Defendant Bank of America.

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

“The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000)(citation omitted).

Here, Plaintiffs make no clear allegations in their brief that a contract existed outside of the signed note and deed of trust to secure the loan.³ Thus, to establish a breach of contract, Plaintiffs must show that Defendant breached the duty undertaken in the express terms of the written loan contract between the parties. The terms of deed of trust include the following duties:

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender’s opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, **Lender may** give Borrower *a notice identifying the lien*. Within 10 days of the date on which that notice is given, **Borrower shall** satisfy the lien or take one or more of the actions set forth above in this Section 4.

(emphasis added). Thus, the terms of the contract designate the affirmative duty to assure that this lien has and maintains first priority to Plaintiffs as the borrowers. The only duty assumed by Defendant is a discretionary one in which Defendant may choose to notify Plaintiffs if it learns that this lien does not have first priority, but Defendant does not have to perform this action. Therefore, Plaintiffs can estab-

3. Plaintiffs allude to the possibility that Defendant’s refinancing solicitations or subsequent negotiations constituted an offer but provide nothing specific allowing this Court to determine that a clear and definite offer was made or accepted prior to the written contract signed by the parties.

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

lish no affirmative duty on the part of Defendant to inform Plaintiffs that the lien held second priority status.⁴

II. Tort Claims

Plaintiffs next argue that the trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether a duty existed with respect to Plaintiffs' tort claims. We agree.

A. Breach of Fiduciary Duty

[3] A fiduciary relationship “may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Beyond the usual occurrence, such as that found between a lawyer and client, the relationship “extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.” *Id.* (citation omitted)(internal quotation marks omitted). “Whether such a relationship exists is generally a question of fact for the jury.” *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009)(citation omitted).

While uncommon, North Carolina law does leave room for the recognition of a fiduciary relationship between lender and borrower.

[A]n ordinary debtor-creditor relationship generally does not give rise to such a special confidence: [t]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship. This is not to say, however, that a bank-customer relationship will never give rise to a fiduciary relationship given the proper circumstances. Rather, parties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract and the duties set forth in the U.C.C.

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 60-61, 418 S.E.2d 694, 699 (1992)(second and third alteration in original)(cita-

4. Although Plaintiffs' complaint alleges in the alternative that they were intended third-party beneficiaries of the contract between LandSafe and Bank of America, Plaintiffs do not advance this argument on appeal. Accordingly, we need not address it.

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

tions omitted)(internal quotation marks omitted). In *Branch Banking & Trust Co.*, this Court found that no fiduciary duty existed where the borrowers relied on outside counsel and advice in addition to the representations of the lender. *Id.*

Here, Plaintiffs argue that special circumstances were present to give rise to a fiduciary relationship where the facts suggest that Defendant advised Plaintiffs that a first priority lien was possible and being provided. Plaintiffs allege that they openly discussed their circumstances with Defendant and that Defendant assured them they could obtain a first priority lien mortgage loan. We find this case distinguishable from *Branch Banking & Trust Co.* because Plaintiffs did not receive outside advice. *Id.* When the facts are viewed in the light most favorable to Plaintiffs, we find that there is a question of fact as to whether or not the circumstances of the parties' interaction prior to signing the loan give rise to a fiduciary relationship and consequently created a fiduciary duty for Defendant.⁵

B. Negligent Misrepresentation

[4] Plaintiffs argue that Defendant negligently misrepresented that the new loan would receive first priority status. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988)(citations omitted). In addition, "parties to a contract impose upon themselves the obligation to perform it; [however,] the law [also] imposes upon each of them the obligation to perform it with ordinary care . . ." *See Toone v. Adams*, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964).

Given our decision to remand on the issue of whether a fiduciary duty existed, we remand on this issue as well to determine, if a duty existed, whether Defendant negligently misrepresented the priority the loan would receive.

III. The Secure and Fair Enforcement Mortgage Licensing Act

[5] Plaintiffs argue that the trial court erred in dismissing the statutory claims under § 53-244.110 of the Secure and Fair Enforcement

5. Specifically, a question of fact exists as to whether or not Defendant sought to give legal advice to Plaintiffs. In either event, when a financial institution undertakes to provide a customer with a service beyond that inherent in the creditor-debtor relationship, it must do so reasonably and with due care.

DALLAIRE v. BANK OF AM.

[224 N.C. App. 248 (2012)]

Mortgage Licensing Act (the S.A.F.E. Act), N.C. Gen. Stat. § 53-244.110 (2011), and its predecessor the Mortgage Lending Act (MLA), N.C. Gen. Stat. §§ 53-243.01 to -543.18 (2001)(repealed 2009). We disagree.

“It is a well-established rule of construction in North Carolina that a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation.” *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999)(citation omitted). “The application of a statute is deemed ‘retroactive’ or ‘retrospective’ when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment.” *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). For example, in *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 718-19, 401 S.E.2d 85, 87 (1991), this Court refused to apply the North Carolina “Lemon Law” under the New Motor Vehicles Warranties Act, N.C. Gen. Stat. §§ 20-351 to -351.10 (1990), to a plaintiff’s vehicle lease where “the rights and obligations involved in the plaintiff’s claim [arose] out of the lease contract which was executed . . . prior to the time when the statute came into effect in North Carolina” and there was no indication that the legislature intended such retroactive application. *Estridge*, 101 N.C. App. at 718, 401 S.E.2d at 86.

Here, it is not proper to retroactively apply the S.A.F.E. Act to the circumstances of Plaintiffs’ loan with Defendant. The S.A.F.E. Act was enacted in July of 2009. Secure and Fair Enforcement Mortgage Licensing Act, ch. 374, 2009 N.C. Sess. Laws 681 (codified at N.C. Gen. Stat. § 53-244.010 to 53-244.121 (2011)). The legislature expressed clear intent that it be applied prospectively:

Except as otherwise provided by Section 5 of this act [(pertaining to individuals licensed under the old requirements and the effect of the Act on their licensure status)], this act becomes effective July 31, 2009, and applies to all applications for licensure as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer filed on or after that date.

ch. 374, § 6, 2009 N.C. Sess. Laws at 709. As in *Estridge*, Plaintiffs’ claims arise out of the negotiations and contract executed prior to the enactment of this statute. In fact, Plaintiffs signed the contract in 2007, two years before the S.A.F.E. Act came into existence. Thus, it

GRIER v. GUY

[224 N.C. App. 256 (2012)]

is inapplicable to the facts of this case and the trial court properly dismissed the claim that Defendant violated this Act.

[6] With respect to Plaintiffs’ reliance on the MLA, we find Plaintiffs’ claim abandoned. “Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). Plaintiffs fail to provide any provision of the MLA that creates a statutory duty applicable to the case *sub judice*. Plaintiffs’ brief merely alleges that the MLA had a similar purpose to the S.A.F.E. Act in protecting consumers in mortgage loan transactions. In order to vaguely establish that the MLA created duties of disclosure, Plaintiffs brief then cites *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009), where this Court found the MLA created a duty for a lender’s to notify the borrower that the property was in a flood plain. *Id.* at 39-44, 681 S.E.2d at 473-76. However, Plaintiffs fail to provide any argument as to how that case or the MLA itself directly apply to the case *sub judice*. Plaintiffs’ mere statement that “issues of material fact exist as to whether [Defendant] violated its statutory standards of conduct” is insufficient where there is no argument as to what that statutory standard is or how it was violated. This Court will not make the argument for Plaintiffs.

Affirmed in part, Reversed and Remanded in part.

Judges STROUD and HUNTER, JR. concur.

DEYLAN T. GRIER BY AND THROUGH HIS GUARDIAN AD LITEM, LESLIE A. BROWN AND
LESLIE A. BROWN, INDIVIDUALLY, PLAINTIFFS-APPELLEES

v.

DONNA L. GUY, ROBIN JENKINS AND LEROY JENKINS, JR., DEFENDANTS-APPELLANTS

No. COA12-416

Filed 18 December 2012

1. Judgments—refusal to set aside default judgment—no excusable neglect—service of process

The trial court did not abuse its discretion by denying defendant Robin Jenkin’s (defendant’s) motion to set aside a default judgment under Rule 60(b) on the ground of excusable neglect. The complaint and summons were hand delivered to Guy, defend-

GRIER v. GUY

[224 N.C. App. 256 (2012)]

ant's mother, with a copy for defendant, at the home in which they both lived. Though Guy informed defendant that she believed the papers were intended for defendant's stepfather (Leroy Jenkins), defendant was on notice that the sheriff had brought legal papers to the home. Ignorance of the judicial process or confusion about the nature of the action is not excusable neglect under Rule 60(b).

2. Appeal and Error—preservation of issues—failure to set aside default judgment—motion on other grounds

Defendant's argument on appeal that plaintiff did not state a claim and that the trial court erred by entering a default judgment against her was dismissed where her motion in the trial court was on other grounds. Defendant moved in the trial court to set aside the default judgment on the grounds that service of process was improper rather than any argument that plaintiffs' complaint failed to state a claim against her.

3. Judgments—refusal to set aside default judgment for all parties—judgment not illogical or unjust

The trial court did not err by not setting aside a default judgment against defendant when it set aside a default judgment against a co-defendant, Leroy Jenkins. Defendant and Jenkins were jointly and severally liable, not jointly liable, and the eventual summary judgment in favor of Jenkins did not necessarily render judgment against defendant illogical or unjust. Even assuming *arguendo* the *Frow* principle, *Frow v. De La Vega*, 82 U.S. 552, 554(1872), could apply on these facts, defendant failed to show any error.

Appeal by Defendant Robin Jenkins from judgment entered 19 February 2009 and order entered 19 January 2010 by Judge Robert P. Johnston and judgment entered 21 December 2011 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2012.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith; Archibald Law Office, by C. Murphy Archibald, for Plaintiffs-Appellees.

Allen, Kopet & Associates, P.L.L.C., by Glenn E. Miller, Jr., for Defendants-Appellants.

McGEE, Judge.

GRIER v. GUY

[224 N.C. App. 256 (2012)]

Only Defendant Robin Jenkins (Defendant) appeals from a default judgment and an order denying her Motion to Set Aside Default Judgment. For the reasons stated below, we affirm in part and dismiss in part.

On or about 17 February 2006, Plaintiff Deylan T. Grier (Grier) allegedly suffered severe burns to his person while in the care of Defendant Donna L. Guy (Guy). Plaintiffs allege that the injury occurred at 9400 Lake Spring Avenue, Charlotte, North Carolina, a home owned by Defendant and her husband, Defendant Leroy Jenkins, Jr. (Jenkins). Defendant is Guy's mother. Rp 31. Jenkins is Guy's stepfather. Grier, through his mother, Leslie A. Brown (Brown), as his guardian *ad litem*, filed a complaint in Mecklenburg County Superior Court on 25 January 2008. Plaintiffs alleged negligent and willful and wanton injury by Guy. Against Defendant and Jenkins, Plaintiffs alleged a claim of negligent entrustment of Defendant's and Jenkins' home.¹ In her individual capacity, Brown sued to recover medical expenses incurred on behalf of Grier.

A sheriff's deputy hand-delivered a copy of Plaintiffs' complaint and summons to Guy at the Lake Spring Avenue home on 1 February 2008. The deputy also left a copy of Plaintiffs' complaint and summons for Defendant and Jenkins with Guy. Defendant and Guy both resided at the Lake Spring Avenue home at the time of service. Jenkins did not reside at the Lake Spring Avenue home at the time of service. According to Guy's affidavit, although she accepted service of process for Defendant, she did not remember giving Defendant the documents. Guy did, however, inform Defendant that someone from the sheriff's office had stopped by the house looking for Jenkins, and had left some papers.

After Defendants failed to file a responsive pleading within the time allowed, the Clerk of Superior Court entered an entry of default against Guy, Jenkins, and Defendant on 24 September 2008. The trial court granted a judgment by default against Guy, Jenkins, and Defendant on 19 February 2009, awarding medical expenses, compensatory damages, and punitive damages to Plaintiffs.

Counsel for all three Defendants filed a motion to set aside the default judgment pursuant to Rule 60 of the North Carolina Rules of

1. We note that we can find no case where the negligent entrustment of real property has been recognized as a cause of action in North Carolina. However, because Defendant does not argue on appeal that there is no such cause of action in North Carolina, she has abandoned this argument. N.C.R. App. P. 28(b)(6). For the purposes of this appeal we assume, without deciding, that such a cause of action does exist.

GRIER v. GUY

[224 N.C. App. 256 (2012)]

Civil Procedure on 1 December 2009. On 19 January 2010, without objection from Plaintiffs, the trial court set aside the default judgment as to Jenkins due to the failure to properly serve process upon Jenkins. The trial court denied the motion as to Guy and Defendant, finding no mistake, inadvertence, or excusable neglect.

Jenkins, through an attorney different from the one who had argued the Rule 60 motion, filed an answer to Plaintiffs' complaint on 5 August 2010. Jenkins subsequently filed a motion for summary judgment on 9 May 2011. The trial court granted summary judgment in favor of Jenkins on 21 December 2011. Defendant appeals.

I

[1] Defendant first argues that the trial court erred in denying Defendant's motion to set aside the default judgment under Rule 60(b) on the grounds of mistake, inadvertence, surprise, or excusable neglect. We disagree. Since Defendant's brief discusses only the ground of excusable neglect, we confine our analysis to this ground. See N.C.R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2011) of the North Carolina Rules of Civil Procedure permits a court to set aside a default judgment on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect[.]" Determining what constitutes excusable neglect is a fact-specific determination in which the Court must consider "all the surrounding circumstances" to decide what "may be reasonably expected of a party in paying proper attention to his case." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986). The party claiming excusable neglect must also show that he had a meritorious defense. *Monaghan v. Schilling*, 197 N.C. App. 578, 584, 677 S.E.2d 562, 566 (2009).

However, in the absence of sufficient evidence of excusable neglect, there is no need to reach the question of a meritorious defense. *Id.* Generally, this Court will not find excusable neglect where the party establishes merely that he was ignorant of the judicial process or misunderstood the nature of the action against him, even when the party has little education. *In re Hall*, 89 N.C. App. 685, 688-89, 366 S.E.2d 882, 885 (1988). Our Supreme Court has found excusable neglect where the defendant was assured by her husband that he had paid the judgment and that she did not need to respond to the summons and complaint. *McInnis*, 318 N.C. at 425-26, 349 S.E.2d at 555. Subsequent cases citing *McInnis* have not expanded reliance

GRIER v. GUY

[224 N.C. App. 256 (2012)]

on a family member's assurances beyond husband and wife, and then only construe it narrowly. *See, e.g., Mitchell County DSS v. Carpenter*, 127 N.C. App. 353, 356-357, 489 S.E.2d 437, 439 (1997) (finding inexcusable neglect where disabled defendant usually relied upon her husband for transportation to court proceedings but was not lulled into reliance by him).

Here, Defendant was on notice that the sheriff had brought legal papers to the Lake Spring Avenue home. Further, Guy properly accepted service as a "person of suitable age and discretion then residing therein" under Rule 4(j)(1)(a) of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a) (2011). Defendant does not argue that Guy was not competent to accept service. Guy did not assure Defendant that she would take care of the matter or lull her into believing, as in *McInnis*, that she did not need to respond. Though Guy informed Defendant that she believed the papers were intended for Jenkins, under *In re Hall*, ignorance of the judicial process or confusion about the nature of the action is not excusable neglect under Rule 60(b). Since we find no evidence of excusable neglect, we need not consider whether Defendant had a meritorious defense. *Monaghan*, 197 N.C. App. at 584, 677 S.E.2d at 566.

Thus, we find no abuse of discretion in the trial court's denial of Defendant's motion to set aside the default judgment under Rule 60.

II.

[2] Defendant argues that the trial court erred in entering a default judgment against her when Plaintiffs' complaint failed to state a valid cause of action against her. Defendant has abandoned this argument.

Defendant moved to set aside the default judgment on the grounds that service of process was improper. We have held against Defendant on this issue above. Defendant did not move to set aside the default judgment based upon any argument that Plaintiffs' complaint failed to state a claim against her.

A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery. A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. Accordingly, if the complaint in the present action failed to state a cause of action as against [movant], the default judgment against her cannot be

GRIER v. GUY

[224 N.C. App. 256 (2012)]

supported and must be set aside even without any showing of mistake, surprise or excusable neglect.

Lowe's v. Worlds, 4 N.C. App. 293, 295, 166 S.E.2d 517, 518 (1969) (citations omitted). In *Lowe's*, however, the appellant had moved the trial court to set aside the default judgment because the complaint failed to state a claim against her. *Id.* at 295, 166 S.E.2d at 518; see also *Presnell v. Beshears*, 227 N.C. 279, 280, 41 S.E.2d 835, 836 (1947) (stating that the defendant's motion to set aside the judgment was based on the complaint's failure to state a claim).

Rule 10(a) of the Rules of Appellate Procedure requires that the appellant "have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). "[A] contention not made in the court below may not be raised for the first time on appeal[.]" *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989). The appellant is not entitled to "swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and internal quotation marks omitted). Defendant's argument is dismissed for this reason.

Further, Defendant argues that she could not have known at the time she filed her motion to set aside the default judgment that summary judgment would subsequently be granted in favor of Jenkins. Defendant states: "Therefore, the Summary Judgment entered in favor of . . . Jenkins . . . on the basis that Plaintiffs' Complaint did not state a valid claim" supports her argument that Plaintiffs' complaint did not state a valid claim against her. Defendant appears to misapprehend the distinction between a 12(b)(6) motion and a motion for summary judgment. The former tests whether a complaint states a valid claim; the latter does not.

The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a 12(b)(6) motion to dismiss, the trial court need only look to *the face of the complaint* to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions

GRIER v. GUY

[224 N.C. App. 256 (2012)]

and other specified matter outside the pleadings. Summary judgment is proper only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law.

Locus v. Fayetteville State Univ., 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (citations omitted). Defendant had every opportunity, in her motion to set aside the default judgment, to challenge the complaint against her on its face, and she failed to do so.

In deciding Jenkins' motion for summary judgment, the trial court will have considered affidavits and other evidence outside the pleadings, which tended to show Jenkins was Guy's stepfather, and was living in South Carolina at times relevant to this action. Defendant, on the other hand, is Guy's biological mother, and was living with Guy in the home in which Grier was injured.

In addition, Defendant makes no argument on appeal, stating in what manner the complaint failed to state a claim against her. This violates Rule 28(b)(6) of the N.C. Rules of Appellate Procedure, and this Court will not make Defendant's argument for her. This argument is dismissed. *Ahmadi v. Triangle Rent A Car, Inc.*, 203 N.C. App. 360, 363, 691 S.E.2d 101, 103 (2010).

III.

[3] Defendant further argues that the trial court should have set aside the default judgment against her when it set aside the default judgment against Jenkins. We disagree.

Defendant argues that because Defendant and Jenkins were to be held jointly and severally liable under Plaintiffs' complaint, once summary judgment was granted in favor of Jenkins, Defendant could not be held liable. Defendant mainly relies on *Vandervoort v. Gateway Mountain Ppty. Owners Assn.*, 114 N.C. App. 655, 442 S.E.2d 350 (1994), which states:

Where a plaintiff files a complaint for joint and several liability against several defendants, and one of them does not respond to the complaint, the proper procedure is to *enter* default against the non-answering defendant who loses his standing in court and is not entitled to appear in any way and proceed upon the other defendants' answers. If the court decides against the plaintiff on the merits of the claim asserted against the answering defendants, the complaint should be dismissed as to all defendants, including the defaulting party; likewise,

GRIER v. GUY

[224 N.C. App. 256 (2012)]

if the court decides in favor of the plaintiff, he is entitled to a final judgment against all. . . . This principle and reasoning which applies to joint and several liability extends to cases where several defendants have closely related defenses or where “it is necessary that the relief against the defendants be consistent.”

Id. at 657-58, 442 S.E.2d at 352 (citations omitted); *see also Rawleigh, Moses & Co. v. Furniture, Inc.*, 9 N.C. App. 640, 643-44, 177 S.E.2d 332, 333-34 (1970), citing Moore, Federal Practice and Procedure, Sec. 55.06, pp. 1819-21 (“*This rule may also be applied with propriety where the liability is both joint and several or is in some other respect closely interrelated.*”). The principle at play in *Vandervoort* and *Rawleigh* is known as the *Frow* principle, grounded in the following language from the United States Supreme Court:

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant’s favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. This was so expressly decided by the New York Court of Errors, in the case of *Clason v. Morris*. Spencer, J., says: “It would be unreasonable to hold, that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree.”

Frow v. De La Vega, 82 U.S. 552, 554, 21 L. Ed. 60 (1872). *Frow* does not address joint and several liability, or liability that is otherwise closely interrelated and, subsequent to *Vandervoort* and *Rawleigh*, our Supreme Court held that the *Frow* principle does *not* apply when liability is joint and several:

GRIER v. GUY

[224 N.C. App. 256 (2012)]

While the Court of Appeals correctly stated the principle of *Frow*, the principle does not apply in the present case because defendants have not been alleged as jointly liable, but as *jointly and severally liable*. The *Frow* principle should be applied where the defendants have been alleged only as jointly liable. When two or more obligors are alleged jointly, it means that they are “undivided” and “must therefore be prosecuted in a joint action against them all.” Because the liability cannot be divided, the matter can be decided only in a like manner as to all defendants. Therefore, if one is liable, then all must be liable, and if one is not liable, then all are not liable.

Harlow v. Voyager Communications V, 348 N.C. 568, 571, 501 S.E.2d 72, 74 (1998) (citation omitted); *see also id.* at 571-73, 501 S.E.2d at 74-75. To the extent that *Vandervoort* and *Rawleigh* are in conflict with *Harlow*, they have been overruled. Therefore, to the extent that Defendant’s argument is that the *Frow* principle should be applied in this case because Defendant is jointly and severally liable with Jenkins, and summary judgment was granted in favor of Jenkins, Defendant’s argument fails. “Where the plaintiff has alleged the defendants to be *jointly and severally liable*, the *Frow* principle will *not apply* because the defendants are *not so closely tied that the judgment against each must be consistent.*” *Harlow*, 348 N.C. at 571, 501 S.E.2d at 74 (emphasis added).

Defendant cites *Harlow* in her brief, but argues that *Harlow* is not dispositive because the claims against Defendant and Jenkins are more “interrelated” than the claims against the defendants in *Harlow*. Defendant claims that our Supreme Court in *Harlow*

indicated that in cases where logically inconsistent adjudications as to liability could be produced if a final judgment on the merits is made separately against one defendant who is in default when there are multiple defendants who are alleged to be jointly and severally liable then the principle set forth in *Vandervoort* should be applied.

Unhelpfully, Defendant does not cite to *Harlow*, or any other opinion, in support of this contention. We note that *Harlow* does not cite or otherwise mention *Vandervoort*. Our review of *Harlow* finds nothing to support Defendant’s statement. In fact, the plain holding of *Harlow*, that the *Frow* principle does *not* apply when liability is joint

GRIER v. GUY

[224 N.C. App. 256 (2012)]

and several, clearly undermines Defendant's argument. Nothing in *Frow* suggests that an outcome with "logically inconsistent adjudications" in cases where the defendants are not jointly liable is sufficient to invoke the *Frow* principle. Defendant cites us to no other authority in support of this argument.

Our own research uncovers little beyond *Vandervoort* and *Rawleigh* to support Defendant's argument, and the portions of *Vandervoort* and *Rawleigh* that may support Defendant's position, and that have not been overruled by *Harlow*, are dicta. Our Court has cited some federal case law in an unpublished opinion that might support the concept that the *Frow* principle could apply in certain situations where liability was not joint, though the cases cited in this opinion are not all supportive of Defendant's position:

Following the trend in federal jurisdictions, our Supreme Court has limited the *Frow* holding to cases "where the defendants have been alleged only as jointly liable." *Harlow v. Voyager Communications V*, 348 N.C. 568, 571, 501 S.E.2d 72, 74 (1998); *see also In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257-58 (7th Cir. 1980) ("The result in *Frow* was clearly mandated by the Court's desire to avoid logically inconsistent adjudications as to liability. However, when different results as to different parties are not logically inconsistent or contradictory, the rationale for the *Frow* rule is lacking."), *Intl Controls Corp. v. Vesco*, 535 F.2d 742, 746-47 n. 4 (2d Cir. 1976), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730 (1978) ("[A]t most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others."), *Whelan v. Abell*, 953 F.2d 663, 674-75 (D.C.Cir.1992) ("[A] default order that is inconsistent with a judgment on the merits must be set aside only when liability is truly joint—that is, when the theory of recovery requires that all defendants be found liable if any one of them is liable—and when the relief sought can only be effective if judgment is granted against all.").

Cole v. Erwin, ___ N.C. App. ___, 729 S.E.2d 128, 2012 WL 2895265, *6 (2012) (unpublished opinion). The United States Bankruptcy Court from the Middle District of North Carolina has embraced applying the *Frow* principle when allowing default judgment against one defendant would be logically inconsistent with the outcome for similarly sit-

GRIER v. GUY

[224 N.C. App. 256 (2012)]

uated non-defaulting defendants. *In re Moss*, 03-12672C-7G, 04-2004, 2005 WL 1288134 (Bankr. M.D.N.C. May 16, 2005) (“*Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1499, 1512 (11th Cir.1984) (holding that the principle that ‘when defendants are similarly situated, but not jointly liable, judgment should not be entered against a defaulting defendant if the other defendant prevails on the merits’ is sound policy). Cf. *Westinghouse Elec. Corp. v. Rio Algom Ltd.* (*In re Uranium Antitrust Litigation*), 617 F.2d 1248, 1257 (7th Cir.1980) (stating that *Frow* was not applicable where different results as to different parties were not logically inconsistent.”); see also *Hudson v. Peerless Ins. Co.*, 374 F.2d 942, 944-45 (4th Cir. 1967).

Defendant has not cited to any binding precedent supporting her argument, and we have found none. We need not answer this question here, however, because Defendant would fail even if we accepted her argument. In order to have prevailed at trial against both Defendant and Jenkins, Plaintiffs would have had to prove that use of the house by Guy was consented to and authorized by Defendant and Jenkins, *Hill v. West*, 189 N.C. App. 189, 193, 657 S.E.2d 694, 697 (2008), and that Defendant and Jenkins knew, or reasonably should have known, that Guy was incompetent or reckless, and likely to cause injury to others while utilizing the house. *Swicegood v. Cooper*, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995).

In this case, an affidavit submitted with Jenkins’ motion to set aside the default judgment avers that Jenkins “was not living at th[at] residence[.]” and “as of 2004, [Jenkins] had moved to 7822 Toogooboo Road, Hollywood, South Carolina[;] . . . this address [in South Carolina] ha[d] been [Jenkins’] dwelling house and usual place of abode from 2004 to the present date.” Jenkins also filed an answer in which Jenkins asserted that he was “without knowledge or information sufficient to form a belief as to the truth of the allegation[s]” because “at all times relevant to the Complaint, he continued to help pay the mortgage on the house . . . but that he did not, at any time relevant to the Complaint, reside therein.” Jenkins made a motion for summary judgment arguing there was no genuine issue of material fact as to the negligent entrustment claim against him, and the trial court entered an order granting Jenkins’ motion for summary judgment.

Plaintiffs’ complaint alleged that Defendant and Jenkins “knew or should have known that [Guy] would be likely to cause injury to . . . Grier or allow him to be injured while in her custody.” There is nothing logically inconsistent with a finding that Defendant, who is Guy’s biological mother and was living in the house with Guy at the

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

time of the incident, had the requisite knowledge, while Jenkins, who was not Guy's biological parent and was not living in the house, did not.

Though it is possible Defendant would have prevailed at trial, this is generally the case when the sanction of default judgment has been entered. Defendant and Jenkins were jointly and severally liable, not jointly liable, and summary judgment in favor of Jenkins did not necessarily render judgment against Defendant illogical or unjust. Even assuming *arguendo* the *Frow* principle could apply on these facts, Defendant fails to show any error was committed by the trial court when it entered, and subsequently maintained, default judgment against Defendant. This argument is without merit.

Affirmed in part; dismissed in part.

Judges BEASLEY and THIGPEN concur.

IN THE MATTER OF POSHA WHATLEY

No. COA12-716

Filed 18 December 2012

1. Appeal and Error—mootness—collateral consequences

Respondent's appeal from an involuntary commitment was properly before the Court of Appeals, notwithstanding the fact that the period of commitment had ended, because of collateral legal consequences.

2. Mental Illness— involuntary commitment—dangerous to herself—findings not sufficient

Respondent's involuntary commitment on the basis that respondent was dangerous to herself was not upheld where the trial court's findings reflected respondent's mental illness, but did not indicate that respondent's illness or any of her symptoms would persist and endanger her within the near future.

3. Mental Illness— involuntary commitment—dangerous to others—findings not sufficient

Respondent's involuntary commitment on the basis that she was dangerous to others was not upheld where the findings per-

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

tained only to respondent's past conduct and drew no nexus between that conduct and future danger to others.

4. Mental Illness— involuntary commitment—insufficient findings—remedy

An involuntary commitment order that lacked sufficient findings was remanded for further findings, if any could be made.

Appeal by Respondent from order entered 18 January 2012 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 23 October 2012.

Roy Cooper, Attorney General, by Charlene Richardson, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by John F. Carella, Assistant Appellate Defender, for Respondent.

THIGPEN, Judge.

Posha Whatley (“Respondent”) appeals from the trial court’s involuntary commitment order, contending, *inter alia*, that the findings of fact in the order were insufficient to support her commitment. For the following reasons, we agree with Respondent’s contention, and we reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

I. Factual & Procedural Background

On 5 January 2012, Respondent was involuntarily committed to a mental health facility (“Presbyterian Hospital”) pursuant to an affidavit and petition for involuntary commitment filed that day by her physician, Dr. Amishi Shah. The affidavit and petition requesting Respondent’s commitment alleged that Respondent had been diagnosed with bipolar disorder, that she had been admitted with psychosis while taking care of her two-month-old child, that she remained disorganized and paranoid, that she was refusing to take her medications, and that she clearly represented a danger to herself or others if not treated. Based upon his 5 January 2012 examination of Respondent, Dr. Shah concluded that Respondent was “mentally ill” and “dangerous to self” and recommended that Respondent be committed as an inpatient at Presbyterian Hospital for 30 days. A court order was entered that day by Magistrate A. Williams finding that there were reasonable grounds to believe that the facts alleged in

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

the petition were true and ordering that Respondent be temporarily committed for examination and treatment at Presbyterian Hospital pending a hearing in district court.

Respondent was evaluated three times following her commitment and prior to her district court hearing. On 6 January 2012, Dr. Noel Ibanez examined Respondent and found that Respondent continued to exhibit bizarre, psychotic behavior, an inability to care for herself, poor insight, poor impulse control, and a tendency to place herself directly at risk of harm. From these findings, Dr. Ibanez concluded that Respondent was “mentally ill” and “dangerous to self” and recommended inpatient commitment for a period of 30 days. On 12 January 2012, Dr. Shah evaluated Respondent a second time, and, in his report based upon this evaluation, indicated that Respondent remained paranoid and disorganized with poor insight and judgment, that Respondent initially presented as manic and psychotic while caring for her two-month-old child, that she needed continued inpatient stay for medication stabilization, and that she was “clearly at risk to self if discharged too soon.” Dr. Shah again opined that Respondent was “mentally ill” and “dangerous to self” and recommended inpatient commitment for a period of 30 days. A court order filed 13 January 2012 indicates that following Dr. Shah’s second evaluation, Respondent requested a continuance of her district court hearing in order “to discuss voluntary [commitment] with her doctor.” On 18 January 2012, Dr. Shah again evaluated Respondent and made findings similar to those included in his previous reports, noting that Respondent had been admitted with psychosis while taking care of her two-month-old son, that she had a history of bipolar disorder, that she remained paranoid and disorganized with poor judgment, and that she needed continued stabilization. Dr. Shah also noted Respondent’s statement to him that she did not plan to follow-up with treatment as an outpatient. Dr. Shah again recommended that Respondent be committed as an inpatient based on his opinion that she was mentally ill and a danger to herself; however, this time Dr. Shah recommended that Respondent be admitted as an inpatient for 15 days, rather than 30 days, as he had recommended in his previous reports.

The matter of Respondent’s involuntary commitment came on for hearing at a special proceedings court session in Mecklenburg County District Court on 18 January 2012. At the hearing, Dr. Shah indicated his recommendation—to which Respondent objected—that Respondent “continue to receive treatment at Presbyterian Hospital

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

up to an additional 15 days for inpatient treatment, for the balance of 90 days of outpatient treatment[.]” By order entered 18 January 2012, the trial court concluded that Respondent was mentally ill and dangerous to herself and others. The court ordered that Respondent be involuntarily committed at Presbyterian Hospital for a period not to exceed 15 days and thereafter committed to an outpatient facility for a period not to exceed 90 days.

On 30 January 2012, Respondent’s treating physician at Presbyterian Hospital requested a hearing to extend Respondent’s involuntary commitment. This request was rendered moot, however, when Respondent subsequently consented to inpatient treatment beyond the timeframe set forth in the 18 January 2012 order. Consequently, the trial court ordered that “no action be taken on Petitioner’s Request for Re-hearing” and that Respondent remain under the outpatient terms of the 18 January 2012 commitment order. Respondent timely filed notice of appeal from the trial court’s 18 January 2012 commitment order with this Court on 25 January 2012.

II. Analysis

Respondent contends that the trial court erred in failing to record sufficient findings of fact in its order for involuntary commitment to support its conclusions that Respondent was dangerous to herself and others. We agree.

[1] Preliminarily, we note that Respondent’s appeal is properly before us, notwithstanding the fact that the period of her involuntary commitment has ended. *In re Mackie*, 36 N.C. App. 638, 639, 244 S.E.2d 450, 451 (1978) (explaining that “a prior discharge will not render questions challenging the involuntary commitment proceeding moot”); *see also In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472–73 (2009) (providing that “[w]hen 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”). We accordingly undertake our review of the trial court’s commitment order as follows:

On appeal of a commitment order our function is to determine whether there was any competent evidence to support the “facts” recorded in the commitment order and whether the trial court’s ultimate findings of mental illness and dangerous to self or others were supported by the “facts” recorded in the order. We do not consider whether the evidence of respondent’s mental

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof.

In re Collins, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) (citations omitted).

[2] N.C. Gen. Stat. § 122C-268(j) sets forth the criteria for involuntary commitment and provides that the trial court must “find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others” N.C. Gen. Stat. § 122C-268(j) (2011). The trial court must also record the facts that support its “ultimate findings,” i.e., conclusions of law, that the respondent is mentally ill and dangerous to himself or others. *Id.*; *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008) (describing “[a] trial court’s duty to record the facts that support its findings [as] ‘mandatory’ ”).

The trial court here found the following facts “by clear, cogent and convincing evidence”:

Respondent was exhibiting psychotic behavior that endangered her and her newborn child. She is bipolar and was experiencing a manic stage. She was initially noncompliant in taking her medications but has been compliant over the past 7 days. Respondent continues to exhibit disorganized thinking that causes her not to be able to properly care for herself. She continues to need medication monitoring. Respondent has been previously involuntarily committed.

Respondent does not challenge any of the trial court’s findings of fact, and these findings, therefore, are binding on appeal. *See In re Zollicoffer*, 165 N.C. App. 462, 469, 598 S.E.2d 696, 700 (2004). The trial court also checked a box in its order indicating its intention to find “as facts all matters set out in the physician’s/eligible psychologist’s report, specified below[.]” Although the court did not specify which report it sought to incorporate, this Court has previously indicated that the most recent report be incorporated under these circumstances. *Booker*, 193 N.C. App. at 437, 667 S.E.2d at 304 (holding that the trial court had incorporated by reference “the last physician’s report” into its order). The most recent physician’s report presented to the trial court here was Dr. Shah’s 18 January 2012 report. We deduce from the fact that this report was completed on the day of the

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

hearing and from the fact that Dr. Shah was the only physician to testify at the hearing that the 18 January 2012 report was likely the report that the trial court intended to incorporate into its order. This report set forth the following findings:

Patient admitted [with] psychosis while taking care of her two month old son. She has a [history of] Bipolar [disorder]. She remains paranoid, disorganized, intrusive. She tells me that she does not plan to follow up as an outpatient. She has very poor insight [and] judgment and needs continued stabilization.

As detailed below, we hold that even assuming that the trial court successfully incorporated the contents of Dr. Shah's 18 January 2012 report into its order, the order was still insufficient to support Respondent's involuntary commitment.

A. Dangerous to Self

N.C. Gen. Stat. § 122C-3 defines "dangerous to self" to mean that, within the relevant past, the individual's conduct has demonstrated the following:

I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; *and*

II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself[.]

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2011) (emphasis added).

Our review of the trial court's findings, which we assume *arguendo* included the findings set out in Dr. Shah's report, indicates that the second prong of the "dangerous to self" inquiry is not satis-

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

fied. In short, none of the court's findings demonstrate that there was "a reasonable probability of [Respondent] suffering serious physical debilitation within the near future" absent her commitment. Each of the trial court's findings pertain to either Respondent's history of mental illness or her behavior prior to and leading up to the commitment hearing, but they do not indicate that these circumstances rendered Respondent a danger to herself in the future. For instance, the court's findings concerning Respondent's psychotic behavior, history of bipolar disorder, and "manic stage" reflect only the court's ultimate finding of mental illness, which Respondent does not contest. Similarly, the findings that Respondent "remain[ed] paranoid," "exhibit[ed] disorganized thinking," and demonstrated "very poor insight [and] judgment" describe Respondent's condition at the time of the hearing, but do not in themselves indicate that Respondent presented a threat of "serious physical debilitation" to herself within the near future. The trial court also found that Respondent needed medication monitoring and that she did not plan to follow up as an outpatient, but, again, there is no finding that connects these concerns with the court's ultimate finding of "dangerous to self" as defined in N.C. Gen. Stat. § 122C-3(11)(a)(1). Simply put, the trial court's findings reflect Respondent's mental illness, but they do not indicate that Respondent's illness or any of her aforementioned symptoms will persist and endanger her within the near future. Accordingly, we cannot uphold the trial court's commitment order on the basis that Respondent was dangerous to herself.

B. Dangerous to Others

[3] As an alternative basis for upholding the trial court's commitment order, we next address whether the court's findings of fact were sufficient to support its conclusion that Respondent was dangerous to others. *See In re Monroe*, 49 N.C. App. 23, 31-32, 270 S.E.2d 537, 541 (1980) (affirming an involuntary commitment order on the basis of dangerousness to others even though the evidence was insufficient to establish dangerousness to self). An individual is "dangerous to others" if

within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; *and that there is a reasonable probability that this conduct will be repeated*. Previous episodes of dangerousness to

IN RE WHATLEY

[224 N.C. App. 267 (2012)]

others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11)(b) (2011) (emphasis added).

The only findings relevant to the trial court's conclusion that Respondent was dangerous to others are the court's findings that "Respondent was exhibiting psychotic behavior that endangered . . . her newborn child" and—as incorporated from Dr. Shah's report—that Respondent had been "admitted [with] psychosis while taking care of her two month old son." These findings are clearly inadequate to demonstrate "a reasonable probability that this conduct will be repeated," *see id.*, as the findings pertain only to Respondent's past conduct and draw no nexus between that conduct and future danger to others. Thus, the trial court's findings are insufficient to support its conclusion that Respondent was dangerous to others, and the commitment order cannot be upheld on this basis.

III. Conclusion

[4] In sum, we hold that the trial court's findings of fact are insufficient to support its conclusions that Respondent presented a danger to herself and others. We believe that the appropriate remedy is to remand to the trial court for entry of additional findings—if any can be made—to support its conclusions. Absent additional findings, however, the commitment order cannot be upheld. We accordingly reverse the trial court's 18 January 2012 order and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

MATTHEW JENNER AND JULIA MARKSON, PLAINTIFFS

v.

ECOPLUS, INC., DEFENDANT

No. COA12-719

Filed 18 December 2012

1. Enforcement of Judgments—motion to recognize—North Carolina Uniform Foreign-Country Money Judgments Recognition Act

Plaintiffs' motion to recognize a foreign-country money judgment was properly before the trial court. The North Carolina Uniform Foreign-Country Money Judgments Recognition Act (Act) does not require that a defendant be given an opportunity to file an answer before a trial court may hold a hearing in the matter. Defendant received "a court proceeding" in which it had the opportunity to oppose recognition as required by the Act.

2. Enforcement of Judgments—foreign-country money judgment—burden of proof—ground for nonrecognition

The trial court erred in an action to recognize a foreign-country money judgment by not requiring defendant to carry the burden of proving the existence of a ground for nonrecognition. Further, defendant did not appeal from the default judgment entered by the English court, the mechanism for correcting the purported error defendant now alleged.

Appeal by Plaintiffs from order and judgment entered 28 March 2012 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 November 2012.

Kilpatrick Townsend & Stockton LLP, by Richard D. Dietz, Adam H. Charnes, Thurston H. Webb, and Daniel M. Vandergriff, for Plaintiffs.

John F. Hanzel and David A. Grassie for Defendant.

STEPHENS, Judge.

Factual and Procedural History

Plaintiffs Matthew Jenner and Julia Markson are citizens and residents of the United Kingdom. Defendant Ecoplus, Inc. is a Wisconsin corporation with its principal place of business in Huntersville, North Carolina. In May 2008, Defendant executed separate loan agreements

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

with each Plaintiff for \$150,000. Defendant defaulted on the loans, and on 15 February 2011, Plaintiffs filed suit in the United States District Court for the Western District of North Carolina alleging a breach of the loan agreements. On 14 March 2011, Defendant moved to dismiss for improper venue, citing a forum selection clause in the loan agreements specifying the courts of England and Wales as the exclusive forum and venue for any legal actions arising thereunder.

On 28 March 2011, the parties stipulated to a dismissal without prejudice, agreeing that Plaintiffs would re-file the claim in an English court. On 10 May 2011, Plaintiffs re-filed their claim against Defendant in the High Court of Justice, Queen's Bench Division, in London, England. On 23 May 2011, Plaintiffs served Defendant with the complaint as well as an informational leaflet from the English court system stating that Defendant had 22 days to either respond to the claims or request an extension of up to 36 days. Defendant did not answer the complaint or request an extension. As a result, on 21 June 2011, the English court entered a default judgment in favor of Plaintiffs. Defendant did not appeal the judgment or take any further action in the English court system.

On 17 January 2012, pursuant to the North Carolina Uniform Foreign-Country Money Judgments Recognition Act ("the Recognition Act" or "the Act"), N.C. Gen. Stat. § 1C-1850 *et seq.* (2011), Plaintiffs filed a Complaint to Recognize a Foreign-Country Money Judgment in the Mecklenburg County Superior Court. On 23 January 2012, Plaintiffs filed a Motion to Recognize a Foreign-Country Money Judgment and sought a hearing on the motion. On 24 January 2012, the trial court granted Defendant an extension until 20 March 2012 to file an answer to the complaint. On 26 January 2012, Plaintiffs noticed the hearing on their motion for 12 March 2012. On 17 February 2012, Defendant filed a motion to strike or, in the alternative, for relief from Plaintiff's motion. In that motion, Defendant asserted (1) that the Act required the issue of recognition of a foreign-country money judgment be raised by complaint, cross-claim, or affirmative defense, rather than by motion; (2) that, because Plaintiffs initially raised the issue of recognition by filing a complaint, Defendant was entitled to sufficient time to respond; (3) that the time for filing Defendant's answer had been extended to 20 March 2012; and (4) that ruling on the motion at the hearing set for 12 March would improperly deny Defendant an opportunity to respond to the complaint. On these grounds, Defendant asked that Plaintiffs' motion be stricken or that Defendant be granted relief from the motion. Defendant did not seek a continu-

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

ance of the hearing on Plaintiffs' motion or an adjudication on the merits of the case.

At the 12 March 2012 hearing, the parties disagreed about the nature of Plaintiffs' motion. Plaintiffs sought immediate recognition of the English judgment, contending that the Act was intended to provide a speedy and efficient manner in which to recognize foreign-country money judgments. Defendant countered that a decision on the merits would be "premature" because the time the trial court granted Defendant to answer the complaint had not expired. Defendant made no substantive argument under the Act, *i.e.*, that one or more of the grounds existed for not recognizing the English judgment.

At the end of the hearing, the trial court found *sua sponte* that, because the informational leaflet from the English court system appeared to give Defendant 36 days to respond to the complaint, and only 28 days had elapsed between service of the complaint on Defendant and entry of the default judgment in favor of Plaintiffs, "that judgment was entered prematurely." In open court, the trial court denied Plaintiffs' motion to recognize the foreign-country judgment. On 28 March 2012, the trial court filed an order and judgment denying Plaintiffs' motion and entering judgment in favor of Defendant. Plaintiffs appeal.

Discussion

Plaintiffs make four arguments on appeal: that (1) the trial court erred by finding that the English court had entered judgment prematurely, (2) the trial court erred by not requiring Defendant to carry the burden of nonrecognition and failing to make appropriate findings of fact and conclusions of law, (3) the trial court's ruling could endanger litigants' ability to enforce North Carolina judgments abroad, and (4) the trial court's ruling violates well-settled principles of comity and respect for other courts. Defendant argues, *inter alia*, that the Motion to Recognize a Foreign-Country Money Judgment was not properly before the trial court. We reverse and remand.

Standard of Review

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003) (citation omitted).

Legislative intent controls the meaning of a statute. To determine legislative intent, a court must analyze the

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish. First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings. The Court's analysis therefore properly begins with the words themselves.

. . . .

Where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.

Brown v. Flowe, 349 N.C. 520, 522, 523, 507 S.E.2d 894, 895-96 (1998) (citation and quotation marks omitted). Further, our Supreme Court

has noted that the commentary to a statutory provision can be helpful in some cases in discerning legislative intent. *State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989); *State v. Hosey*, 318 N.C. 330, 348 S.E.2d 805 (1986). In *Bogle* this Court noted that since the commentary printed with the North Carolina Rules of Evidence was not enacted into law, it was not binding but, where proper, could be given substantial weight in our efforts to discern legislative intent. *Bogle*, 324 N.C. at 202-03 n.5, 376 S.E.2d at 752 n.5.

Parsons v. Jefferson-Pilot Corp., 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993).

I. Plaintiffs' Motion to Recognize the Foreign Judgment

[1] We first consider whether Plaintiffs' Motion to Recognize a Foreign-Country Money Judgment was properly before the trial court. We hold that it was.

The Recognition Act provides that "[i]f recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment[.]" and "[i]f recognition or nonrecognition of a foreign-country judgment is sought in some other action, the issue of recognition may be raised by complaint, counterclaim, cross-

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

claim, or affirmative defense.” N.C. Gen. Stat. § 1C-1855 (a), (b) (2011). The Act does not expressly provide that a party may, by motion, request a court to recognize a foreign judgment, and the Act “is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements.” *Id.* cmt. 4. However, the legislative history of the Recognition Act persuades us that the General Assembly did not intend that an action to merely *recognize* a foreign judgment be as procedurally involved as a civil action seeking an adjudication on the merits of a claim.

The forerunner to the Recognition Act, the North Carolina Foreign Money Judgments Recognition Act, N.C. Gen. Stat. § 1C-1800 *et seq.* (1962) (repealed 2009), “was silent as to the proper procedure for seeking recognition of a foreign-country judgment[.]” N.C. Gen. Stat. § 1C-1855, cmt. 1. In the new Recognition Act, the drafters acknowledged that foreign-country judgments, in contrast to sister-state judgments, are not subject to the Full Faith and Credit Clause of the federal Constitution and may come from judicial systems that differ significantly from those in the United States. The Official Comment explains that “[t]hese differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised.” *Id.*

The new Act does not, however, expressly require that a trial court receive a defendant’s answer before determining whether to recognize a foreign judgment. The Official Comment merely states that “the issue of recognition always must be raised in a court proceeding.” *Id.* In other words, although the Act requires *some* judicial oversight, we do not believe the Act’s drafters intended that the full constellation of judicial procedure found in other civil actions be utilized. We note that the Recognition Act is a statute of inclusion with a strong presumption that foreign-country judgments will be recognized. The Act provides that, “[e]xcept as otherwise provided in this section, a court of this State *shall* recognize a foreign-country judgment to which this Article applies.” *Id.* § 1C-1853(a) (emphasis added). According to the Official Comment, absent a recognized exception, the Act “places an *affirmative duty* on the forum court to recognize a foreign-country money judgment[.]” *Id.* cmt. 3 (emphasis added). On the other hand, North Carolina courts must *not* recognize a foreign-country judgment if it was rendered by an unfair judicial system that does not provide adequate due process, or if the foreign court lacked subject matter jurisdiction or personal jurisdiction over

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

the defendant. *Id.* § 1C-1853(b). Further, the Recognition Act contemplates various circumstances in which a court must deny recognition unless the court concludes as a matter of law that recognition would still be reasonable. *Id.* § 1C-1853(c). “A party *resisting* recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in . . . this section exists.” *Id.* § 1C-1853(g) (emphasis added).

Entry of an order recognizing a foreign-country judgment is merely a preliminary step to enforcement. Once such a judgment is recognized, a plaintiff must still satisfy the Uniform Enforcement of Foreign Judgments Act, N.C. Gen. Stat. § 1C-1701 et seq. (2011). *See Maxwell Schuman & Co. v. Edwards*, 191 N.C. App. 356, 358, 663 S.E.2d 329, 331 (2008) (“The [Recognition Act] does not govern the enforcement of foreign judgments. Instead, it pertains only to whether a court should recognize the judgment. Enforcement of judgments is governed by the [Enforcement Act].”) (citations and quotation marks omitted)). To require full civil proceedings under both statutes may unduly burden plaintiffs seeking to enforce a legitimate judgment from a foreign country in North Carolina.

In light of the history of and legislative intent behind the Recognition Act, we hold that Plaintiffs’ motion was properly before the trial court. Plaintiffs initiated the action via complaint, in accordance with section 1C-1855, and then noticed a hearing at which Defendant had an opportunity to satisfy its burden in support of nonrecognition under section 1C-1853(g). Defendant did not seek a continuance, but appeared at the hearing and argued only that Plaintiffs’ motion was premature. Defendant chose not to present any evidence or argument that an exception permitting nonrecognition applied to Plaintiffs’ foreign-country judgment.

In sum, we conclude that the Act does not require that a defendant be given an opportunity to file an answer before a trial court may hold a hearing in the matter. Here, Defendant unquestionably received “a court proceeding” in which it had the opportunity to oppose recognition as required by the Act. Accordingly, Plaintiffs’ motion was properly before the trial court.

II. Burden of Proof

[2] Plaintiffs argue that the trial court erred by not requiring Defendant to carry the burden of proving the existence of a ground for nonrecognition. We agree.

JENNER v. ECOPLUS, INC.

[224 N.C. App. 275 (2012)]

As discussed above, the Recognition Act places the burden of proving the existence of a ground for nonrecognition squarely on the defendant. § 1C-1853(g). At the hearing, Defendant made no argument at all opposing recognition; rather, it argued only that Plaintiffs' motion was premature because Defendant's time in which to file an answer had not yet elapsed. Because Defendant offered not the slightest evidence or argument to satisfy its burden of proof in opposing recognition, the trial court had no basis under the Recognition Act to deny recognition and enter final judgment in favor of Defendant. To the contrary, once the hearing was concluded without presentation of evidence or argument that one of the Act's limited exceptions applied, the trial court was obligated to recognize the judgment.

Finally, we note that, even had Defendant properly argued in support of its burden in the trial court, it would not likely have prevailed. The only contention Defendant made in this Court to support nonrecognition was that the English court misapplied its own rules of civil procedure and entered the default judgment prematurely. As a result, Defendant asserted that the English judgment could be "shoehorned" into the exception found in section 1C-1853(c)(8): "The specific proceeding in the foreign court leading to the judgment was fundamentally unfair." We believe a shoehorn would be a woefully inadequate tool with which to fit an alleged procedural error by the English court into the category of "fundamentally unfair." The Act's Official Comment 12 provides an instructive example of when a specific proceeding might be considered "fundamentally unfair": "that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment." § 1C-853 cmt. 12. There is no suggestion of political corruption in the foreign judgment here. More importantly, Official Comment 12 goes on to specifically note that

a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case *because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.*

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

Id. (emphasis added). Here, as noted *supra*, Defendant did not appeal from the default judgment entered by the English court, the simple and entirely adequate mechanism for correcting the purported error it now alleges.

We reverse and remand to the trial court for entry of an order recognizing Plaintiffs' English court judgment.

REVERSED and REMANDED.

Judges GEER and MCCULLOUGH concur.

RICHARD M. JOHNSTON, PLAINTIFF

v.

THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA12-45

Filed 18 December 2012

1. Appeal and Error—interlocutory orders and appeals—substantial right—State's right to enforce criminal laws

The trial court's memorandum of decision and judgment of 24 October 2011 was an appealable interlocutory order. The State has a substantial right to enforce the criminal laws of North Carolina, and this right was affected by a ruling declaring a statute, The North Carolina Felony Firearms Act, to be unconstitutional.

2. Declaratory Judgments—subject matter jurisdiction—felon's right to possess firearms

The trial court had subject matter jurisdiction over plaintiff's declaratory judgment action. This was not the first case in which a convicted felon sought a declaration from the courts that he has a right to possess firearms.

3. Constitutional Law—United States—right to bear arms—substantive due process—North Carolina Felony Firearms Act

The portion of the trial court's order concluding that the North Carolina Felony Firearms Act, as applied to plaintiff, violated substantive due process rights guaranteed by the United States Constitution was reversed. As to the federal substantive

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

due process issue, the case was remanded to the trial court to give the State an opportunity to present evidence and argument on this question and for plaintiff to respond.

4. Constitutional Law—North Carolina—right to bear arms—substantive due process—North Carolina Felony Firearms Act

The portion of the trial court's order concluding that the North Carolina Felony Firearms Act, as applied to plaintiff, violated substantive due process rights guaranteed by the North Carolina Constitution was reversed and remanded for the trial court to take evidence and make additional findings.

5. Constitutional Law—right to bear arms—procedural due process—North Carolina Felony Firearms Act

The portion of the trial court's order concluding that the North Carolina Felony Firearms Act, on its face, violated procedural due process rights guaranteed by the State and federal Constitutions was reversed.

Judge BEASLEY concurring in part and dissenting in part.

Appeal by defendant from judgment entered 24 October 2011 by Judge Abraham Penn Jones in Caswell County Superior Court. Heard in the Court of Appeals 9 May 2012.

Dan L. Hardway Law Office by Dan L. Hardway for plaintiff-appellee.

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

STEELMAN, Judge.

The North Carolina Felony Firearms Act (Act) does not violate plaintiff's procedural due process rights under the Constitution of the State of North Carolina or the Constitution of the United States. We remand plaintiff's federal substantive due process claim to the trial court for consideration of additional evidence and application of the appropriate standard of review. We remand plaintiff's State substantive due process claim to the trial court for additional evidence and findings.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

I. Factual and Procedural History

On 17 August 2010, Richard Johnston (plaintiff) filed a complaint in the superior court of Caswell County seeking a declaratory judgment that the Act (Article 54A of Chapter 14 of the North Carolina General Statutes) was unconstitutional on its face and as applied to him. The complaint alleged that in 1978, plaintiff was convicted of the felony of conspiracy to commit larceny in Rockingham County¹ and that in 1981, he was convicted of the felonies of arson, conspiracy to burn a building, and fraud in Caswell County. Plaintiff alleged that his probation and suspended sentences were concluded by 1983. The complaint also sought a declaration that his right to bear arms “was fully restored by operation of law on January 27, 1988, and that such restoration has remained in full force and effect from that time to the present and continuing thereafter[.]” Plaintiff also prayed for compensatory damages and attorney’s fees.

On 14 September 2010, the State of North Carolina (State) filed answer and requested that all of plaintiff’s claims for relief be denied. On 2 December 2010, the State filed a motion to dismiss or alternatively for summary judgment. On 20 May 2011, plaintiff filed a motion for summary judgment. On 5 July 2011, the State filed an amended motion to dismiss / summary judgment.

On 24 October 2011, the trial court filed a memorandum of decision and judgment. The trial court held that there were no material issues of fact, denied the State’s motions to dismiss and for summary judgment, and granted plaintiff’s motion for summary judgment, declaring that the Act was unconstitutional. The judgment further provided that the trial court retained jurisdiction to rule on plaintiff’s claims for damages and attorney fees.

The State appeals. On 27 January 2012, plaintiff filed a motion to dismiss the State’s appeal as being interlocutory.

II. Interlocutory Appeal

[1] Plaintiff contends that the State’s appeal is interlocutory and should be dismissed. We disagree.

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory

1. The complaint failed to disclose that plaintiff was also convicted of felonious receipt of stolen property in 1978.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

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, 361-62, 57 S.E.2d 377, 381 (1950) (internal citations omitted). Since the trial court has not ruled upon plaintiff's claims for compensatory damages and attorney fees, its memorandum of decision and judgment is not a final order and is interlocutory.

Ordinarily, "interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). However, an interlocutory order "which affects a substantial right" is appealable. N.C. Gen. Stat. § 1-277 (2011). "The inquiry as to whether a substantial right is affected is two-part—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [a party] if not corrected before appeal from final judgment[.]" *Jenkins ex rel. Hajeh v. Hearn Vascular Surgery, P.A.*, ___ N.C. App. ___, ___, 719 S.E.2d 151, 156 (2011) (alterations in original) (internal quotation marks omitted).

Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In the instant case, the trial court declared that the Act was unconstitutional, in effect enjoined the State from prosecuting plaintiff for violations of the Act, and denied the State's motion to stay its order pending appeal.

A declaration by a trial court that a criminal statute of this State is unconstitutional is an extraordinary ruling.

The broad aim of the criminal law is, of course, to prevent harm to society—more specifically, to prevent injury to the health, safety, morals and welfare of the public. This it accomplishes by punishing those who have done harm, and by threatening with punishment those who would do harm, to others.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

Wayne R. LaFave and Austin W. Scott, Jr., *Handbook on Criminal Law*, (West Publishing, St. Paul, Minn., 1972) § 2, p. 9.

We hold that the State has a substantial right to enforce the criminal laws of North Carolina and that this right is affected by a ruling declaring a statute, duly enacted by the General Assembly, to be unconstitutional. The State has also demonstrated that the deprivation of that substantial right will potentially work injury if not addressed before appeal from a final judgment. The trial court's judgment prohibits the State from prosecuting plaintiff for possession of a firearm. Further, it casts doubt upon every prosecution by the State throughout North Carolina under Article 54A of Chapter 14 of the General Statutes.

The trial court's memorandum of decision and judgment of 24 October 2011 is an appealable interlocutory order. Plaintiff's motion to dismiss the State's appeal is denied.

III. Subject Matter Jurisdiction

[2] The State contends that the trial court lacked subject matter jurisdiction to hear this case. We disagree.

The State's contention is that plaintiff's complaint is beyond the scope of actions authorized as declaratory judgments pursuant to Article 26 of Chapter 1 of the North Carolina General Statutes. However, this is not the first case in which a convicted felon has sought a declaration from the courts that he has a right to possess firearms. In the cases of *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009), and *Baysden v. State*, ___ N.C. App. ___, ___, 718 S.E.2d 699 (2011), the civil complaints filed by the plaintiffs sought declaratory relief and injunctive relief, just as the complaint in the instant case. Both of these cases proceeded in the identical posture as the instant case.

This argument is without merit.

IV. North Carolina Felony Firearms Act

In 1971, the General Assembly enacted the Felony Firearms Act, N.C. Gen. Stat. § 14-415.1, which made unlawful the possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years. N.C. Gen. Stat. § 14-415.2 set forth an exemption for felons whose civil rights had been restored. 1971 N.C. Sess. Laws ch. 954, § 2.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

In 1975, the General Assembly repealed N.C. Gen. Stat. § 14-415.2 and amended N.C. Gen. Stat. § 14-415.1 to ban the possession of firearms by persons convicted of *certain* crimes for five years after the date of “such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such convictions, whichever is later.” 1975 N.C. Sess. Laws ch. 870, § 1.

State v. Johnson, 169 N.C. App. 301, 303, 610 S.E.2d 739, 741 (2005). In 1975, the General Assembly amended the Act to allow an exception for felons to possess firearms “within his own home or on his lawful place of business.” 1975 N.C. Sess. Laws ch. 870, § 2. “In 1995, the General Assembly amended N.C. Gen. Stat. § 14-415.1 to prohibit possession of certain firearms by all persons convicted of any felony.” *Johnson*, 169 N.C. App. at 303, 610 S.E.2d at 741. “The 1995 amendment did not change the previous provision in N.C.G.S. § 14-415.1 stating that ‘nothing [therein] would prohibit the right of any person to have possession of a firearm within his own house or on his lawful place of business.’” *Britt*, 363 N.C. at 548, 681 S.E.2d at 321 (alteration in original).

In 2004, the General Assembly amended the Act “to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felon’s own home and place of business.” *Britt*, 363 N.C. at 548, 681 S.E.2d at 321. In 2006, the General Assembly amended the Act to exclude antique firearms. 2006 N.C. Sess. Laws ch. 259 § 7(b). Our Supreme Court held the 2004 version unconstitutional as applied to Mr. Britt, under the North Carolina Constitution. *Britt*, 363 N.C. at 550, 681 S.E.2d at 323.

In 2010, the General Assembly amended the Act to provide that a person convicted of a single nonviolent felony and who has had his or her citizenship rights restored may petition the district court to restore his or her firearms rights. 2010 N.C. Sess. Laws, ch. 108, § 1. This amendment requires that the petitioner have had his or her citizenship rights restored for at least 20 years in order to file a petition. *Id.* This amendment became effective on 1 February 2011. 2010 N.C. Sess. Laws ch. 108 § 7.

In 2011, the General Assembly amended N.C. Gen. Stat. § 14-415.1 to exclude persons who, pursuant to the law of the jurisdiction in which the conviction occurred, have been pardoned or had his or her firearm rights restored, if such restoration could be granted under

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

North Carolina law. 2011 N.C. Sess. Laws ch. 268 § 13. This amendment became effective on 1 December 2011. 2011 N.C. Sess. Laws ch. 268 § 26.

V. Scope of Analysis and Standard of Review

The trial court concluded that the Act, as applied to plaintiff, violated substantive due process rights guaranteed by the United States Constitution and the North Carolina Constitution. The trial court also concluded that the Act, on its face, violated procedural due process rights guaranteed by both Constitutions.

“Conclusions of law are reviewed de novo and are subject to full review.” *State v. Biber*, ___ N.C. ___, ___, 712 S.E.2d 874, 878 (2011).

First, we address plaintiff’s substantive due process challenge to the Act. Second, we analyze plaintiff’s procedural due process challenge. *See, e.g., State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (“In the event that the legislation in question meets the requirements of substantive due process, procedural due process ‘ensures that when government action deprive[s] a person of life, liberty, or property . . . that action is implemented in a fair manner.’”).

We analyze plaintiff’s arguments regarding substantive due process under the United States Constitution, substantive due process under the North Carolina Constitution, procedural due process under the United States Constitution, and procedural due process under the North Carolina Constitution, in that order.

In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court. We also look for guidance to the decisions of the North Carolina Supreme Court construing federal constitutional and State constitutional provisions, and we are bound by those interpretations. *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749, (2006) (“The Supreme Court of the United States is the final authority on federal constitutional questions.”) We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

VI. Substantive Due Process Under the Constitution of the United States

[3] “Substantive due process protection prevents the government from engaging in conduct that . . . interferes with rights implicit in the

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

concept of ordered liberty.” *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (internal quotation marks omitted).

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In a plurality, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *District of Columbia v. Heller*, 554 U.S. 570, 171 L. Ed. 2d 637 (2008), and applies equally to the federal government and the States. *McDonald v. Chicago*, ___ U.S. ___, ___, 177 L. Ed. 2d 894, 929 (2010).

The Supreme Court in *Heller* recognized the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635, 171 L. Ed. 2d at 683. The Court noted that a prohibition on the possession of firearms by a felon is a presumptively lawful regulatory measure. *Heller*, 554 U.S. at 626-27, 171 L. Ed. 2d at 678 n.26. “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]” *Heller*, 554 U.S. at 626-27, 171 L. Ed. 2d at 678.

“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons[.]” *McDonald*, ___ U.S. at ___, 177 L. Ed. 2d at 926 (internal quotation marks omitted). “We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.” *Id.*

A. U.S. v. Chester

The Fourth Circuit Court of Appeals analyzed the Second Amendment rights of a defendant who was convicted of a domestic violence misdemeanor in *U.S. v. Chester*, 628 F.3d 673, 674 (4th Cir. 2010). In that case, the defendant was convicted of illegal possession of a firearm under 18 U.S.C. § 922(g)(9). *Chester*, 628 F.3d at 674. 18 U.S.C. § 922(g)(9) is a federal statute that, at the time *Chester* was decided, prohibited any person who has been convicted “in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(9). The sole issue on appeal was whether the statute infringed the defendant’s right to bear arms in light of *Heller*. *Chester*, 628 F.3d at 674.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

In *Chester*, the Court observed that the Supreme Court “clearly staked out the core of the Second Amendment. Indeed, *Heller* explained that ‘whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” *Chester*, 628 F.3d at 676 (quoting *Heller*, 554 U.S. at 635, 171 L. Ed. 2d at 683) (alteration in original).

The Court analyzed language in *Heller* describing “longstanding prohibitions on the possession of firearms by felons” as “presumptively lawful regulatory measures[.]” *Chester*, 628 F.3d at 676. The Court concluded that it is unclear whether *Heller* suggested that longstanding prohibitions such as the prohibition of possession of a firearm by a felon “were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason.” *Chester*, 628 F.3d at 679.²

Given this ambiguity, the Fourth Circuit Court of Appeals applied a two-part test to evaluate the right of a domestic violence misdemeanant to bear arms. *Chester*, 628 F.3d at 680 (“Thus, a two-part approach to Second Amendment claims seems appropriate under *Heller*, as explained by the Third Circuit Court of Appeals, see *Marzzarella*, 614 F.3d at 89, and Judge Sykes in the now-vacated *Skoien* panel opinion, see 587 F.3d at 808-09.”).

“The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.” *Chester*, 628 F.3d at 680 (internal quotation marks omitted). “This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid.” *Id.* If the regulation burdens conduct that was within the Second Amendment’s scope at the time the Second Amendment was ratified, “then we move to the second step of applying an appropriate form of means-end scrutiny.” *Id.*

2. The Fourth Circuit Court of Appeals noted that other courts have found *Heller*’s list of presumptively lawful firearm regulations “susceptible to two meanings.” *Chester*, 628 F.3d at 679 n.5. For example, in *U.S. v. Marzzarella*, 614 F.3d 85, 91 (3rd Cir. 2010), *cert. denied*, ___ U.S. ___, 178 L. Ed. 2d 790 (2011), the Third Circuit Court of Appeals speculated that *Heller* “may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny.” *Marzzarella*, 614 F.3d at 91. Alternatively, *Heller* may suggest that the restrictions are presumptively lawful “because they regulate conduct outside the scope of the Second Amendment.” *Id.*

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

i. Whether Conduct Is Within Scope of Second Amendment

To determine whether a domestic violence misdemeanor had a right to bear arms under the Second Amendment, the Fourth Circuit Court of Appeals considered historical data on the right of felons to possess firearms. *Id.* The Court concluded that “it appears to us that the historical data is not conclusive on the question of whether the founding era understanding was that the Second Amendment did not apply to felons.” *Id.*

Commentators are “divided on the question of the categorical exclusion of felons from Second Amendment protection.” *Chester*, 628 F.3d at 681. *See also State v. Whitaker*, 201 N.C. App. 190, 200, 689 S.E.2d 395, 401 (2009) (“[W]e still cannot read *Heller* as extending an unqualified right to keep and bear arms to convicted felons.”) On subsequent occasions, the Fourth Circuit Court of Appeals deferred reaching a conclusion as to the Second Amendment’s scope.³

The Fourth Circuit Court of Appeals analyzed the Second Amendment’s scope in *U.S. v. Moore*, 666 F.3d 313 (4th Cir. 2012). The defendant was convicted of possession of a firearm under 18 U.S.C. § 922(g)(1). *Moore*, 666 F.3d at 315. 18 U.S.C. § 922(g)(1) is a federal statute that, at the time *Moore* was decided, prohibited any person who has been convicted of a crime “punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(1). The defendant challenged the statute as applied to him. *Moore*, 666 F.3d at 319.

The Court noted that *Heller* left open the issue of an as-applied challenge. *Moore*, 666 F.3d at 319. The Court concluded that the defendant’s assault and robbery convictions put the defendant’s right to possess firearms outside the Second Amendment’s scope. *Moore*, 666 F.3d at 320. “However the Supreme Court may come to define a ‘law-abiding responsible citizen’ for Second Amendment purposes,

3. *U.S. v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 181 L. Ed. 2d 482 (2011) (deferred the question); *U.S. v. Staten*, 666 F.3d 154 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 182 L. Ed. 2d 794 (2012) (assuming, without deciding, for the sake of analysis that the defendant had rights under the Second Amendment); *U.S. v. Chapman*, 666 F.3d 220 (4th Cir. 2012) (holding that a statute prohibiting possession of firearms while subject to a domestic violence protective order survived intermediate scrutiny); *U.S. v. Carter*, 669 F.3d 411 (4th Cir. 2012) (assuming, without deciding, that the defendant had Second Amendment rights).

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

[the defendant] surely would not fall within that group.” *Moore*, 666 F.3d at 319.⁴

In the instant case, the trial court cited no historical evidence in its analysis of whether a convicted felon’s right to bear arms was within the scope of the Second Amendment. Instead, the trial court cited decisions of the Third Circuit Court of Appeals and the Seventh Circuit Court of Appeals and concluded that a convicted felon “still has a fundamental right” to keep and bear arms.

In *U.S. v. Barton*, 633 F.3d 168 (3rd Cir. 2011), the defendant was convicted of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). “[F]elons are categorically different from the individuals who have a fundamental right to bear arms.” *Barton*, 633 F.3d at 175. The Third Circuit Court of Appeals held that *Heller* and *McDonald* compelled a conclusion that 18 U.S.C. § 922(g)(1) was facially constitutional. *Id.* The Court further held that the regulation was constitutional as applied to the defendant because he failed to present facts distinguishing his circumstances from other felons who are categorically unprotected by the Second Amendment. *Id.*

In *U.S. v. Williams*, 616 F.3d 685 (7th Cir. 2010), *cert. denied*, ___ U.S. ___, 178 L. Ed. 2d 532 (2010), the defendant was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The Court applied intermediate scrutiny and concluded that the government’s objective to keep firearms from violent felons is important. *Williams*, 616 F.3d at 692-93. The Court concluded that the regulation was substantially related to the objective. *Williams*, 616 F.3d at 693.

Barton and *Williams* both found that the regulation of possession of firearms by a felon was constitutional. These cases do not

4. Other circuits have handled the issue similarly. In *U.S. v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 178 L. Ed. 2d 193 (2010), the Ninth Circuit Court of Appeals analyzed an as-applied challenge to 18 U.S.C. § 922(g)(1) and concluded that, although “the historical question has not been definitively resolved[,]” the statute did not violate the Second Amendment as applied to the defendant. *Vongxay*, 594 F.3d at 1118.

In *U.S. v. Greeno*, 679 F.3d 510 (6th Cir. 2012), *cert. denied*, ___ U.S. ___, 184 L. Ed. 2d 222, 2012 WL 3280559 (Oct. 1 2012), the Sixth Circuit Court of Appeals analyzed the Second Amendment’s scope in a challenge to a federal sentencing guideline that provided that a two-level enhancement may be added if a defendant convicted of a drug offense possessed a dangerous weapon. *Greeno*, 679 F.3d at 513. The Court held that the enhancement, “like other historical restrictions on the possession and use of weapons, punishes an individual who possesses a dangerous weapon for an unlawful purpose and, thus, it falls outside the scope of the Second Amendment right.” *Greeno*, 679 F.3d at 520.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

support the trial court's conclusion that convicted felons enjoy a fundamental right to bear arms.

In *Chester*, the Fourth Circuit Court of Appeals concluded that, due to "the lack of historical evidence in the record[,] it could not say that the Second Amendment did not apply to persons convicted of domestic violence misdemeanors. *Chester*, 628 F.3d at 681. The Court assumed that the defendant's Second Amendment rights were intact and proceeded to the next step of its analysis.

In determining whether plaintiff's conduct in the instant case falls within the scope of the Second Amendment, we elect to follow the persuasive authority of *Chester*, *Carter*, *Staten*, and *Chapman*. The State does not argue that plaintiff is wholly unprotected by the Second Amendment, and the record before us does not contain historical evidence to reveal whether the Second Amendment protects a felon's right to bear arms. We cannot conclude that the Second Amendment did not apply to convicted felons.

Assuming *arguendo*, without deciding, that the Second Amendment protects plaintiff's right to bear arms, we proceed to the next step of the analysis.

ii. Level of Scrutiny

The United States Supreme Court declined to establish a specific level of scrutiny for regulations that restrict Second Amendment rights. *See Heller*, 554 U.S. at 635, 171 L. Ed. 2d at _____. The Court indicated that rational basis review was not the appropriate level of scrutiny. *Heller*, 554 U.S. at 628, 171 L. Ed. 2d at 679 n.27.

The Fourth Circuit Court of Appeals looked to the First Amendment as a guide for the appropriate standard of review. *Chester*, 628 F.3d at 682. "In the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* The Court observed that the Second Amendment does not lend itself to a "one-size-fits-all standard of review" any more than any other constitutional right. *Id.* "Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms." *Id.* (quoting *U.S. v. Skoien*, 587 F.3d 803, 813-14 (7th Cir. 2009), *vacated by U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010)).

Although *Chester* asserts his right to possess a firearm in his home for the purpose of self-defense, we believe

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue of Chester’s criminal history as a domestic violence misdemeanor. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.

Chester, 628 F.3d at 682-83 (internal citation omitted). The Fourth Circuit Court of Appeals has consistently applied intermediate scrutiny. *See, e.g., U.S. v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 181 L. Ed. 2d 482 (2011); *U.S. v. Staten*, 666 F.3d 154, 160-61 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 182 L. Ed. 2d 794 (2012); *U.S. v. Chapman*, 666 F.3d 220, 225 (4th Cir. 2011); *U.S. v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012).

In the instant case, plaintiff’s claim is not within the core right described in *Heller*. By virtue of plaintiff’s criminal history, his claim is not within the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense.

“Accordingly, the government must demonstrate under the intermediate scrutiny standard that there is a reasonable fit between the challenged regulation and a substantial government objective.” *Chester*, 628 F.3d at 683 (internal quotation marks omitted). “Although [the various forms of intermediate scrutiny] differ in precise terminology, they essentially share the same substantive requirements.” *Id.* (quoting *U.S. v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir. 2010), *cert. denied*, ___ U.S. ___, 178 L. Ed. 2d 790 (2011)) (alterations in original). “They all require the asserted governmental end to be more than just legitimate, either ‘significant,’ ‘substantial,’ or ‘important’ . . . [and] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect.” *Id.* (alterations in original).

B. Application of Intermediate Scrutiny

In the instant case, the trial court concluded that the State “failed to meet its burden of showing that the Felony Firearms Act is constitutional as applied to Plaintiff under any standard of scrutiny.” The trial court concluded that the State has not shown a substantial relationship between the means and “the government’s admittedly significant interest[.]” We apply an intermediate level of scrutiny to the Act to determine whether it violates plaintiff’s substantive due process rights under the United States Constitution.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

First, the State must demonstrate a substantial government objective. The State argues that the purpose of the Act is to ensure public safety and “to protect the public by preventing future violence by individuals who have already shown disdain for the law.”

Public safety is an important government objective. “In this case, the government’s stated objective is to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms. We cannot say that this objective is not an important one.” *Williams*, 616 F.3d at 692-93 (internal citations omitted). See also *U.S. v. Skoien*, 614 F.3d 638, 642 (4th Cir. 2010), cert. denied, ___ U.S. ___, 179 L. Ed. 2d 645 (2010) (“[N]o one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective.”).

Second, the State must demonstrate a reasonable fit between the Act and the objective of ensuring the public safety. The State argues that our Supreme Court upheld the Act against an *ex post facto* challenge in *State v. Whitaker*, 364 N.C. 404, 409, 700 S.E.2d 215, 218 (2010). However, *Whitaker* does not control the issue of whether the Act violates plaintiff’s substantive due process rights under the United States Constitution.

In *Chester*, the Fourth Circuit Court of Appeals remanded to give the government an opportunity to show “a substantial relationship” between the statute and the objective. *Chester*, 628 F.3d at 683.

[The government] has not attempted to offer sufficient evidence to establish a substantial relationship between § 922(g)(9) and an important governmental goal. Having established the appropriate standard of review, we think it best to remand this case to afford the government an opportunity to shoulder its burden and Chester an opportunity to respond. Both sides should have an opportunity to present their evidence and their arguments to the district court in the first instance.

Chester, 628 F.3d at 683.

We cannot conclude on this record that the State carried the burden of establishing a reasonable fit and a substantial relationship between the important goal of ensuring public safety and the Act. Having established that intermediate scrutiny is the appropriate level of scrutiny, we remand this issue to the trial court to give the State an opportunity to present evidence and argument that it can meet this burden and plaintiff an opportunity to respond.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

VII. Substantive Due Process Under the Constitution of the State of North Carolina

[4] “Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained.” *Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 229, 569 S.E.2d 695, 703 (2002).

“No 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.” N.C. Const. art. I, § 19. Our Law of the Land Clause was “copied in substance from Magna Charta by the framers of the [North Carolina] Constitution of 1776” and is synonymous with “due process of law, a phrase appearing in the Federal Constitution and the organic law of many states.” *State v. Ballance*, 229 N.C. 764, 768-69, 51 S.E.2d 731, 734 (1949) (internal quotation marks omitted). See also *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.C. Const. art. 1, § 30.

A. Level of Scrutiny

Our Supreme Court examined an argument that the 2004 version of the Act violated substantive due process rights, as applied to the plaintiff, under the North Carolina Constitution in *Britt*, 363 N.C. 546, 681 S.E.2d 320.

In that case, our Supreme Court held that “regulation of the right to bear arms is a proper exercise of the General Assembly’s police power, but that any regulation must be at least ‘reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.’” *Britt*, 363 N.C. at 549, 681 S.E.2d at 322 (quoting *State v. Dawson*, 272 N.C. 535, 547, 159 S.E.2d 1, 10 (1968)).

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

The question was whether, as applied to the plaintiff, the Act was “a reasonable regulation.” *Britt*, 363 N.C. at 549, 681 S.E.2d at 322.⁵

Our Supreme Court has held that “the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision.” *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999) (quoting *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998)).

The North Carolina Constitution may guarantee a broader right to individuals to keep and bear arms than the United States Constitution. *Whitaker*, 201 N.C. App. at 202, 689 S.E.2d at 402 n.4; *State v. Fennell*, 95 N.C. App. 140, 143, 382 S.E.2d 231, 233 (1989). If rational basis review results in less protection of the right to bear arms under the North Carolina Constitution than the United States Constitution, “use of the rational basis standard may not be appropriate[.]”⁶ *Whitaker*, 201 N.C. App. at 202, 689 S.E.2d at 402 n.4. However, we are “bound by precedent to use rational relation as the level of constitutional scrutiny[.]” *Id.*

To determine whether the Act was reasonable, our Supreme Court considered (1) the factors surrounding the plaintiff and (2) the nature of the Act.

First, regarding the factors surrounding the plaintiff, the Court noted that the plaintiff’s felony conviction was for possession with intent to sell and deliver a controlled substance in 1979. *Britt*, 363 N.C. at 549, 681 S.E.2d at 322. Our Supreme Court considered the fact that the plaintiff’s crime did not involve violence or the threat of violence; the length of time since the conviction in 1979; the lack of evidence that the plaintiff was dangerous or ever misused firearms, before his crimes or after the restoration of his rights; and the fact that the plaintiff willingly gave up his weapons after learning of the Act. *Britt*, 363 N.C. at 549-50, 681 S.E.2d at 322-23. Consideration of

5. The Supreme Court noted that, because of its holding, the Court “need not address plaintiff’s argument that the right to keep and bear arms is a fundamental right entitled to a higher level of scrutiny.” *Britt*, 363 N.C. at 549, 681 S.E.2d at 322 n.2.

6. The State Constitutions may not provide less protection than the federal Constitution. Typically, rational basis review provides less protection than intermediate scrutiny. Currently, the Fourth Circuit Court of Appeals applies intermediate scrutiny. *Chester*, 628 F.3d at 683. The North Carolina Supreme Court has applied rational basis to challenges to the Act under the North Carolina Constitution.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

these factors led to the conclusion that the plaintiff “is not among the class of citizens who pose a threat to public peace and safety.” *Britt*, 363 N.C. at 550, 681 S.E.2d at 323.

Second, our Supreme Court considered the nature of the 2004 amendment to the Act. The version at issue in *Britt* did not allow restoration of firearm rights. *Id.*

Based on the factors surrounding the plaintiff and the 2004 version of the Act, our Supreme Court concluded that the Act was unconstitutional under the North Carolina Constitution. *Id.*

Based on the facts of plaintiff’s crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute’s operation, as applied to plaintiff, the 2004 version of N.C.G.S. § 14-451.1⁷ [sic] is an unreasonable regulation, not fairly related to the preservation of public peace and safety.

Id.

B. Application in Subsequent Cases

i. State v. Whitaker

In *Whitaker*, the defendant was convicted of eleven counts of possession of a firearm by a felon. *Whitaker*, 201 N.C. App. at 191, 689 S.E.2d at 395. The defendant argued that the Act was unconstitutional under the federal and State Constitutions. *Id.*

This Court interpreted *Britt* as focusing on five factors to determine if the Act was unconstitutional as applied to the plaintiff. *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404. These factors included:

(1) the type of felony convictions, particularly whether they involved violence or the threat of violence[,] (2) the remoteness in time of the felony convictions; (3) the felon’s history of lawabiding [sic] conduct since [the] crime, (4) the felon’s history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and (5) the felon’s assiduous and proactive compliance with the 2004 amendment.

7. N.C. Gen. Stat. § 14-451.1 is not a statute. Context indicates that our Supreme Court intended to hold N.C. Gen. Stat. § 14-415.1 unconstitutional as applied to the plaintiff. This appears to be the only place in the opinion that the Act is cited incorrectly.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

Whitaker, 201 N.C. App. at 205, 689 S.E.2d at 404 (alterations in original) (internal quotation marks omitted).

Analyzing these factors required finding facts. “Normally, the trial court finds facts, and the appellate courts do not engage in fact finding.” *Id.* The Court observed that the trial court’s order did not find most of the facts regarding these factors, “and thus the Supreme Court apparently based its factual findings as to Mr. Britt upon the uncontroverted evidence presented before the trial court.” *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404.

The defendant in *Whitaker* was convicted in 1988 of selling and delivering cocaine, indecent liberties with a minor in 1989, and possessing cocaine in 2005. *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404. The Court found that “there is no indication that these crimes involved violence or the threat of violence[.]” *Id.* (internal quotation marks omitted). “Mr. Britt’s felony convictions were more remote in time” than the defendant’s most recent felony conviction. *Id.*

The Court found that the “defendant has demonstrated a blatant disregard for the law as he has been convicted of numerous misdemeanors[.]” *Id.* The Court found that there was no evidence that the defendant was dangerous or had ever misused firearms. However, the defendant acquired the guns that led to his criminal charge after N.C. Gen. Stat. § 14-415.1 prohibited him from possessing them. *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405. The Court held that “we cannot conclude that N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to defendant.” *Id.*⁸

ii. State v. Buddington

In *State v. Buddington*, ___ N.C. App. ___, 707 S.E.2d 655 (2011), the defendant was indicted for possessing a firearm as a felon. The defendant argued that the Act was unconstitutional as applied to him. *Buddington*, ___ N.C. App. at ___, 707 S.E.2d at 656.

The defendant filed an unverified motion to dismiss based on constitutional grounds but failed to present any evidence in support of his motion. “In order for defendant to prevail in a motion to dis-

8. The Court also rejected arguments that the Act violated the prohibition against *ex post facto* laws and that the Act was an unconstitutional bill of attainder. *Whitaker*, 201 N.C. App. at 207, 689 S.E.2d at 405. The dissent disagreed with holdings regarding *ex post facto* and bill of attainder. *Whitaker*, 201 N.C. App. at 210-12, 689 S.E.2d at 408. Our Supreme Court affirmed the majority. *State v. Whitaker*, 364 N.C. 404, 412, 700 S.E.2d 215, 220 (2010).

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

miss through an as-applied constitutional challenge to N.C. Gen. Stat. § 14-415.1, he must present evidence which would allow the trial court to make findings of fact regarding [the five factors enumerated in *Whitaker*]. *Buddington*, ___ N.C. App. at ___, 707 S.E.2d at 657.

iii. *Baysden v. State*

In *Baysden*, this Court considered an as-applied challenge to the Act. The Court applied the “reasonable regulation” test enunciated in *Britt*, *supra*. *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 703. This Court held that “we clearly have a sufficient evidentiary record upon which to evaluate the validity of Plaintiff’s claim[.]” *Id.* The Court observed that none of the five factors of the analysis in *Britt* is determinative. *Id.*

The Court found that the plaintiff was in “essentially the same position as Mr. Britt.” *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 704. The plaintiff was convicted of two felonies, “neither of which involved any sort of violent conduct, between three and four decades ago.” *Id.* The Court found that the plaintiff had been a law-abiding citizen since then. *Id.* The Court found that the plaintiff used weapons in a safe and lawful manner until the 2004 amendments and has “assiduously and proactively” complied with the Act. *Id.*

The Court noted that the fact that the General Assembly amended the Act to allow for restoration of the right to possess firearms “is not particularly relevant to the required constitutional analysis.” *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 704. The Court acknowledged that our Supreme Court mentioned the lack of relief, but theorized that the Supreme Court intended to justify its analysis of the challenge as applied to the plaintiff. *Id.* The Court rejected the proposition that our Supreme Court intended to signal that a restoration provision would insulate the Act from “as-applied” challenges. *Id.*

This Court also rejected the proposition that the Act’s definitions control whether the plaintiff’s prior convictions constituted violent felonies for constitutional analysis under *Britt* and *Whitaker*. *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705. Instead, the Court concluded that the “Supreme Court’s references to Mr. Britt’s ‘uncontested lifelong non-violence towards other citizens,’ *Britt*, 363 N.C. at 550, 681 S.E.2d at 323 . . . require us to focus on the litigant’s actual conduct rather than upon the manner in which the General Assembly has categorized or defined certain offenses.” *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705. “In light of the undisputed evidence that the sawed-off shotgun that Plaintiff possessed in 1972 was inopera-

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

ble . . . we are unable to conclude that Plaintiff's prior convictions include 'violent' crimes[.]” *Id.*

After weighing the other factors enumerated in *Britt*, the Court sustained the plaintiff's challenge. *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705-06.⁹

C. Application to the Instant Case

The trial court concluded that the State “failed to meet its burden of showing that the Felony Firearms Act is constitutional as applied to Plaintiff under any standard of scrutiny.” We apply the “reasonable regulation” analysis to determine whether the Act violates plaintiff's substantive due process rights under the North Carolina Constitution.

We consider the factors surrounding plaintiff to determine whether plaintiff is “among the class of citizens who pose a threat to public peace and safety.” *Britt*, 363 N.C. at 550, 681 S.E.2d at 323. These factors include the five factors outlined in *Whitaker*:

- (1) the type of felony convictions, particularly whether they involved violence or the threat of violence[.]
- (2) the remoteness in time of the felony convictions;
- (3) the felon's history of lawabiding [sic] conduct since [the] crime,
- (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and
- (5) the felon's assiduous and proactive compliance with the 2004 amendment.

Whitaker, 201 N.C. App. at 205, 689 S.E.2d at 404 (alterations in original) (internal quotation marks omitted).

First, we consider whether the convictions involved violence or the threat of violence. *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404. The trial court found that plaintiff was convicted of felonious receipt of stolen property and conspiracy to commit grand larceny on 27 January 1978. The trial court also found that plaintiff was convicted of “fraudulent setting fire, conspiracy, false statement to procure, and conspiracy to receive, receiving, conspiracy to commit larceny and accessory before the fact in violation of N.C. Gen. Stat. §§ 14-65, 14-214, 14-71, and 14-5” on 11 June 1981.

9. The State appealed to our Supreme Court as of right, based on the dissent. Plaintiff's petition for discretionary review of additional issues was granted by our Supreme Court. The appeals were argued on 8 May 2012 and are still pending before our Supreme Court.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

Normally, “the appellate courts do not engage in fact finding.” *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404. However, we examine the uncontroverted evidence presented to the trial court. *Id.*

The record shows that plaintiff was convicted of conspiracy to commit larceny of a trailer loaded with tobacco and receipt of stolen property in 1978. The record further shows that plaintiff pled no contest to fraudulent setting fire, conspiracy, and false statement to procure in 1981. The record also shows that plaintiff pled guilty to conspiracy to receive, receiving, conspiracy to commit larceny, accessory before the fact of larceny, and receiving in 1981. However, the record shows that the 1981 convictions arose from plaintiff’s conduct committed in 1976. A jury found plaintiff guilty of “taking a bear with the use or aid of bait” on 13 November 1996.

The trial court concluded that the crimes of 1978 and 1981 “did not involve either violence or the use of a firearm.” This Court has rejected the proposition that the statutory definitions control whether plaintiff’s prior convictions constitute “violent” felonies for constitutional analysis. *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705.

In the instant case, the trial court made no findings of fact that supported its conclusion that the crimes did not involve either violence or the threat of violence. We cannot ascertain, based upon the record before us, whether plaintiff’s convictions involved violence or the threat of violence. We remand for the trial court to take evidence and make findings as to this factor.

The dissent acknowledges that the majority opinion in *Baysden* is controlling, but then engages in statutory analysis of plaintiff’s conviction for fraudulently burning a dwelling in order to determine its violence.

This Court rejected the proposition that the Act’s definitions control whether the plaintiff’s prior convictions constituted violent felonies for constitutional analysis under *Britt* and *Whitaker*. *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705. This Court is bound by the prior decisions of another panel addressing the same issue. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). We are not at liberty to follow the rationale of the dissent in *Baysden*.

Moreover, although statutory analysis is improper under *Baysden*, the dissent does not demonstrate that the offense of fraudulently setting fire is a violent crime. The statute defines burning a

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

dwelling as “[i]f any person . . . shall wantonly and willfully *or* for a fraudulent purpose set fire[.]” N.C. Gen. Stat. § 14-65 (emphasis added). The dissent assumes that plaintiff was convicted of wantonly and willfully setting fire, but plaintiff was convicted of fraudulently setting fire. The dissent cites no authority for the proposition that fraud constitutes violence or the threat of violence.

Because we cannot determine whether plaintiff’s convictions involved violence or the threat of violence and because statutory analysis is not permitted under *Baysden*, we remand for the trial court to take evidence and make findings as to this factor.

Second, we consider the length of time since plaintiff’s convictions. *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404. Almost 31 years have passed since plaintiff was last convicted of a felony. Almost 16 years have passed since plaintiff was convicted of a misdemeanor hunting violation. This factor appears to weigh in favor of plaintiff’s claim.

Third, we consider “the felon’s history of lawabiding [sic] conduct since [the] crime[.]” *Id.* In *Britt*, the plaintiff was convicted of a single count of possession with intent to sell and deliver methaqualone. *Britt*, 363 N.C. at 547, 681 S.E.2d at 321. “In the thirty years since plaintiff’s conviction of a nonviolent crime he has not been charged with any other crime nor is there any evidence that he has misused a firearm in any way.” *Britt*, 363 N.C. at 548, 681 S.E.2d at 322.

In the instant case, the record shows that plaintiff was convicted of conspiracy to commit larceny of a trailer loaded with tobacco and receipt of stolen property in 1978. The record also shows that plaintiff pled no contest to fraudulent setting fire, conspiracy, and false statement to procure in 1981. The record shows that plaintiff pled guilty to conspiracy to receive, receiving, conspiracy to commit larceny, accessory before the fact of larceny, and receiving in 1981. However, the record shows that these convictions in 1981 arose from plaintiff’s actions in 1976. A jury found plaintiff guilty of “taking a bear with the use or aid of bait” on 13 November 1996.

It is difficult to determine, from *Britt* and *Whitaker*, from which conviction this Court is to analyze the felon’s subsequent conduct. Since the crimes for which plaintiff was convicted in 1981 were committed in 1976, prior to 1978, we have considered all of these crimes under the first factor of this analysis. Thus, the only conviction for post-1978 conduct is for a hunting violation. We hold that this evi-

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

dences generally law-abiding conduct since 1978 and is a factor to be weighed in favor of plaintiff.

Fourth, we consider the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited. *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404. The record shows plaintiff's affidavits as to his own responsible, lawful firearm possession between 1988 and 2004. During this time period, plaintiff was convicted of a hunting offense. We cannot ascertain from the record before us whether plaintiff used a firearm in a responsible, lawful manner during the events giving rise to this conviction. We remand for the trial court to take additional evidence and make findings as to this factor.

Fifth, we consider the felon's compliance with the 2004 amendment. *Id.* Plaintiff's affidavit shows that he willingly gave up his weapons after learning of the Act. This factor appears to weigh in favor of plaintiff's claim. However, we note that this factor would appear to weigh in the favor of any plaintiff who chooses to challenge the Felony Firearms Act under the Declaratory Judgment Act, as opposed to challenging the Act by appealing a criminal conviction for firearm possession by a felon.

After careful consideration of the five factors outlined in *Whitaker*, we cannot determine from the record before us whether plaintiff is "among the class of citizens who pose a threat to public peace and safety[.]" *Britt*, 363 N.C. at 550, 681 S.E.2d at 323.

We remand to the trial court with instruction to take additional evidence regarding the *Whitaker* factors surrounding plaintiff's felony convictions and post-conviction history. The portion of the trial court's order concluding that the Act, as applied to plaintiff, violates substantive due process rights guaranteed by the North Carolina Constitution is reversed.

VIII. Procedural Due Process under the Constitution of the
United States

[5] "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

establish that no set of circumstances exists under which the Act would be valid.” *U.S. v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987).

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Elridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews*, 424 U.S. at 333, 47 L. Ed. 2d at 32.

A. Existence of a Constitutionally Protected Interest

“The requirements of procedural due process apply only to the *deprivation* of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556 (1972) (emphasis added).

To analyze plaintiff’s facial challenge, we first determine whether the State deprived an individual of liberty or property. Plaintiff does not argue, and the trial court did not conclude, that the Act deprives an individual of property. Therefore, we do not analyze the Act to determine whether it deprives an individual of property.

Next, we analyze whether the State deprived an individual of liberty. The United States Supreme Court has previously defined the meaning of “liberty” in the Fourteenth Amendment.

[L]iberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Board of Regents, 408 U.S. at 572, 33 L. Ed. 2d at 558. The United States Supreme Court held that the Second Amendment right to keep and bear arms is a fundamental right necessary to our system of ordered liberty. *McDonald*, ___ U.S. at ___, 177 L. Ed. 2d at 921.

The right in the instant case is distinguishable from the Second Amendment right in *Heller* and *McDonald*. The right in *Heller* is “the right of a *law-abiding, responsible* citizen to possess and carry a

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

weapon for self-defense[.]” *Chester*, 628 F.3d at 683. The right in the instant case is the right of a convicted felon to bear arms.

No federal or State case has held that a convicted felon enjoys a liberty interest to bear arms under the Fourteenth Amendment. We hold that the Act does not deprive plaintiffs of liberty without due process of law under the United States Constitution. The portion of the trial court’s order concluding that the Act, on its face, violates procedural due process rights guaranteed by the United States Constitution is reversed.

Assuming *arguendo*, without deciding, that the State deprived an individual of a constitutionally protected interest, we proceed to the next step in our analysis.

B. Whether Procedures Are Constitutionally Significant

The trial court concluded that “there are presently no procedures attendant upon the deprivation of this fundamental liberty interest that are constitutionally sufficient.”

To survive a facial challenge, the procedures of the Act need only be adequate to authorize the deprivation of liberty of at least some persons charged with being a felon in possession of a firearm. *See, e.g., Salerno*, 481 U.S. at 751, 95 L. Ed. 2d at 711; *Schall v. Martin*, 467 U.S. 253, 264, 81 L. Ed. 2d 207, 217 (1984). The United States Supreme Court describes a more thorough review in *Mathews*.

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 47 L. Ed. 2d at 33.

Our Supreme Court described this analysis as a “three-factor balancing test[.]” *Henry v. Edmisten and Barbee v. Edmisten*, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986). “The first factor that must be weighed is the private interest affected by the challenged official action.” *Henry*, 315 N.C. at 482, 340 S.E.2d at 726. The private inter-

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

est that the Act affects is the interest of a convicted felon to possess firearms. As previously discussed, no court has held that a convicted felon has a protected liberty interest to bear arms under the Fourteenth Amendment. Therefore, it is not clear what weight, if any, to assign this private interest.

“The second step in the balancing test requires us to weigh the risk of erroneous deprivation of the private interest as a result of the procedures used and the probable value of additional procedural safeguards.” *Henry*, 315 N.C. at 484, 340 S.E.2d at 727. The risk of an erroneous deprivation of this interest is small, but there are no procedures to determine whether the interest should or should not be deprived. Our legislature mandated that any felon found in possession of a firearm is subject to criminal liability. To the extent that plaintiff argues this determination is unconstitutional, that argument is addressed in the Section of this opinion on substantive due process protections.

“The third and final factor that must be weighed is the state’s interest served by the summary procedure used, including the state function involved and the fiscal and administrative burdens that would result from additional procedures argued to be necessary.” *Henry*, 315 N.C. at 488, 340 S.E.2d at 730. The State’s interest is to ensure the public safety. As previously discussed, this constitutes an important government objective.

After balancing these three factors, we conclude that the State’s interest in ensuring the public safety outweighs the private interest involved (if any) and any risk of erroneously depriving those interests. The Act does not deprive plaintiffs of liberty without due process of law under the United States Constitution.

IX. Procedural Due Process under the Constitution of the State of North Carolina

“No 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.” N.C. Const. art. I, § 19. “The Law of the Land Clause is the parallel provision in the state constitution to the Due Process Clause of the Fourteenth Amendment of the federal constitution.” *Henry*, 315 N.C. at 480, 340 S.E.2d at 725.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully[.]” *In re W.B.M.*, ___ N.C. App. ___, ___, 690 S.E.2d 41, 47 (2010).

The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if such legislation can be upheld on any reasonable ground. An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the Act would be valid.

W.B.M., ___ N.C. App. at ___, 690 S.E.2d at 47 (internal citations and quotation marks omitted).

Similar to the analysis of procedural due process rights under the United States Constitution, we examine procedural due process questions under the North Carolina Constitution in two steps. “[F]irst, 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.” *W.B.M.*, ___ N.C. App. at ___, 690 S.E.2d at 48 (internal citation omitted).

A. Existence of a Constitutionally Protected Interest

Plaintiff does not argue, and the trial court did not conclude, that the Act interferes with property or a property interest. We do not analyze the Act to determine whether it interferes with property or a property interest.

Next, we analyze whether the State interfered with liberty or a liberty interest. We have recognized that “liberty,” in the context of the Law of the Land Clause, extends beyond freedom from arbitrary physical constraint or servitude. *See Ballance*, 229 N.C. at 769, 51 S.E.2d at 734 (“liberty” includes the right to pursue a vocation); *State v. Stines*, 200 N.C. App. 193, 198, 683 S.E.2d 411, 414 (2009) (satellite-based monitoring enrollment implicates a significant liberty interest); *W.B.M.*, ___ N.C. App. at ___, 690 S.E.2d at 49 (“liberty” to pursue a vocation in childcare is limited by inclusion on a list of those who allegedly abused or neglected children).

The United States Supreme Court held that the Second Amendment right to keep and bear arms is a fundamental right necessary to our system of ordered liberty. *McDonald*, ___ U.S. at ___, 177 L. Ed. 2d at 921. As previously discussed, the right in the instant

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

case is distinguishable from the Second Amendment right in *Heller* and *McDonald*.

No North Carolina case has held that, under the Law of the Land Clause, a convicted felon enjoys a liberty interest to bear arms. The Act does not deprive plaintiffs of liberty without due process of law under the North Carolina Constitution. The portion of the trial court's order concluding that the Act, on its face, violates procedural due process rights guaranteed by the North Carolina Constitution is reversed.

Assuming *arguendo*, without deciding, that plaintiff has a constitutionally protected interest, we proceed to the second step in the analysis.

B. Whether Procedures Are Constitutionally Significant

Our Supreme Court altered the *Mathews* balancing test to analyze challenges to State statutes under the North Carolina Constitution's Law of the Land Clause in *Henry, supra*.

We are not satisfied with using a balancing test as a gauge to determine what procedural steps our state's Law of the Land Clause requires before the state may deprive a person of a protected interest. The balancing test is open to several objections. First, it makes the decision making process unduly responsive to the subjective notions of the decision makers. Each court must make its own assessment of the weight to be afforded the private interest, the state's interest and the value of additional procedures. Second, infusion of this subjectivity into the decision making process necessarily leads to unpredictable and sometimes inconsistent results. In this case, for example, the superior court judge reached a different conclusion about the constitutionality of the revocation statute than did we using the same balancing test.

The root of the problem with using the balancing test to determine whether the process provided by a statute is that which is constitutionally due is that the test confuses the judicial and legislative functions. The role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials. Rather

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

than rebalancing, the Court's role is only to measure the balance struck by the legislature against the required minimum standards of the constitution. The best way for the Court to discharge this function is for it to enunciate a workable principle as to what process the law of the land minimally requires.

Henry, 315 N.C. at 490-91, 340 S.E.2d at 731.

The Court in *Henry* summarized procedures, as set out in several federal cases, that satisfied the Law of the Land Clause.

In the instant case, the risk of an erroneous deprivation of a constitutionally protected liberty interest is small, but no procedures exist to determine whether the interest should be deprived. The General Assembly mandated that any felon found in possession of a firearm is subject to criminal liability. To the extent that plaintiff argues that this determination is unconstitutional, that argument is addressed in the Section of this opinion analyzing substantive due process protections.

After considering the requirements of the Law of the Land Clause, we hold that the Act does not deprive individuals of a constitutionally protected liberty interest without due process of law under the North Carolina Constitution.

X. Conclusion

The portion of the trial court's order concluding that the Act, as applied to plaintiff, violates substantive due process rights guaranteed by the United States Constitution is reversed. As to the federal substantive due process issue, we remand to the trial court to give the State an opportunity to present evidence and argument on this question and for plaintiff to respond.

The portion of the trial court's order concluding that the Act, as applied to plaintiff, violates substantive due process rights guaranteed by the North Carolina Constitution is reversed and remanded for the trial court to take evidence and make additional findings.

The portion of the trial court's order concluding that the Act, on its face, violated procedural due process rights guaranteed by the State and federal Constitutions is reversed.

REVERSED AND REMANDED.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

Judge CALABRIA concurs.

Judge BEASLEY concurs in part and dissents in part.

BEASLEY, Judge concurring in part and dissenting in part.

I agree with the majority that this appeal, while interlocutory, is properly before us as affecting a substantial right and that the trial court had subject matter jurisdiction to hear this case. I also agree with the majority's reversal of the trial court's ruling on the procedural due process claims. I further agree with the majority that, with regard to the substantive due process claims under the U.S. Constitution, we should remand pursuant to *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), to determine whether the State has met its burden under intermediate scrutiny.¹ However, because I believe that Plaintiff's substantive due process claims under the North Carolina Constitution fail, I respectfully dissent.

In its analysis of Plaintiff's substantive due process claims under the North Carolina Constitution, the trial court relied upon the factors put forth in *Britt* and reaffirmed in *Baysden v. State*, ___ N.C. App. ___, 718 S.E.2d 699 (2011), to reach its conclusion that the statute is unconstitutional as applied to Plaintiff in this case. See *Britt v. State*, 363 N.C. 546, 550, 681 S.E.2d 320, 323 (2009); *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 703. I agree with the majority that *Baysden* controls, despite my dissenting opinion therein. However, even if the statute may be unconstitutional as applied to a particular plaintiff, Plaintiff *sub judice* surely should not benefit from such exception, granting him unbridled constitutional protection, for several reasons.²

1. However, the trial court notes that the State did not respond to the statistics provided by Plaintiff suggesting that the statute has not had an effect on firearms violence. I would first note that the State is not required to provide statistical evidence to establish a reasonable fit. See *Carter*, 669 F.3d at 418. Second, the trial court itself states that "the statistical evidence cited by Plaintiff is not a complete and comprehensive study of recidivism firearm violence[.]" The statistics referenced by the court provide no comparison of figures pre- and post-enactment of this statute or its corresponding amendments. Thus, there is no indication of how many crimes the statute prevents. Further, the trial court makes light of the relatively low number of recidivist felons convicted of violent crimes in the face of the number of convicted felons, but this could equally be evidence of the effectiveness of the statute—in other words, the number is low precisely because convicted felons have been prohibited from possessing firearms. Thus, these statistics are unhelpful and should be accorded no weight.

2. Our court in *Baysden* also determined, without remanding to the trial court for its determination as the majority *sub judice* now holds, that the plaintiff's conviction of possession of a sawed-off shot gun did not constitute a violent felony. ___ N.C. App. at ___, 718 S.E.2d at 705-06.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

The factors utilized by our Supreme Court in *Britt* were applicable in determining whether the statute is constitutional as applied to an individual who has not displayed *either* a violent tendency or a repetitive disregard for the laws of this state. *Britt*, 363 N.C. at 550, 681 S.E.2d at 323. In *Baysden*, our Court rejected the premise that “the fact that Plaintiff has two, rather than one, prior felony convictions demonstrates the appropriateness of a finding in the State’s favor.” *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705. Citing *Britt* and *Whitaker*, the Court noted that “the appropriate inquiry requires an analysis of the number, age, and severity of the offenses for which the litigant has been convicted.” *Id.* at ___, 718 S.E.2d at 705-06. In *Baysden*, our Court held that in evaluating “‘the facts of [P]laintiff’s crime[s], his long post-conviction history of respect for the law, the absence of any evidence of violence by the [P]laintiff, and the lack of any exception or possible relief from the statute’s operation,’ ” the as applied challenge must be upheld. *Id.* at ___, 718 S.E.2d at 706 (alterations in original)(quoting *Britt*, 363 N.C. at 550, 681 S.E.2d at 323).

Plaintiff *sub judice* was convicted of **ten** felonies. In Caswell County, North Carolina, Plaintiff was convicted of the following felonies:

- 80 CRS 1186 Fraudulently Set Fire to Dwelling House;
- 80 CRS 1187 Conspiracy;
- 80 CRS 1188 False Statement to Procure;
- 81 CRS 322 Conspiracy to Receive;
- 81 CRS 323 Receiving;
- 81 CRS 324 Conspiracy to Commit Larceny;
- 81 CRS 325 Accessory Before Fact of Larceny;
- 81 CRS 1554 Receiving.

In Rockingham County, Plaintiff was convicted of the following felonies:

- 77 CRS 1697 Conspiracy to Commit Grand Larceny;
- 77 CRS 1699 Receiving Stolen Property.

Our Court in *Baysden* declared that the number of felonies is not dispositive of a felon’s right to legally possess a firearm. *Id.* at ___, 718 S.E.2d at 705-06. Further, our Court noted that we should be persuaded by “‘uncontested lifelong non-violence towards other citi-

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

zens.’ ” *Id.* at ___, 718 S.E.2d at 705 (quoting *Britt*, 363 N.C. at 550, 681 S.E.2d at 323). Under the majority’s analysis, it appears that there is no limit to the number of felony convictions permissible for a felon to lawfully possess a firearm under the statute. If this statute is in violation of the constitution as applied to this Plaintiff, it is difficult to imagine to whom, regardless of the number of felony convictions accrued, it applies. I would proffer that Plaintiff’s ten felony convictions are excessive by any means.

Further, I would contend that Plaintiff’s previous convictions were violent. The majority in *Baysden* concluded that “statutory definitions [do not] control our determination of” which crimes are violent and we should instead examine the specific conduct involved in each conviction. *Id.* at ___, 718 S.E.2d at 705. Such a rule requires us to look at the circumstances of the crime and not rely solely on the statutory definitions; but it does not preclude consideration of statutory definitions, as these provide the backbone of those circumstances. One may not be convicted of the crime without performing each of the statutorily required elements, thus the conviction itself provides the basic circumstances of the act in question. I would nonetheless contend that the circumstances required for a conviction of fraudulently burning a dwelling are necessarily violent.

By statute, fraudulently burning a dwelling occurs

[i]f any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building.

N.C. Gen. Stat. § 14-65 (2011). Our Supreme Court has held that

for a burning of a dwelling to be criminal under G.S. 14-65 as a willful and wanton burning, it must be shown to have been done intentionally, without legal excuse or justification, and with the knowledge that the act will endanger the rights or safety of others or with reasonable grounds to believe that the rights or safety of others may be endangered.

JOHNSTON v. STATE OF N.C.

[224 N.C. App. 282 (2012)]

State v. Brackett, 306 N.C. 138, 142, 291 S.E.2d 660, 662-63 (1982). Thus, where the offense is willful and wanton, it requires and recognizes a risk to human safety and life. Thus, the mere use of fire to burn a home, or anything for that matter, when one is merely acting with a fraudulent purpose, is, at the very least, a dangerous act per se.

When these concepts are combined in the context of using fire to destroy a house for pecuniary gain with disregard for the inherent risk to life and safety, whether we draw upon the statutory definitions of what should be considered a violent or non-violent crime, see N.C. Gen. Stat. § 14-415.4, or disregard it as our precedent now requires, I see no conclusion other than that such an act is violent. Even where we completely disregard any statutory guidance, I contend that the very nature of fire and of the act of setting fire to a home, for whatever purpose, is violent *per se*.

The majority *sub judice* regards this dissent as ignoring the precedent set by *Baysden* because I engage in the above analysis to determine whether Plaintiff's prior conviction was violent. However, I believe such an analysis, rather than remanding, is precisely what *Baysden* requires of this Court. *Baysden* does not remand for further findings as to the precise circumstances of Baysden's possession of the shotgun. *Baysden*, ___ N.C. App. at ___, 718 S.E.2d at 705. Instead, the majority in *Baysden* summarily concluded that because of "the absence of any indication that [Baysden] did anything other than possess that inoperable object, [it was] unable to conclude that [Baysden's] prior convictions include 'violent' crimes for purposes of the constitutional analysis required." *Id.* at ___, 718 S.E.2d at 705 (footnote omitted). In other words, *Baysden* permits this Court to determine whether a crime was violent based only on the evidence before it. The evidence before this Court *sub judice*, as discussed above, indicates that Plaintiff used fire, an inherently dangerous object, to burn a dwelling home, despite the unpredictable nature of fire and the risk that fire poses to human life. This is a violent crime per se. Under the precedent of *Baysden*, we need not remand to have the trial court make such a finding.

KING v. BROOKS

[224 N.C. App. 315 (2012)]

DONALD KING, PLAINTIFF

v.

JIMMY LEE BROOKS, TOMMY LEE BROOKS, A/K/A TOMMIE LEE BROOKS,
FRANKIE LEE SOUTHERLAND, A/K/A FRANKIE LEE SOUTHLAND, JESSICA FAWN
CHAVEZ, A/K/A JESSICA FREE, HENDERSON RACHMAN, NICHOLAS JONES,
WILLIAM WRIGHT, AND WILLIAM WRIGHT D/B/A WRIGHT'S COIN SHOP,
DEFENDANTS

No. COA12-533

Filed 18 December 2013

1. Conversion—defense—bona fide purchaser for value—good faith—directed verdict denied

The trial court did not err in a conversion action by denying defendant's motions for directed verdict and JNOV. Assuming that a *bona fide* purchaser for value defense to conversion exists in North Carolina, the stories the co-defendants told defendant about their titles to the coins at issue were weak.

2. Conversion—instructions—bona fide purchase for value—requested instruction incorrect

The trial court properly refused to give the jury an instruction on the *bona fide* purchaser for value defense in a conversion action. Defendant's requested instruction to the jury was an incorrect statement of law in that it required the jury to make an irrelevant finding.

3. Damages and Remedies—compromise verdict—allegation not supported by evidence

The trial court did not abuse its discretion by denying defendant's motion for a new trial based on the allegation that the jury returned a "compromise" verdict. The precedent relied upon by defendant concerned damages for pain and suffering, unlike this case, where the jury simply awarded plaintiff his full recovery from defendant and then allowed defendant to recover from his co-defendants. There was no evidence that the jury returned a compromise verdict or blatantly ignored the judge's instructions.

Judge STROUD concurring in result only.

Appeal by William Wright from judgment entered 15 September 2011 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 10 October 2012.

KING v. BROOKS

[224 N.C. App. 315 (2012)]

*William E. Loose for Plaintiff-Appellee.**Patla, Straus, Robinson & Moore, P.A., by Brian D. Gulden, for Defendant-Appellant.*

BEASLEY, Judge.

William Wright (Appellant) appeals from the jury's verdict finding him liable to Donald King (Appellee) for conversion. For the following reasons, we affirm.

Appellee is a collector of many things, including coins, stamps, antiques, and sports memorabilia. Between April 2007 and June 2007, thieves broke into Appellee's house at least once and stole a number of collectible items from his home. Appellant is one of several defendants in this case and is a coin shop owner.

Detective Ron Heacock of the Buncombe County Sheriff's Department spoke with Appellant in the course of investigating the break-in(s) at Appellee's home. Appellant had purchased coins from several of his co-defendants. Detective Heacock informed Appellant that individuals matching the descriptions of Jimmy Brooks and Nicholas Jones had attempted to sell some stolen coins at a shop in Black Mountain. The coin dealer in Black Mountain questioned the individuals at length about their title to the coins but turned them away when it was evident that they did not understand the nature of the coins and refused to show identification. Detective Heacock told Appellant that his co-defendants were suspects in the theft(s) and were suspected of selling the coins they had stolen, which made Appellant "visibly upset." The stories provided to Appellant by his co-defendants regarding their title to the coins varied. Appellant was told that some of the coins were acquired through various trades with a drug addict who had inherited the coins; that some of the coins were being sold to pay for the care of a disabled child, who was present at the store; and that some of the coins were acquired in exchange for caring for an elderly woman. By Appellant's testimony, nothing about these stories made him think that the coins might be stolen. Appellant paid Jimmy Brooks approximately \$19,207; Tommy Brooks about \$1,507; Frankie Southerland around \$56,800; Jessica Chavez approximately \$6,648; and Nick Jones about \$3,300. Appellant cooperated with the Sheriff's Department and was able to recover some of Appellee's property. Some items had Appellee's name on them. Appellant's co-defendants were later charged criminally in conjunction with the break-in(s) at Appellee's home. Appellant's co-defendants pled guilty to a variety of charges.

KING v. BROOKS

[224 N.C. App. 315 (2012)]

Appellee filed a complaint for conversion, among other claims, on 18 March 2009 in Buncombe County Superior Court. Appellant filed an answer and crossclaim on 26 May 2009. Appellant cross-claimed against co-defendants Frankie Southerland, Jessica Chavez, and Jimmy Brooks for fraud and civil conspiracy. Mr. Wright filed an amended crossclaim on 4 February 2011 to add claims of fraud and civil conspiracy against Tommy Brooks.

At the close of Appellee's evidence and the close of all evidence, Appellant moved for directed verdict. Those motions were denied. Appellant also requested a jury instruction on an affirmative defense. Appellant argued that he was a bona fide purchaser for value without knowledge that the coins were stolen, and as such the jury should be instructed on this defense. The trial court denied Appellant's request for a jury instruction.

On 9 September 2011, the jury returned a verdict finding Appellant and his co-defendants liable to Appellee. Specifically, the jury found Appellant, Tommy Brooks, and Frankie Southerland liable for conversion. The jury found that Appellant owed \$84,000 in damages to Appellee. Only nominal damages were awarded against Tommy Brooks and Frankie Southerland. The jury found Tommy Brooks liable to Appellant for fraud in the amount of \$1,507. The jury found Frankie Southerland liable to Appellant for fraud in the amount of \$56,800. Appellee obtained a judgment by default on 15 September 2011 against Jimmy Brooks, Nicholas Jones, and Jessica Chavez.

Appellant filed a motion for judgment notwithstanding the verdict (JNOV) or in the alternative a new trial on 22 September 2011. The same was denied on 11 October 2011. Appellant filed his timely notice of appeal to this Court on 26 October 2011.

[1] Appellant argues the trial court erred in denying his motions for directed verdict and JNOV because he presented sufficient evidence that he was a bona fide purchaser for value. If such a defense exists in North Carolina, we nonetheless affirm the trial court's denial of both motions.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)(citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). "On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to

KING v. BROOKS

[224 N.C. App. 315 (2012)]

the jury.” *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000). A motion for directed verdict or JNOV should be denied “unless the evidence, taken as true and viewed in the light most favorable to the plaintiff, establishes an affirmative defense as a matter of law.” *Radford v. Keith*, 160 N.C. App. 41, 43, 584 S.E.2d 815, 817 (2003). Our review is *de novo*. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008).

“In this state, conversion is defined as ‘an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner’s rights.’” *Spinks v. Taylor*, 303 N.C. 256, 264-65, 278 S.E.2d 501, 506 (1981)(quoting *Peed v. Burlerson’s, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)), *superseded by statute on other grounds as stated in Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995). There is some authority in North Carolina indicating that the status of a bona fide purchaser for value is a defense to the tort of conversion. In *Singer Manufacturing Co. v. Summers*, 143 N.C. 102, 105-06, 55 S.E. 522, 523 (1906), the Supreme Court stated,

It is well established that when a man’s property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrongdoer as long as he can identify or trace it; and the right attaches, not only as to the wrongdoer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration. . . . The principle applies, not only to specific property, but to money and choses in action.

Singer appears to open the door for a bona fide purchaser for value defense, given the language allowing the rightful owner to trace his property into the hands of those who have acquired the property in a manner other than for value and in good faith. *Id.* A more recent case from our Supreme Court also seems to recognize the bona fide purchaser for value defense to conversion. The Supreme Court held that if the defendant proved that it did not have notice, constructive or actual, that the funds it acquired were the plaintiff’s property, then the defendant could not be liable for conversion. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, ___ N.C. ___, ___, 723 S.E.2d 744, 749 (2012).

KING v. BROOKS

[224 N.C. App. 315 (2012)]

Taking the evidence in the light most favorable to Appellee, Appellant did not establish the affirmative defense of a bona fide purchase for value as a matter of law. We find that the stories that Appellant's co-defendants fed him regarding their titles to the coins are weak in establishing his good faith in purchasing the coins. Appellant did not establish his affirmative defense as a matter of law, and the trial court properly denied both the motion for directed verdict and the motion for JNOV.

[2] Further, Appellant did not submit a correct statement of law to the trial court. Thus, the trial court properly refused to give the jury an instruction on the bona fide purchase for value.

“[R]equests for special instructions—*i.e.*, non-pattern jury instructions—must be submitted to the trial court in writing prior to the charge conference. Requests for special instructions not made in compliance with N.C. Gen. Stat. § 1-181 and Rule 51(b) may be denied at the trial court's discretion.” *Swink v. Weintraub*, 195 N.C. App. 133, 155, 672 S.E.2d 53, 67-68 (2009)(citations omitted), *review denied*, 363 N.C. 812, 693 S.E.2d 352 (2010).

When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error.

Ellison v. Gambill Oil Co., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007)(citations omitted), *aff'd per curiam and review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009). The Court has reviewed an appeal regarding jury instructions under the above standard of review, rather than abuse of discretion, even when counsel did not sign the instructions as required by Rule 51. *Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 490-91 (2000). Based on *Kinsey*, this Court can “decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim,” even though Appellant's counsel did not sign the written proposed jury instructions. *Ellison*, 186 N.C. App. at 169, 650 S.E.2d at 821.

A specific jury instruction should be given when “(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the

KING v. BROOKS

[224 N.C. App. 315 (2012)]

instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.”

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)). This Court has previously upheld a refusal to give an instruction to the jury where the instruction misstated the applicable law for the jury. *Cobb ex rel. Knight v. Town of Blowing Rock*, ___ N.C. App. ___, ___, 713 S.E.2d 732, 736, 740 (2011)(affirming, in both the majority and dissenting opinion, the trial court’s refusal to instruct the jury on a landowner’s purported higher duty of care owed to a child because it was an incorrect statement of law), *rev’d on other grounds*, __ N.C. ___, 722 S.E.2d 479 (2012).

The applicable portion of the written instructions proposed by Appellant’s counsel read as follows:

Was the Defendant a purchaser of currency for value without knowledge of any defect of title and in good faith?

On this issue, the burden of proof is on the Defendant. This means that the Defendant must prove, by the greater weight of the evidence, these things:

First, that what the Defendant purchased was currency.

...

A diligent investigation in North Carolina’s statutory and case law reveals no requirement that a defendant purchase currency. If the defense exists, it seemingly requires only that a defendant purchase the converted property for value, in good faith, without notice, constructive or actual, that the property has been converted. *See Variety Wholesalers*, ___ N.C. at ___, 723 S.E.2d at 749; *Singer*, 143 N.C. at 105-06, 55 S.E. at 523. As such, Appellant’s requested instruction to the jury is an incorrect statement of law in that it requires the jury to make an irrelevant finding. The trial court properly denied the request for this instruction.

[3] Appellant argues that the trial court erred in denying his motion for a new trial because the jury returned a “compromise” verdict. We disagree.

“[A]n appellate court’s review of a trial judge’s discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether

KING v. BROOKS

[224 N.C. App. 315 (2012)]

the record affirmatively demonstrates a manifest abuse of discretion by the judge.” *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

Appellant cites *Roberston v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), for the proposition that a new trial should be granted when the jury renders a compromise verdict or demonstrates a misunderstanding of the law. *Roberston* is inapposite. This Court has stated that *Roberston* “dealt exclusively with the issue of damages for pain and suffering.” *McFarland v. Cromer*, 117 N.C. App. 678, 682, 453 S.E.2d 527, 529 (1995). This Court has also stated that *Robertson* “held that uncontroverted damages cannot be arbitrarily ignored by the jury.” *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 320, 542 S.E.2d 317, 319 (2001).

Here, the damages are not for pain and suffering. The jury also did not ignore the law; they simply awarded Appellee his full recovery from Appellant and then allowed Appellant to recover from his co-defendants. Appellant could have sought a judgment by default against Jimmy Brooks and Jessica Chavez to, in essence, indemnify his loss. Appellant also could have pursued claims against Nicholas Jones, another co-defendant whom he paid for property stolen from Appellee’s home. There is no evidence that the jury returned a compromise verdict or blatantly ignored the judge’s instructions. As such, we find no abuse of discretion and affirm the denial of the motion for a new trial.

For the reasons stated above, we affirm the trial court’s denial of the motion for directed verdict, motion for JNOV, request for jury instructions, and motion for a new trial.

Affirmed.

Judge ELMORE concurs.

Judge STROUD concurs in result only.

LEWIS v. HOPE

[224 N.C. App. 322 (2012)]

ERIC D. LEWIS, PLAINTIFF

v.

JAMES T. HOPE, D/B/A, HOPE'S AUTOMOTIVE, DEFENDANT

No. COA12-651

Filed 18 December 2012

1. Judgments—default judgment—failure to plead—appearance irrelevant

The trial court did not abuse its discretion in an unfair and deceptive trade practices case by failing to set aside the entry of default. Defendant's default was based on his failure to plead. As such, his appearance was not relevant because the clerk could enter default on these grounds.

2. Appeal and Error—preservation of issues—failure to include transcript

Although defendant contended the trial court acted improperly when it granted default judgment where there were no allegations of damages made in the complaint and where defendant was denied the opportunity to be heard at the hearing on damages, the Court of Appeals was not able to properly review this claim because defendant failed to include a transcript of the hearing in the record.

Appeal by Defendant from a judgment entered 20 March 2012 by Judge Lucy N. Inman in Wake County Superior Court. Heard in the Court of Appeals 24 October 2012.

Hairston Lane Brannon, PA, by Jeremy R. Leonard, for Plaintiff-Appellee.

Garey M. Balance, for Defendant-Appellant.

BEASLEY, Judge.

James T. Hope (Defendant) appeals from a default judgment entered following an entry of default for failure to file a responsive motion. For the following reasons, we affirm in part and dismiss in part.

On 16 August 2011, Plaintiff filed a complaint against Defendant alleging unfair and deceptive trade practices arising from work Defendant performed on Plaintiff's car. Defendant received service on 15 September 2011. Sometime thereafter, Defendant sent

LEWIS v. HOPE

[224 N.C. App. 322 (2012)]

Plaintiff's counsel a letter providing his account of the interactions between them. Defendant did not file this letter or an answer with the court. On 20 December 2011, Plaintiff filed a Motion for Entry of Default, accompanied by an affidavit from Plaintiff. On 22 December 2011, a Wake County clerk entered default against Defendant. This order was served on Defendant on 3 January 2012. On 9 January 2012, Plaintiff filed a Motion for Default Judgment. Defendant filed a response on 15 March 2012. Both parties appeared before the trial court on 19 March 2012, whereupon Defendant filed a motion to set aside the entry of default. The trial court denied this motion and entered default judgment against Defendant. It held a hearing on damages in which Plaintiff testified. The trial court awarded treble damages to Plaintiff plus attorney's fees.

[1] Defendant first argues that the trial court abused its discretion by failing to set aside the entry of default in this matter. We disagree.

“A trial court’s decision of whether to set aside an entry of default, will not be disturbed absent an abuse of discretion.” *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009)(citation omitted). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that it[’s order] was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

“When a party against whom a judgment for affirmative relief is sought has failed to plead . . . the clerk shall enter his default.” N.C. Gen. Stat. § 1A-1, Rule 55(a) (2011). “For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).” N.C. Gen. Stat. §1A-1, Rule 55(d) (2011).

What constitutes ‘good cause’ depends on the circumstances in a particular case, and . . . an inadvertence which is not strictly excusable may constitute good cause, particularly where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.

Luke, 194 N.C. App. at 748, 670 S.E.2d at 607 (internal quotation marks and citation omitted). “The defendant carries the burden of showing good cause to set aside entry of default.” *Id.*

LEWIS v. HOPE

[224 N.C. App. 322 (2012)]

It is not disputed that Defendant failed to file a responsive pleading. However, Defendant argues that he established good cause for this failure through his correspondence with Plaintiff and several state agencies and, particularly, his letter to Plaintiff's counsel, as this evidence shows his intent to address the matter and belief he was doing so properly. Defendant's claims amount to nothing more than alleging that he was unaware of the need to file an answer because of his unfamiliarity with the law. This Court has previously held such an excuse insufficient to warrant a finding of abuse of discretion. *See, e.g., First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 158, 530 S.E.2d 581, 584 (2000) (upholding a trial court's refusal to set aside entry of default where the defendant claimed good cause on the basis of her lack of knowledge of the law).

Additionally, Defendant's reliance on *Roland v. Motor Lines, Inc.*, 32 N.C. App. 288, 231 S.E.2d 685 (1977), is misplaced. In *Roland*, this Court found that a defendant's letter to the plaintiff's attorney constituted an appearance and precluded the clerk from entering default judgment. *Id.* at 289-91, 231 S.E.2d at 687-88. Defendant argues that under this precedent, the entry of default in his case was in error because his letter constitutes an appearance. This is mistaken for several reasons. First, Defendant fails to recognize that a copy of the letter in *Roland* was also filed with the clerk. *Id.* at 290, 231 S.E.2d at 687. Here, Defendant failed to file a copy of his correspondence with the clerk.

Second, in the case at hand, default judgment was entered by the trial court on the basis of failure to plead; in *Roland*, the clerk handled both the entry of default and the default judgment on the basis of failure to appear. *Id.* The result of this distinction is that different portions of the default statute control. *See* N.C. Gen. Stat. § 1A-1, Rule 55 (2011). Under Rule 55(a), a clerk may *enter default* whenever "a party . . . has failed to plead or is otherwise subject to default judgment as provided" in either portion of section (b). Rule 55(a). Subsection (b) provides two alternatives for entering default *judgment* depending on who enters the judgment. Rule 55(b). Under Rule 55(b)(1), a *clerk* may only enter default *judgment* where the defendant has "defaulted for failure to appear." *Id.* Under Rule 55(b)(2), a *judge* may enter default *judgment* "[i]n all other cases" upon application by party entitled to the judgment. *Id.*

Thus, *Roland* addressed whether or not the defendant's letter constituted an appearance because the default *judgment* was entered by the clerk; as such, the validity of the entry of default depended

LEWIS v. HOPE

[224 N.C. App. 322 (2012)]

upon whether or not the defendant failed to appear. *Roland*, 32 N.C. App. at 290-91, 231 S.E.2d at 687-88. Conversely, in the case at hand, Defendant's default was based on his failure to plead. As such, his appearance is not relevant because the clerk could enter default on these grounds both because section (a) directly grants that authority and because section (b)(2) grants the judge the authority to enter default judgment. *See* Rule 55. Because of these distinctions and because Defendant does not contest his failure to file a responsive pleading, we find no abuse of discretion.

[2] Defendant next argues that the trial court acted improperly when it granted default judgment where there were no allegations of damages made in the Complaint and where Defendant was denied the opportunity to be heard at the hearing on damages. We disagree and dismiss the argument.

“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.” *Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990)(citation omitted). Where a complaint is sufficiently pleaded, “[u]pon entry of default, the defendant will have no further standing to defend on the merits or contest the plaintiff's right to recover. Defendant is, however, entitled to a hearing on the issue of damages.” *Luke*, 194 N.C. App. at 751, 670 S.E.2d at 609 (citations omitted). “In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may, if he can, reduce the amount of damages to nominal damages.” *Potts v. Howser*, 267 N.C. 484, 494, 148 S.E.2d 836, 844 (1966)(citation omitted).

We note first that Defendant has failed to challenge the trial court's findings of fact with regard to damages and is thus without the ability to challenge the specific amount awarded. *Powers v. Tatum*, 196 N.C. App. 639, 640, 676 S.E.2d 89, 91 (2009)(“Where petitioner fails to challenge any of the trial court's findings of fact on appeal, they are binding on the appellate court[.]”). Defendant may only challenge, as he does, Plaintiff's ability to recover any amount at all due to an insufficient pleading. However, here, Plaintiff sufficiently pleaded damages, alleging damages in excess of \$10,000. *See* N.C. Gen. Stat. §1A-1, Rules 8, 9 (2011). While Defendant may have been entitled to be heard in the hearing on damages to contest this recovery in the event he requested such an opportunity, *see Hunter*, 97 N.C. App. at 377, 388 S.E.2d at 634; *Potts*, 267 N.C. at 494, 148 S.E.2d at 844, we are not able to properly review this claim because Defendant has

failed to include a transcript of the hearing in the record, leaving us unable to determine whether and why such a denial occurred. N.C. R. App. P. 9(a)(1)e (requiring that a transcript be included in the record where it “is necessary for an understanding of all issues presented”); N.C. R. App. P. 9(a) (“[Appellate] review is solely upon the record on appeal[.]”); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 200, 657 S.E.2d 361, 362, 366 (2008) (finding “[c]ompliance with the rules . . . is mandatory” and that this Court may dismiss non-jurisdictional defaults where they “impair[] the court’s task of review” (citations omitted)). Consequently, this argument is dismissed.

Affirmed in part and Dismissed in part.

Judges ELMORE and STROUD concur.

ELLIS PITTMAN, PLAINTIFF

v.

HYATT COIN & GUN, INC., AND LARRY HYATT, (IN HIS CAPACITY AS PRESIDENT OF
HYATT COIN & GUN, INC.), DEFENDANTS

No. COA12-706

Filed 18 December 2012

1. Firearms and Other Weapons—negligence—summary judgment—stolen gun—reasonable firearms merchant

The trial court did not err in a case arising out of the sale of a firearm by granting summary judgment in favor of defendants on the allegation of negligence even though plaintiff contended that defendants had a duty to ensure the gun was not stolen. The record established that defendants acted in accordance with what a reasonable firearms merchant would do.

2. Firearms and Other Weapons—unfair trade practices—legal title to sell

The trial court did not err in a case arising out of the sale of a firearm by granting summary judgment in favor of defendants on the issue of unfair trade practices. The facts showed that defendants’ practice did not cause a negative impact on the marketplace and displayed no inequitable assertion of power, as the

PITTMAN v. HYATT COIN & GUN, INC.

[224 N.C. App. 326 (2012)]

firearm sold to plaintiff was one which defendants had legal title to sell.

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

Plaintiff's remaining arguments that the trial court erred in granting summary judgment with respect to his claims of negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages necessarily failed based on the resolution of the prior issues.

Appeal by Plaintiff from judgment entered on 24 January 2012 by Judge Forrest D. Bridges in Mecklenberg County Superior Court. Heard in the Court of Appeals 24 October 2012.

Johnson & Nicholson, PLLC, by Carnell Johnson, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog, LLP, by Jaye E. Bingham-Hinch and John W. Ong, for Defendant-Appellees.

BEASLEY, Judge.

Ellis Pittmann (Plaintiff) appeals from an order granting Defendant summary judgment. For the following reasons, we affirm.

On 21 August 2010, Plaintiff purchased a Ruger P345 pistol with the serial number 664-57001 from Defendant Hyatt Coin & Gun, a federally licensed firearms dealer. Defendants previously purchased the pistol from a customer in 2009 and noted the transfer of title in the store's Firearms Acquisition and Disposition Record Book. Defendants made no comments and gave no warnings to Plaintiff regarding whether the title to the pistol had been verified.

Plaintiff was traveling in Dillon, South Carolina, when he was pulled over by a Dillon police officer for speeding. Plaintiff informed the officer that he had the pistol in his glove box. The officer ran the serial number of the pistol through the National Crime Information Center (NCIC) database and discovered that a gun with that serial number was listed as stolen. Plaintiff did not have his bill of sale to prove his purchase of the pistol. The officer arrested Plaintiff for speeding and possession/receiving stolen goods. Further investigation revealed that the serial number on the stolen gun had been entered incorrectly into the database. On 23 July 2009, Willie Walker

reported that his gun, with the serial number 664-57007, was stolen, but the police report incorrectly listed the serial number as that matching Plaintiff's pistol.

Plaintiff filed this action on 16 February 2011, claiming negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, unfair and deceptive trade practices, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and inadequate instruction or warning under Chapter 99B of the North Carolina General Statutes. Following Defendants' motion to dismiss on the grounds of failure to state a claim, the court dismissed all but Plaintiff's claims for negligence, negligent and intentional infliction of emotional distress, unfair and deceptive trade practices, and punitive damages. On 4 November 2011, Defendants filed a motion for summary judgment; it was first amended on 7 November 2011 and again on 22 December 2011. A hearing was held on 3 January 2012. The trial court granted the motion and dismissed the remaining claims in an order filed on 24 January 2012.

[1] Plaintiff argues that the trial court erred by granting Defendant's motion for summary judgment. Specifically, Plaintiff first argues that the trial court erred in granting summary judgment to Defendants on the allegation of negligence because evidence was presented establishing a duty to ensure the gun was not stolen. We disagree.

"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)).

To prevail on a summary judgment motion in a negligence action, the plaintiff must show that the defendant had a legal duty and that the defendant breached that duty. *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995). "Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions, or where such a defendant of ordinary prudence would have foreseen that the plaintiff's injury was probable under the circumstances." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002)(citations omitted). "When there is no dispute as to the facts or when only a single inference can be drawn

PITTMAN v. HYATT COIN & GUN, INC.

[224 N.C. App. 326 (2012)]

from the evidence, the issue of whether a duty exists is a question of law for the court.” *Mozingo v. Pitt Cnty. Mem’l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991), *aff’d*, 331 N.C. 182, 415 S.E.2d 341 (1992).

Here, the record contains no genuine issue of fact that Defendants breached, or even had, a legal duty to check the NCIC database or perform any other act of assurance beyond those actually performed. The evidence on record here establishes that Defendants had no statutory duty to check the NCIC database, *see* 28 U.S.C. § 534 (2011), or any other database. They had no access to the NCIC database or any other that would have informed them a firearm was reported stolen. Thus, Defendants’ duty was to act as a reasonable and prudent person under the same or similar circumstances. *See Stewart v. Allison*, 86 N.C. App. 68, 71, 356 S.E.2d 109, 110 (1987) (“The law imposes on every person in an active course of conduct the positive duty to use ordinary care to protect others from harm; it is negligence to violate this duty.” (citation omitted)). There is no evidence on the record that indicates Defendants breached this duty. Based on the affidavits and deposition testimony submitted by Defendants, the record instead establishes that Defendants acted in accordance with what a reasonable firearms merchant would do. Thus, there is no genuine issue of fact with regard to the existence of a legal duty to act in the manner advocated by Plaintiff or the breach thereof. We affirm.

[2] Plaintiff next argues that summary judgment for Defendants was in error because genuine issues of material fact existed with regard to the claim for unfair and deceptive trade practice. First, Plaintiff alleges such practices occurred in selling stolen firearms. This argument fails because the firearm in this case was not in fact stolen. Next Plaintiff alleges that the act of failing to warn that the title had not been verified constitutes an unfair or deceptive trade practice. Again, we disagree.

“A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.” *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980)(citations omitted), *overruled in part on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). “The facts surrounding the transaction and the impact on the marketplace determine whether a particular act is unfair or deceptive, and this determination is a question of law for the court.” *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 167, 681 S.E.2d 448, 452 (2009)(citation omitted).

The facts here show that Defendants' practice does not cause a negative impact on the marketplace and displays no inequitable assertion of power, as the firearm sold to Plaintiff was one which Defendants had legal title to sell. In fact, the uncontroverted evidence shows that Defendants have never sold a stolen firearm in their fifty-two years of business.

[3] Plaintiff's remaining arguments that the trial court erred in granting summary judgment with respect to his claims of negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages necessarily fail based on our above analysis. A claim of negligent infliction of emotional distress requires proof of negligent conduct. *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). As we have found no evidence of negligent conduct on the record, this argument fails. Because we found above that Defendants' actions were consistent with those of a reasonable and prudent person, Plaintiff's claim of intentional infliction of emotional distress fails to meet the required showing of "extreme and outrageous conduct . . . to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 354, 595 S.E.2d 778, 782 (2004) (internal quotation marks and citations omitted). Lastly, because a claim of punitive damages is dependent upon a successful claim for compensatory damages, N.C. Gen. Stat. § 1D-15 (2011), this argument must also fail.

Affirmed.

Judges ELMORE and STROUD concur.

STATE v. ELMORE

[224 N.C. App. 331 (2012)]

STATE OF NORTH CAROLINA

v.

MATTHEW LEE ELMORE

No. COA12-459

Filed 18 December 2012

**Motor Vehicles—death by motor vehicle and manslaughter—
prosecuted for both—sentenced for one**

The trial court did not err in a prosecution for death by motor vehicle and manslaughter arising from driving while impaired by denying defendant's pretrial motion to dismiss. Although N.C.G.S. § 20-141.4(c) states that no person charged with death by vehicle may be prosecuted for manslaughter arising out of the same death, the General Assembly's intent was to abrogate a judicial holding such that a defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising out of the same death.

Appeal by Defendant from judgments entered 29 July 2011 by Judge Robert T. Sumner in Superior Court, Catawba County. Heard in the Court of Appeals 23 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Carrie D. Randa, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for Defendant.

McGEE, Judge.

Matthew Lee Elmore (Defendant) was convicted of two counts of involuntary manslaughter on 29 July 2011. Defendant was sentenced to a term of nineteen to twenty-three months in prison, followed by a consecutive term of nineteen to twenty-three months in prison. This sentence was suspended for thirty-six months of supervised probation.

The evidence at trial tended to show that Defendant was involved in a vehicle collision on 13 June 2009. Defendant was driving a Chevrolet Suburban when he ran a red light and collided with a Chrysler LeBaron Convertible. Both occupants in the LeBaron were killed.

Defendant was indicted on two counts of felony death by motor vehicle on 4 January 2010. A superseding indictment issued 4 April

STATE v. ELMORE

[224 N.C. App. 331 (2012)]

2010, adding charges for manslaughter, misdemeanor death by motor vehicle, driving while impaired, running a red light, and reckless driving. At the beginning of trial, Defendant made an oral motion to dismiss, arguing that the State was prohibited by statute from prosecuting Defendant for both death by vehicle and manslaughter charges arising out of the same death. The trial court denied Defendant's motion, ruling that the statute in question prevented punishment under both theories, but not prosecution.

After trial, the jury found Defendant not guilty of felony death by vehicle, but guilty of involuntary manslaughter and misdemeanor death by vehicle. The trial court sentenced Defendant based on manslaughter, and arrested judgment in the charges of misdemeanor death by vehicle. Defendant appeals.

Issue on Appeal

Defendant raises the issue of whether the trial court "violated the mandatory prohibition in N.C. Gen. Stat. § 20-141.4(c) against double prosecutions for manslaughter and death by vehicle arising out of the same death by denying [Defendant's] pretrial motion to dismiss and/or have the State elect between the charges[.]"

N.C. Gen. Stat. § 20-141.4(c) provides:

No Double Prosecutions.—No person who has been placed in jeopardy upon a charge of death by vehicle *may be prosecuted* for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death.

N.C. Gen. Stat. § 20-141.4 (2011)(emphasis added). Defendant contends that the language "may be prosecuted" prohibits the State from pursuing charges of death by vehicle and manslaughter in the same proceeding. After review of the statute, its legislative history, and cases interpreting it, we disagree.

In *State v. Freeman*, 31 N.C. App. 93, 228 S.E.2d 516 (1976), this Court reviewed a defendant's argument that

by instructing the jury on death by vehicle as a lesser included offense of manslaughter, the court violated the provisions of [N.C.]G.S. [§] 20-141.4(c), which state that

STATE v. ELMORE

[224 N.C. App. 331 (2012)]

“. . . no person who has been placed in jeopardy upon a charge of manslaughter *shall subsequently be prosecuted* for death by vehicle arising out of the same death.”

Id. at 95, 228 S.E.2d at 518 (emphasis added). In *Freeman*, the defendant argued that

death by vehicle cannot be considered a lesser included offense of involuntary manslaughter because of the “mutual exclusiveness” between the two offenses and because the legislature would have stated expressly in the statute that death by vehicle is a lesser included offense of manslaughter if it had intended such a result.

Id. at 95-96, 228 S.E.2d at 518. This Court stated that “[t]he purpose of G.S. 20-141.4(c) is not to prevent the courts from treating one offense as a lesser included offense of the other, but rather to prevent the State from bringing a new prosecution against a defendant for death by vehicle after he has already been convicted or acquitted of manslaughter.” *Id.* at 96, 228 S.E.2d at 518.

N.C.G.S. § 20-141.4(c) was amended in 1983 to remove the word “subsequently” and now reads as quoted above. In *State v. Davis*, 198 N.C. App. 443, 680 S.E.2d 239 (2009), this Court addressed the General Assembly’s intent in amending the statute. In *Davis*, the defendant argued “that the North Carolina legislature ha[d] expressed a clear intent not to allow multiple punishments for involuntary manslaughter and felony death by vehicle arising from the same death.” *Id.* at 450, 680 S.E.2d at 245. After a thorough analysis of *Freeman* and N.C.G.S. § 20-141.4(c), this Court agreed. In *Davis*, in order to eliminate apparent confusion about the meaning of the statute, this Court observed that the General Assembly amended N.C.G.S. § 20-141.4(c) in response to *Freeman*:

The legislature also amended N.C. Gen. Stat. § 20-141.4(c) to state:

(c) No Double Prosecutions.—No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death.

STATE v. ELMORE

[224 N.C. App. 331 (2012)]

This was the first amendment of N.C. Gen. Stat. § 20–141.4(c) after *Freeman* was decided. Significantly, the legislature added the heading “No Double Prosecutions” and deleted the word “subsequently” from the statute. It is black letter law that the

Legislature . . . is presumed to have had the law as settled by *State v. [Freeman]* in mind when it passed the act of [1983], and that act will be construed according to the rule as therein stated. The Legislature is presumed to know the existing law and to legislate with reference to it.

State v. Southern R. Co., 145 N.C. 495, 542, 59 S.E. 570, 587 (1907).

Thus, absent clear legislative intent to the contrary, we must presume that the General Assembly acted to abrogate the [holding of *Freeman*]. See . . . *State v. Blackstock*, 314 N.C. 232, 240, 333 S.E.2d 245, 250 (1985) (noting that in construing a statute that has been repealed or amended, it may be presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of the statute).

State v. Bright, 135 N.C. App. 381, 382–83, 520 S.E.2d 138, 139 (1999).

Id. at 451–52, 680 S.E.2d at 246. After conducting this review, this Court concluded that “under N.C. Gen. Stat. § 20–141.4(c) a defendant may not be *sentenced* for both involuntary manslaughter and felony death by vehicle arising out of the same death.” *Id.* at 452, 680 S.E.2d at 246 (emphasis added). This Court ultimately remanded “for resentencing by the trial court, with instructions to vacate [d]efendant’s conviction of either involuntary manslaughter or felony death by vehicle.” *Id.*

In the present case, Defendant cites *Davis* and argues that, “[a]lthough the *Davis* Court simply held that a defendant may not be *sentenced* for both offenses, the defendant in *Davis* did not argue, as does [Defendant in the present case], that he should not have been *prosecuted* for both offenses.” Defendant asserts that “[b]ecause ‘[i]t is not the role of the appellate courts . . . to create an appeal for the appellant[,]’ . . . this Court in *Davis* was not presented with, and thus

STATE v. ELMORE

[224 N.C. App. 331 (2012)]

did not address the issue presented by [Defendant] in this appeal.” Defendant then argues that the language of N.C.G.S. § 20-141.4(c) is “‘clear and unambiguous’ ” and therefore, the word “prosecute” must be given its “ ‘common and ordinary meaning[.]’ ”

Black’s Law Dictionary provides the following definition of the word “prosecute”:

prosecute, vb. (15c) 1. To commence and carry out a legal action <because the plaintiff failed to prosecute its contractual claims, the court dismissed the suit>. 2. To institute and pursue a criminal action against (a person) <the notorious felon has been prosecuted in seven states>. 3. To engage in; carry on <the company prosecuted its business for 12 years before going bankrupt>.

Black’s Law Dictionary 1341 (9th ed. 2009). Defendant asserts that N.C.G.S. § 20-141.4(c) therefore “contains an express prohibition against the trial of a person for involuntary manslaughter once a jury has been empaneled to try a charge of death by vehicle[.]” The State counters that “[t]he facts in *Davis* are almost identical to those in the current case” and therefore “[g]iven the ruling of this Court in *Davis*, [Defendant’s] argument has no merit.” While we agree with Defendant that *Davis* is not controlling on this issue, we hold that this Court’s interpretation of N.C.G.S. § 20-141.4(c) was appropriate and apply it in this case.

In *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922), our Supreme Court observed that: “In our endeavor to ascertain the purpose of the statute, we should also have due regard to the rule that the spirit and reason of the law shall prevail over its letter, especially where a literal construction would work an obvious injustice.” *Id.* at 705, 115 S.E. at 192. Our Supreme Court has continued to rely on this principle. *See Realty Co. v. Trust Co.*, 296 N.C. 366, 369, 250 S.E.2d 271, 273 (1979). The Court again cited this principle in *Hill v. Bechtel*, 336 N.C. 526, 444 S.E.2d 186 (1994), observing that:

“In our endeavor to ascertain the purpose of the statute, we should also have due regard to the rule that the spirit and reason of the law shall prevail over its letter, especially where a literal construction would work an obvious injustice.” *State v. Bell*, 184 N.C. 701, 705, 115 S.E. 190, 192 (1922). Matters implied by the language of a statute must be given effect to the same extent as matters specifically expressed. *In re Wharton*, 305 N.C.

STATE v. ELMORE

[224 N.C. App. 331 (2012)]

565, 574, 290 S.E.2d 688, 693 (1982); *Iredell County Bd. of Educ. v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952).

Id. at 532, 444 S.E.2d at 190.

Though N.C.G.S. § 20-141.4(c) does state that “[n]o person who has been placed in jeopardy upon a charge of death by vehicle *may be prosecuted* for the offense of manslaughter arising out of the same death[,]” we conclude that the General Assembly’s intent was to abrogate the holding of *Freeman*, as noted in *Davis*, to wit: the General Assembly intended that “under N.C. Gen. Stat. § 20–141.4(c) a defendant may not be *sentenced* for both involuntary manslaughter and felony death by vehicle arising out of the same death.” *Davis*, 198 N.C. App. at 452, 680 S.E.2d at 246 (emphasis added). To hold otherwise would involve an overly literal interpretation of N.C.G.S. § 20-141.4(c), and our Supreme Court in the past has disfavored the overly literal interpretation of statutes contrary to legislative intent. *See Hensley v. N.C. Dep’t of Env’t & Natural Res.*, 364 N.C. 285, 291, 698 S.E.2d 41, 45 (2010) (overturning this Court’s reading of a statute when our Supreme Court found “this reading of the definition of land-disturbing activity to be overly literal.”); *see also State v. Humphries*, 210 N.C. 406, 410, 186 S.E. 473, 476 (1936) (“ ‘In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion.’ ”). We therefore conclude the trial court did not err in denying Defendant’s pretrial motion.

No Error.

Judges BRYANT and THIGPEN concur.

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

STATE OF NORTH CAROLINA

v.

MALIK SHAHEEM FRANKLIN, DEFENDANT

No. COA12-412

Filed 18 December 2012

1. Appeal and Error—writ of certiorari—untimely appeal

The Court of Appeals granted defendant's petition for a writ of *certiorari* under N.C.R. App. P. 21(a) and considered the issues presented in his brief as defendant lost his right to appeal by failure to take timely action.

2. Jurisdiction—subject matter—written order not materially different from oral ruling

The trial court had subject matter jurisdiction to enter its written order in a trafficking in drugs, possession with intent to sell or deliver a controlled substance, and conspiracy to traffic in drugs case because it did not differ materially from the court's oral ruling. The written order merely reduced the oral ruling to writing.

3. Search and Seizure—motion to suppress—passenger in car—probable cause—scope and duration of search

The trial court did not err in a trafficking in drugs, possession with intent to sell or deliver a controlled substance, and conspiracy to traffic in drugs case by denying defendant's motion to suppress. Defendant did not have standing to challenge the search of the car since he was a passenger. Further, defendant did not contest that the officer acted with probable cause to believe that defendant committed a traffic infraction in failing to wear a seatbelt. Finally, the scope and duration of the stop were not overly extended.

Judge BEASLEY concurring in separate opinion.

Judge ELMORE dissenting in separate opinion.

Appeal by defendant from judgment entered on or about 8 November 2011 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 10 October 2012.

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General Joseph L. Hyde, for the State.

Michele Goldman, for defendant-appellant.

STROUD, Judge.

After his motion to suppress was denied, defendant pled guilty to various drug-related charges. Defendant appeals, and for the following reasons, we affirm.

I. Background

On 28 February 2011, defendant was indicted for trafficking in drugs, possession with intent to sell or deliver a controlled substance, and conspiracy to traffic in drugs. On 8 July 2011, defendant filed a motion “to suppress any and all physical evidence seized from” him “and to suppress any statements or other evidence which was obtained[.]” On 7 November 2011, the trial court held a hearing regarding defendant’s motion to suppress and orally denied the motion. On or about 8 November 2011, defendant pled guilty to all of the charges against him, and the trial court sentenced him on all of his convictions to 35 to 42 months imprisonment; at this hearing, defendant’s attorney stated defendant was “appealing his denial of his motion to suppress.” On 21 November 2011, the trial court filed a written order denying defendant’s motion to suppress. As to defendant’s appeal, defendant only appealed at the hearing regarding his guilty plea from the oral ruling regarding his motion to suppress; defendant never filed any written notices of appeal nor did he appeal in any manner from either the judgment upon which his convictions were entered or the written order regarding his motion to suppress.

II. Notice of Appeal

[1] All of defendant’s issues on appeal are concerning his motion to suppress, but since defendant did not file a notice of appeal from the judgment or after entry of the written order denying his motion to suppress, we must first address whether we have jurisdiction to consider defendant’s appeal. In *Miller*, this Court stated,

N.C. Gen. Stat. § 15A-979(b) (2009) states that: An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty. Defendant has failed to appeal from the judgment

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

of conviction and our Court does not have jurisdiction to consider Defendant's appeal. In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute. Notice of intent to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea. Notice of Appeal is a procedural appellate rule, required in order to give this Court jurisdiction to hear and decide a case. Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by N.C.G.S. § 15A-979(b).

205 N.C. App. 724, 725, 696 S.E.2d 542, 542-43 (2010) (citations and quotation marks omitted). Accordingly, the Court dismissed defendant's appeal. *See id.* at 726, 696 S.E.2d at 543. Here, however, while defendant has not properly provided notice of appeal, he has petitioned this Court for a writ of certiorari to consider his appeal.

North Carolina Rule of Appellate Procedure 21(a) 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, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C.R. App. P. 21(a). Pursuant to Rule 21(a), we grant defendant's petition for a writ of certiorari and will consider the issues presented in his brief as he lost his right to appeal "by failure to take timely action[.]" *Id.*

III. Jurisdiction of Trial Court to Enter Order

[2] Defendants first argument that "the trial court lacked jurisdiction to enter its written order denying . . . [his] motion to suppress where the written order differed materially from the court's oral ruling and where it was entered after . . . [defendant] had given notice of appeal" raises two issues. (Original in all caps.) "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *State v. Herman*, ___ N.C. App. ___, ___, 726 S.E.2d 863, 866 (2012).

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

Defendant's first issue is whether "the trial court lacked jurisdiction to enter its written order" because "the written order differed materially from the court's oral ruling[.]" The trial court stated that "[t]he State will be responsible for preparing the order in this matter[.]" and then orally found, concluded, and ruled,

Detective Lackey of CMPD had a particular storefront noted as 3318 Tuckaseegee Road under surveillance. Two individuals left that storefront and got into an automobile and got onto the highway.

After being on the highway and in movement on that highway, then at that time they put on their seat belts. The Court notes that having viewed the car the defendant and the other occupant were in, the defendant being the passenger and the other occupant being the driver, the rear window of that car was clear and unobstructed, so the officer could see movement—Detective Lackey could see movement in that car and was able to see whether or not they had their seat belts on. That is both a finding of fact and a conclusion of law.

Detective Lackey contacted an Officer Frisk and asked him to conduct a traffic stop relating to the seat belt violation.

When Officer Frisk initiated the stop, both occupants raised their hands in a manner that was, in Officer Frisk's opinion, one that would indicate there was some form of weapon in the automobile, something that he has noted from his nine-and-a-half years of experience. It often happens that someone has a weapon in the car.

Also, backing Officer Frisk up were officers Cooper and Land. The officers conducted a record check, and during conversation with the occupants found that one or both had—the defendant had been and possibly the driver as well—had been involved in weapons charges out of Burke County.

There is dispute over whether or not consent was given. The driver testified here today and said that he did not give consent, however, the Court has viewed tapes from the first patrol car in full length believes that consent was provided to the officers to quote, frisk, unquote, the car, that being looking for weapons.

This was—conclusion of law. This was justifiable based on the raising of the hand hands, the officers

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

experienced previous criminal records involving gun charges—that limited frisk of the car looking for weapons. It was justified for public and officer’s safety at that point in time.

As Officer Cooper frisked the car, he moved a can of hairspray that was laying in the gap between the seat—first off, Officer Frisk was conducting a search of all areas that are known as, quote, lunge areas, end quote. That was the limit of the search. What that means—this is, again, a mixed finding of fact and conclusion of law.

He was looking in areas that either occupant would have access to immediately for retrieving a weapon, which would include gap or valley between a seat and a center console.

In that gap or valley between the seat and center console, Officer Cooper moved a can of hairspray, which, during the movement, something rattled inside that can which is not consistent with a can of hairspray.

Utilizing his experience, he believed there to be a container of concealment that might hold a weapon, since he had seen weapons that were small enough to fit inside that can of hairspray. Part of the hairspray can was able to be removed, and inside that he found a quantity of cocaine.

Therefore, the Court concludes that the stop was valid, the search was valid, and the motion to suppress is denied.

The written order denying defendant’s motion to suppress was filed on 21 November 2011 and stated as follows, in pertinent part:

1. That on February 16, of 2011, Detective Lackey with Charlotte Mecklenburg Police Department (hereinafter referred to as “CMPD”) had a particular storefront under surveillance at 3318 Tuckaseegee Road in Charlotte, NC.
2. That on this date, Detective Lackey was conducting surveillance on this location from across the street.
3. That Detective Lackey observed the defendant leave this same storefront and get into the passenger seat of a vehicle. The driver’s seat of this vehi-

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

cle was occupied by another individual, Olando Norman.

4. That the vehicle Defendant was a passenger in turned onto the highway and Detective Lackey followed the vehicle.
5. That based on the Court's observations of the video, the rear window of the vehicle was clear and unobstructed allowing Detective Lackey to see movement in the vehicle.
6. That the vehicle was in motion on a public street or highway prior to Detective Lackey observing either the driver or the passenger put on their seatbelts.
7. That Detective Lackey contacted CMPD Officer Frisk to make a traffic stop of the vehicle for the seatbelt violation.
8. That Officer Frisk initiated a traffic stop of the vehicle.
9. That upon initiating the traffic stop, both occupants in the car, including the defendant, raised their hands in a manner that indicated that they had a gun in the car.
10. That Officer Frisk's opinion was based on nine and a half years of experience as a law enforcement officer.
11. That CMPD Officers Cooper and Land responded in their patrol car as a back-up unit to the traffic stop initiated by Officer Frisk.
12. That during the course of the traffic stop, the responding officers did a record check of both occupants.
13. That based on the information received in the record check and during conversations with the occupants, including the defendant, the officers found that either one or both, the defendant and the driver, had previously been involved in weapon offenses from Burke County.

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

14. That based on this information, the officers removed both occupants from the vehicle and conducted a weapons frisk of both the driver and the defendant. Neither subject was detained in handcuffs following this weapons frisk.
15. That there is dispute over whether or not consent was given.
16. That the Court heard testimony from the driver of the vehicle, Orlando Norman, who stated that he did not give consent to search the vehicle.
17. That the Court had an opportunity to watch the video from the first patrol car of this specific event in its entirety, including the officer requesting the driver's consent and the driver's response.
18. That Officer Cooper frisked the passenger area of the vehicle in the lunge area where a weapon could be held, including the gap or valley between the driver's seat and center console.
19. That during the course of the weapons frisk, Officer Cooper moved a hairspray can from the gap or valley between the driver's seat and the center console to continue his search.
20. That when he moved the hairspray can, Officer Cooper heard a noise coming from the can which is inconsistent with the typical contents of a can of hairspray.
21. That based on his training and experience, Officer Cooper believed that this might be a container which could conceal a weapon, since he had seen weapons which could fit inside this container of hairspray.
22. That the bottom of this hairspray can was loose and when Officer Cooper unscrewed the bottom of the can, he located what he believed to be crack cocaine.

Based upon these findings of fact, the trial court denied defendant's motion to suppress, concluding:

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

1. That during his observation, Detective Lackey could see movement in the vehicle that the defendant was a passenger in and was able to see whether or not the occupants had their seatbelts on.
2. That the traffic stop of the vehicle for a seatbelt violation was valid.
3. That a limited frisk of the car was justifiable based on the occupants raising their hands when Officer Frisk initiated the traffic stop and the information the officers received both from their record check and from speaking with the defendant and the driver about previous criminal charges involving guns.
4. That the frisk of the “lunge areas” of the vehicle allowed the officer to look in areas that either occupant would have immediate access to for retrieving a weapon, including the gap or valley between the seat and the center console, and was justifiable by concerns of an immediate risk to public and officer safety.
5. That the Court finds, after viewing the video of the traffic stop, that the driver, Orlando Norman, gave consent to “frisk” the car to look for weapons.

We find no “material” difference between the oral ruling and written order.

Defendant’s second issue is that “the trial court lacked jurisdiction to enter its written order” because “the written order . . . was entered after . . . [defendant] had given notice of appeal.” We note the contradiction between defendant’s issues as stated in the record on appeal and his argument, as in “DEFENDANT’S PROPOSED ISSUES ON APPEAL[,]” defendant claimed that “[t]he trial court erred when it failed to enter written findings on its denial of . . . [defendant’s] motion to suppress evidence in violation of N.C. Gen. Stat. § 15A-977(f)[;]” the record as originally filed with this Court on 5 April 2012 did not include the suppression order entered on 21 November 2011. Thus, defendant had originally intended to appeal on the basis that the trial court failed to enter a written order. But on 31 May 2012, defendant’s counsel filed a motion to amend the record on appeal to add the suppression order entered on 21

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

November 2011, and that amendment was allowed. Thus, defendant now argues that the trial court did not have jurisdiction to enter the written order that he first claimed that the trial court erred by failing to enter.

In any event, a similar argument was made and rejected in *State v. Smith*:

Defendant next assigns as error the trial court's entry, over six months post-trial, of a written order denying defendant's motion to suppress identification testimony. He argues that this order should be held void as entered out of term without the consent of the parties pursuant to *State v. Boone*, 310 N.C. 284, 286-91, 311 S.E.2d 552, 554-55 (1984). The order, however, is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress decedent's wife's identification testimony. It was inserted in the transcript in place of the verbal order rendered in open court. In *State v. Horner*, 310 N.C. 274, 278-79, 311 S.E.2d 281, 285 (1984), we held that the trial court's order denying defendant's motion to suppress items of physical evidence was not improperly entered out of session and out of district where the court passed on each part of the motion to suppress in open court as it was argued and later reduced its ruling to writing, signed the order, and filed it with the clerk. The procedure here did not differ substantively from that in *Horner*. We thus overrule this assignment of error.

320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987) (quotation marks omitted). Accordingly, we conclude that the trial court had jurisdiction to enter its written order as it merely "reduced its [oral] ruling to writing[.]" *Id.* at 415, 358 S.E.2d at 335. This argument is overruled.

IV. Motion to Suppress

[3] Defendant raises two arguments regarding his motion to suppress. *State v. Campbell* sets forth the appropriate standard of review:

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

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

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

Defendant's argument challenges a finding of fact in order to contest the search of the car in which defendant was a passenger. We are mindful that

[a]lthough a passenger who has no possessory interest in the vehicle has standing to challenge the propriety of a stop of the vehicle, *Brendlin v. California*, 551 U.S. 249, 251, 168 L.Ed.2d 132, 136 (2007) ("When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop."), or to challenge a "detention beyond the scope of the initial seizure," *State v. Jackson*, ___ N.C. App. ___, ___, 681 S.E.2d 492, 496 (2009), *our Courts have never held that a passenger who has no possessory interest in the vehicle or contents has standing to challenge a search of the vehicle.*

State v. Mackey, 209 N.C. App. 116, 124-25, 708 S.E.2d 719, 724 (emphasis added) (ellipses omitted), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 246 (2011). Accordingly, defendant does not have standing to challenge the search of the car he was in as a passenger, and as such we will not consider this argument on appeal. *See id.*

Defendant's next argument is that

the stop for a seatbelt violation was a pretext for conducting a narcotics investigation. The duration of the stop was measurably extended by the officers' ulterior motive which was to investigate their hunch that Mr. Franklin possessed narcotics. This delay, unsupported

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

by reasonable suspicion, violated Mr. Franklin's constitutional rights.

(Original in all caps.) Defendant's argument raises two separate issues: the first is that the stop was pretextual and the second is that the scope of duration of the stop was extended beyond that justified by a stop for a seatbelt violation.

As to the stop being pretextual, a similar argument was made and rejected in *State v. Parker*:

Because Detective Darisse acted with probable cause to believe that defendant committed a traffic infraction, his initial stop of defendant's car did not violate the Fourth Amendment. It is irrelevant to the validity of the stop that Detective Darisse's primary reason for following defendant was that he had received a complaint that defendant was trafficking methamphetamine or that Detective Darisse did not subsequently issue defendant a citation for speeding.

See State v. Parker, 183 N.C. App. 1, 11, 644 S.E.2d 235, 243 (2007) (citations and quotation marks omitted). Here, defendant does not contest that Officer Frisk "acted with probable cause to believe that defendant committed a traffic infraction" in failing to wear a seatbelt, and thus "[i]t is irrelevant to the validity of the stop [if Office Frisk's] primary reason for following defendant was that" he believed defendant may have been in possession of illegal drugs. *Id.*

As to the scope and duration of the stop, even considering the facts only as argued by defendant, the entire stop from pulling the car over until defendant was arrested took approximately ten minutes and only involved a question involving whether defendant or Mr. Norman had weapons and a phone call with another officer while Officer Frisk simultaneously ran a "criminal history, warrant and license checks[;]" we do not deem the stop to be overly extended in duration. The Fourth Circuit Court of Appeals has recently summarized the law regarding this type of stop as follows:

The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure

STATE v. FRANKLIN

[224 N.C. App .337 (2012)]

of persons within the meaning of this provision. Because an ordinary traffic stop is a limited seizure more like an investigative detention than a custodial arrest, we employ the Supreme Court's analysis for investigative detention used in *Terry v. Ohio*, 392 U.S. (1968), to determine the limits of police conduct in routine traffic stops.

Under *Terry's* dual inquiry, after asking whether the officer's action was justified at its inception, we ask whether the continued stop was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. With regard to scope, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. With regard to duration, although the reasonable duration of a traffic stop cannot be stated with mathematical precision, a stop may become unlawful if it is prolonged beyond the time reasonably required to complete its mission. Thus, we evaluate whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. To prolong a traffic stop beyond the scope of a routine traffic stop, an officer must possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place. This requires either the driver's consent or a reasonable suspicion that illegal activity is afoot.

Although the scope and duration components of *Terry's* second prong require highly fact-specific inquiries, the cases make possible some generalizations. *When a police officer lawfully detains a vehicle, police diligence involves requesting a driver's license and vehicle registration, running a computer check, and issuing a ticket.* The officer may also, in the interest of personal safety, request that the passengers in the vehicle provide identification, at least so long as the request does not prolong the seizure. Similarly, *the officer may*

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

inquire into matters unrelated to the justification for the traffic stop, and may take other actions that do not constitute searches within the meaning of the Fourth Amendment, such as conducting a dog-sniff of the vehicle, but again only so long as those inquiries or other actions do not measurably extend the duration of the stop.

U.S. v. Vaughan, ___ F.3d ___, ___ (4th Cir. 2012) (Nov. 29, 2012) (No. 11-4863) (emphasis added) (citations, quotation marks, and brackets omitted).

Considering “*Terry’s* dual inquiry,” we first conclude that Officer Frisk’s “action was justified at its inception” as he could properly stop the vehicle defendant was in for a traffic violation. *Id.* at ___. Defendant argues that the scope of the stop was not sufficiently limited, where Officer Frisk asked defendant and Mr. Norman if they had weapons and spoke with another officer while he ran a “criminal history, warrant and license checks” with all of this taking about ten minutes. Under *Terry’s* second inquiry, “whether the continued stop was sufficiently limited in scope and duration[,]” we conclude that it was sufficiently limited. *Id.* at ___. Officer Frisk took only the actions which would be required by “police diligence[:] requesting a driver’s license and vehicle registration, running a computer check, and issuing a ticket.” *Id.* at ___ This argument is overruled.

V. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judge ELMORE dissents by separate opinion.

Judge BEASLEY concurs by separate opinion.

ELMORE, Judge dissenting.

I respectfully disagree with the decision of the majority to affirm defendant’s convictions. I agree with defendant that the stop was pretextual and unconstitutional, and therefore the evidence found during the stop should have been suppressed. I also conclude that the duration of the stop was unreasonable. As a result, I would vacate defendant’s convictions which were entered upon his guilty plea.

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

In concluding that the stop was not pretextual, the majority relies on *State v. Parker*, 183 N.C. App. 1, 644 S.E.2d 235 (2007). I find the case *sub judice* to be distinguishable.

In *Parker*, the defendant argued that the trial court erred in denying his motion to suppress evidence seized during a search of his car. There, officers seized drugs, a weapon, and drug paraphernalia from the defendant's vehicle, after searching the vehicle pursuant to a traffic stop. The defendant argued that the traffic stop was only a pretext to search his car for drugs. At the suppression hearing, the State offered the testimony of the officer who conducted the traffic stop. He testified that "he stopped defendant on Highway 268 after observing defendant drive approximately sixty miles per hour in a forty-five mile per hour speed zone, and observing defendant pass another vehicle at approximately eighty miles per hour in a fifty-five mile per hour speed zone." *Id.* at 3, 644 S.E.2d at 238. The trial court then denied the defendant's motion to suppress and this Court affirmed. *Id.* at 5-6, 644 S.E.2d at 240. We held that "[b]ecause Detective Darisse acted with 'probable cause' to believe that defendant committed a traffic infraction, his initial stop of defendant's car did not violate the Fourth Amendment[]" and as a result, "[i]t is irrelevant to the validity of the stop that Detective Darisse's primary reason for following defendant was that he had received a complaint that defendant was trafficking methamphetamine[.]" *Id.* at 11, 644 S.E.2d at 243.

I conclude that such probable cause of a traffic infraction, necessary to warrant a traffic stop of the vehicle in which defendant was riding, did not exist here. Here, the vehicle was stopped for an alleged seatbelt violation. However, the officer who made the stop, Officer Frisk, never witnessed the driver of the vehicle or defendant without their seatbelts properly secured. During the suppression hearing, Officer Frisk was asked "when you saw the people in the car, they both were wearing their seat belts; is that correct?" And he replied, "Yes, sir." Officer Frisk further admitted that while he was following the vehicle he "hadn't observed any other traffic problems[.]"

As such, I am unable to agree that Officer Frisk possessed probable cause to conduct a traffic stop of the vehicle. I agree with defendant that the alleged seatbelt violation was a pretext for the stop. Accordingly, I conclude that the trial court erred in denying defendant's motion to suppress. I would vacate defendant's convictions.

Further, I disagree with the decision of the majority to overrule defendant's argument regarding the duration of the stop. Turning to

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

that issue, assuming *arguendo* that the traffic stop was not pretextual, I conclude that the duration of the stop was unreasonable. Here, the record shows that both parties appear to agree that the stop lasted somewhere between 10 to 12 minutes. The majority of this delay was caused by Officer Frisk's decision to run both the driver's and defendant's information through 3 "different systems to check for different things[.]" According to Officer Frisk he used "NCIC, CJ Leads, KB Cops," to check for any outstanding arrest warrants or prior arrests. I am unable to agree that the delay caused by these actions was reasonable when investigating an alleged seatbelt violation, especially when it was clear from the moment the vehicle was stopped that the violation did not in fact occur.

In *State v. Mendez*, an unpublished opinion by this Court, the officer conducted a traffic stop of the defendant's vehicle under suspicions of impaired driving. We held on appeal that the traffic stop was considered "completed" upon the officer finding no evidence of impairment and that the driver's license proved to be valid. ___ N.C. App. ___, 718 S.E.2d 423 (2011) (unpublished). By this same reasoning, Officer Frisk's stop of the vehicle was completed almost immediately after observing both occupants wearing their seatbelts. This Court has held that "[o]nce the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 502 S.E.2d 358, 360 (1998) (citation omitted). I am unable to find such evidence in the record here. Likewise, I conclude that checking 3 different systems for outstanding warrants or prior arrests is unreasonable when investigating an alleged seatbelt violation. *See Id.* at 816, 501 S.E.2d at 360 ("the scope of the detention must be carefully tailored to its underlying justification").

BEASLEY, Judge concurring with separate opinion.

While I generally agree with the majority's analysis, I write separately to address this Court's jurisdiction.

This Court should deny Defendant's petition for writ of certiorari. There are three bases on which this Court can grant certiorari: "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief." N.C. R. App. P. 21(a)(1).

STATE v. FRANKLIN

[224 N.C. App. 337 (2012)]

Defendant's notice of appeal was timely. The record shows Defendant's appellate entries were filed 8 November 2011, the same day that he pled guilty. The motion to suppress was orally denied on 7 November 2011, and the written order was entered 21 November 2011. The Transcript of Plea clearly indicates that "Defendant reserve[d] his right to appeal the denial of the motion to suppress."

As to this Court's jurisdiction, in *State v. Pimental*, 153 N.C. App. 69, 76, 568 S.E.2d 867, 871 (2002), our Court stated, "[i]f defendant wished to preserve his right to appeal the denial of those motions to suppress, defense counsel need only have insisted that the Transcript of Plea state that defendant was reserving his right to appeal the Court's **denial of his motions to suppress** pursuant to N.C.G.S. § 15A-979(b)." (internal quotation marks omitted and emphasis added). The Transcript of Plea in this case states that "Defendant reserve[d] his right to appeal the denial of the motion to suppress."

State v. Miller, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542-43 (2010), however, states that the defendant **must appeal** from "**his judgment of conviction**." (emphasis added). It seems to be a matter of semantics that Defendant must appeal from the "judgment of conviction" in order to preserve his appeal from the denial of the motion to suppress under N.C. Gen. Stat. § 15A-979(b). His appeal from the judgment appears to be implied by his appeal on the motion to suppress. This panel, however, cannot overrule another panel of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

I would note, though, that *Miller* cites *State v. Taylor*, 2010 WL 1960851 (unpublished). *Taylor* engages in statutory interpretation, devoting all of one paragraph to deciding that the defendant did not appeal from his conviction when he did not appeal in open court and only later filed a written notice of appeal that did not include the judgment. *Miller* then cites *State v. Turner*, 305 N.C. 356, 361-62, 289 S.E.2d 368, 372 (1982), for a proposition that it does not support.

While G.S. 15A-979(c) accords the state the right to appeal from a pretrial order granting a motion to suppress, the statute does not accord a defendant the right to appeal from an order denying the motion. G.S. 15A-979(b) provides that an order denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

STATE v. HESTER

[224 N.C. App. 353 (2012)]

Id. *Turner* was noting that the defendant could not appeal from the motion granting suppression of the evidence since there had not yet been a judgment of conviction, not that the defendant had *failed* to appeal from the judgment of conviction where one actually existed. *Id.* Likewise, *State v. Tate*, 300 N.C. 180, 183, 265 S.E.2d 223, 226 (1980), is misinterpreted by *Miller*.

When the motion to suppress must be and is made *in limine* or can be and is made *in limine*, then the defendant can appeal if the motion is denied and he enters a plea of guilty, G.S. 15A-979(b), and the State can appeal if the motion is granted, G.S. 15A-1445 (which refers to G.S. 15A-979).

Id. I write separately to point out the tension between N.C. Gen. Stat. § 15A-979(b), *Pimental*, and *Miller* but believe that Defendant properly preserved his right to appeal. Thus, I would consider Defendant's appeal as of right rather than based on his petition for writ of certiorari.

STATE OF NORTH CAROLINA

v.

DARRYL HESTER

No. COA12-480

Filed 18 December 2012

1. Appeal and Error—preservation of issues—plain error—failure to show prejudicial impact

Although defendant contended in a felonious larceny case that it was plain error for the trial court to allow three witnesses to testify about what they saw on the original surveillance video, this argument was dismissed. By failing to provide the Court of Appeals with any analysis of the prejudicial impact of the challenged testimony, defendant waived appellate review of this issue.

2. Appeal and Error—preservation of issues—indictment variance—failure to argue—failure to renew motion to dismiss—waiver

Although defendant contended in a felonious larceny case that a variance existed between the facts alleged in his indictment and the evidence produced at trial, this argument was dis-

STATE v. HESTER

[224 N.C. App. 353 (2012)]

missed. Defendant made a general motion to dismiss at the close of the State's evidence, but did not specifically raise the question of a variance. Further, defendant also failed to renew his motion to dismiss at the close of all evidence.

3. Constitutional Law—effective assistance of counsel—dismissal without prejudice

Defendant's claim for ineffective assistance of counsel in a felonious larceny case was dismissed without prejudice to defendant's right to file a motion for appropriate relief in the superior court.

Judge ELMORE dissenting in part and concurring in part.

Appeal by Defendant from judgment entered 14 October 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Carole Biggers, for the State.

Franklin E. Wells, Jr., for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 14 October 2011, a jury found Defendant Darryl Hester guilty of felonious larceny. Defendant then pled guilty to having attained the status of habitual felon. The trial court sentenced Defendant to 84—110 months imprisonment. From the judgment entered upon his convictions, Defendant appeals. For the reasons discussed herein, we dismiss.

The evidence at trial tended to show the following: Sin Wol Kang and Kyong Kang Wentworth hired Defendant for a small remodeling project at their beauty supply store, Beauty 101. In turn, Defendant enlisted Kevin King to assist with the project. On the evening of 15 August 2010, Wentworth noticed that four to six expensive hair extension pieces, together worth between \$2,000 and \$2,300, were missing from the store. Wentworth reported the theft to police on 16 August 2010. Officer Brian Long of the Charlotte-Mecklenburg Police Department met with Kang and Wentworth, who showed Long the store's surveillance video from 15 August 2010.

STATE v. HESTER

[224 N.C. App. 353 (2012)]

At trial, the State introduced and played for the jury a copy of the original surveillance video. In addition, Wentworth, Kang, and Long each testified to what they had seen on the original surveillance video. Kang and Wentworth testified that the original surveillance video showed both Defendant and King taking the hair extension pieces, while Long testified that he only saw Defendant putting the hair extension pieces under his shirt before exiting through the back door of the store. However, all three witnesses agreed that the copy of the surveillance video shown at trial had a much lower picture quality than the original surveillance video. The poor quality of the copy made it very difficult to tell whether Defendant or King had taken any hair extension pieces. Defendant did not object to the introduction of the copy or to any of the testimony about what the original surveillance video showed.

Long testified that, when he arrived at the store to view the surveillance video, King was there with Kang and Wentworth. King gave Long a written statement which was introduced at trial as Defense Exhibit 2. In the statement, King denied taking any hair extension pieces, but reported that he had seen Defendant take them. King did not testify. Defendant did not object to Long's testimony about King's statement.

Defendant testified on his own behalf. He denied having taken the hair extension pieces, but admitted making two restitution payments to Kang and Wentworth: one for \$500 and another for \$400. Defendant explained that, when he learned about the theft of the hair extension pieces, he felt sorry for Kang and Wentworth as a fellow small business owner. Defendant explained that he felt bad about having hired King, whom he blamed for the theft (although Defendant acknowledged that he had not seen King steal anything). Defendant testified that he had agreed and intended to pay Kang and Wentworth \$2,000, but his difficult financial circumstances prevented this:

I have no money. I don't have a bunch of money. Like I said, I called and apologized for my company, for the employees that work for my company. I did do that, but to just have \$2,000 on hand, like I said, I don't have that. My fiancée, she's pregnant. I just had a seven-month-old daughter. We have four other kids, and we had just moved into our own apartment[.]

STATE v. HESTER

[224 N.C. App. 353 (2012)]

Discussion

On appeal, Defendant makes three arguments: (1) that the trial court committed plain error in allowing the State's three witnesses to describe what they had seen in the original surveillance video, (2) that there existed a fatal variance between the facts alleged in the indictment and the evidence produced at trial, and (3) that Defendant's trial counsel provided ineffective assistance. After careful review, we dismiss Defendant's first and second arguments as not properly before this Court. As to Defendant's third argument, we dismiss without prejudice.

I. Testimony about the contents of the original surveillance video

[1] Defendant first argues that it was plain error for the trial court to allow Kang, Wentworth, and Long to testify about what they saw on the original surveillance video. We must dismiss this argument.

Because Defendant did not object to this testimony at trial, we review only for plain error. *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012).

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.

This Court and the United States Supreme Court have emphasized that *plain error review should be used sparingly, only in exceptional circumstances*, to reverse criminal convictions on the basis of unreserved error[.]

Id. (citations, quotations marks, and brackets omitted) (alteration in original, second emphasis added). In sum, for a defendant to establish plain error, he must show not only error, but also prejudice. *Id.*

STATE v. HESTER

[224 N.C. App. 353 (2012)]

Here, while Defendant labels his argument as based on plain error and properly cites his burden under that standard of review, he does not argue prejudice. That is, Defendant does not explain how the challenged testimony, even if erroneously admitted, “tipped the scales” toward a guilty verdict or why the other evidence of his guilt was probably not sufficient standing alone to have resulted in a guilty verdict. Nor does Defendant compare the evidence of his guilt to that in other plain error cases in an effort to analogize or distinguish his case from others. As our Supreme Court has noted, an “empty assertion of plain error, without supporting argument or *analysis of prejudicial impact*, does not meet the spirit or intent of the plain error rule.” *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000) (emphasis added), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In such cases, a defendant has waived appellate review of his argument, and the reviewing court should dismiss. *Id.*; see also *State v. Whitted*, ___ N.C. App. ___, ___, 705 S.E.2d 787, 793 (2011). By failing to provide this Court any analysis of the prejudicial impact of the challenged testimony, Defendant has waived appellate review of this issue.¹ Accordingly, we must dismiss.

II. Defendant’s Indictment

[2] Defendant next argues that a variance existed between the facts alleged in his indictment and the evidence produced at trial. We must dismiss this argument.

The question of variance between the indictment and the proof at trial is properly raised by a motion to dismiss in the trial court. *State v. Skinner*, 162 N.C. App. 434, 446, 590 S.E.2d 876, 885 (2004) (cita-

1. We note that, even were this argument not waived, any error here would not rise to the level of plain error. “It is well settled that all of the essential elements of larceny must be established by sufficient, competent evidence; and the essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture.” *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E.2d 284, 286, *cert. denied*, 293 N.C. 254, 237 S.E.2d 536 (1977). Here, there was direct evidence of Defendant’s guilt in the form of King’s statement to Wilson that King saw Defendant take the hair extension pieces. Further, there was circumstantial evidence of Defendant’s guilt in the form of his restitution payments totaling \$900. Although Defendant testified that he made the payments because he felt sorry for the store’s owners, the payments raise a logical inference that Defendant was actually the thief and felt guilty about his crime. This evidence would likely have led to Defendant’s conviction, even without the testimony about the contents of the original surveillance video. Indeed, given the conflicting testimony about whether the original surveillance tape showed *Defendant and King* stealing the hair extension pieces (according to Wentworth and Kang) or showed *only Defendant* stealing them (according to Long), the jury likely treated this testimony with some skepticism.

STATE v. HESTER

[224 N.C. App. 353 (2012)]

tion omitted). In addition, the defendant must specifically assert variance as grounds for his motion to dismiss. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *disc. review denied and appeal dismissed*, 364 N.C. 437, 702 S.E.2d 496 (2010). Where the defendant fails to do so, he has waived his right to raise this issue on appeal. *Id.* at 385, 692 S.E.2d at 138. Further, “by presenting evidence after the close of the State’s case, a defendant waives any previous motion to dismiss, and in order to preserve [the grounds for the motion to dismiss] for appeal, [the] defendant must renew his motion to dismiss at the close of all evidence.” *State v. Boyd*, 162 N.C. App. 159, 161, 595 S.E.2d 697, 698 (2004).

Here, Defendant made a general motion to dismiss at the close of the State’s evidence, but did not specifically raise the question of a variance. Defendant also failed to renew his motion to dismiss at the close of all evidence. Defendant has waived this issue for appellate review, and accordingly, we dismiss.

III. Ineffective Assistance of Counsel

[3] Finally, Defendant argues that he received ineffective assistance from his trial counsel. We dismiss this argument.

The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions. A defendant must first show that his defense counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Thompson, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citations and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). However, this Court will only decide ineffective assistance claim brought on direct review

when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appoint-

STATE v. HESTER

[224 N.C. App. 353 (2012)]

ment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing [the] defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

Id. at 122-23, 604 S.E.2d at 881.

Here, Defendant bases his claim of ineffective assistance on four alleged errors by his trial counsel: (1) failure to object to the admission of the copy of the surveillance video, (2) failure to object to testimony from Kang, Wentworth, and Long about what they saw on the original surveillance video, (3) failure to specifically raise variance in his motion to dismiss, and (4) failure to renew that motion at the close of all evidence. We note that Defendant did not provide the copy of the surveillance video introduced as an exhibit at trial, and a full and thorough review thereof appears necessary for proper review of Defendant's first ground for ineffective assistance of counsel. Accordingly, we dismiss Defendant's claim for ineffective assistance of counsel without prejudice to Defendant's right to file a motion for appropriate relief in the superior court.

DISMISSED in part; DISMISSED WITHOUT PREJUDICE in part.

Judge CALABRIA concurs.

Judge ELMORE dissents in part and concurs in part.

ELMORE, Judge, dissenting in part, concurring in part.

I respectfully disagree with the majority's decision to dismiss defendant's first argument on the basis that defendant failed to properly argue plain error on appeal. Furthermore, I believe that absent the erroneously admitted testimony there is a reasonable possibility that a different result would have been reached at the trial due to the prejudice to defendant.

In dismissing defendant's argument, the majority relies on *State v. Cummings* where our Supreme Court held that an "empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000).

STATE v. HESTER

[224 N.C. App. 353 (2012)]

However, in *Cummings* the defendant “provide[d] no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done.” *Id.* at 636, 536 S.E.2d at 61.

In the case *sub judice*, defendant has provided sufficient argument in support of his position that the trial court committed plain error in allowing the State’s witnesses to describe what they had seen when they originally viewed the surveillance video. Defendant first asserts that the State failed to lay an adequate foundation for the admission of the video. In making this argument, defendant relies on the three prong test set forth in *State v. Collins*, ___ N.C. App. ___, 716 S.E.2d 255 (2011). Defendant next contends that the testimony proffered by the State’s witnesses amounted to inadmissible lay opinion testimony that “invaded the province of the jury.” Defendant cites *State v. Buie*, 194 N.C. App. 725, 671 S.E.2d 351 (2009) as controlling precedent and details the specific statements he believed to constitute inadmissible lay opinion testimony. Furthermore, defendant alleges that he was prejudiced by the admission of the opinion testimony because it was the “only evidence that [defendant] committed a crime.” Accordingly, I deem it necessary to address defendant’s argument.

i. Opinion testimony

I agree with defendant’s argument that the testimony proffered by the State’s witnesses constituted inadmissible lay opinion testimony.

As defendant did not object to the admission of the contested testimony at trial, he bears the burden of showing that the admission of the testimony was so prejudicial that “absent the error the jury probably would have reached a different verdict.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citations and quotation marks omitted). Under Rule 701, a lay witness’s testimony in the form of opinion or inference is permitted if it is rationally based on the perception of the witness and helpful to gain a clearer understanding of a fact in issue. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2012).

In *State v. Buie*, this Court concluded that the admission of the detective’s testimony regarding the events depicted in two poor quality surveillance tapes was “inadmissible lay opinion testimony that invaded the province of the jury.” *Buie*, 194 N.C. App. at 732, 671 S.E.2d at 355. However, we found its admission to be harmless for two reasons: (1) because there was other independent testimony

STATE v. HESTER

[224 N.C. App. 353 (2012)]

based on firsthand knowledge that supported the victim's claim, and (2) because the trial court repeatedly instructed the jury that they were charged with evaluating the images shown on the surveillance tape. *Id.* at 733-34, 671 S.E.2d at 356-57.

The case at hand can be distinguished from *Buie* because (1) the State did not call any witness who had perceived or had firsthand knowledge that defendant committed the larceny, and (2) the trial court did not instruct the jury that they were charged with interpreting the video. When asked if he saw defendant take anything from Beauty 101, Officer Long replied, "only on videotape." Officer Long testified that on the original video he could "clearly see [defendant] reach up, remove a pack of hair from the wall, place it kind of in the belly of his shirt and then walk outside the side door." I must note that "[t]his Court has upheld the admission of similar testimony by law enforcement officials only when their interpretations were based in part on firsthand observations." *Id.* at 732, 671 S.E.2d at 356. Accordingly, the admission of Officer Long's testimony was in error.

Wentworth and Kang's testimony also amounted to inadmissible lay opinion testimony. When Wentworth was asked if she saw defendant remove the hair extensions from the store, she replied, "[w]ith my bare eyes? . . . No." Kang was asked, "So what made you think [defendant] took your hair is what you saw on the [original] videotape?" She replied, "Yes." Neither Wentworth nor Kang personally perceived defendant take the hair pieces from Beauty 101; instead, each based her opinion of defendant's guilt solely on the alleged contents of the original video. Therefore, I assert that the trial court erred in admitting this testimony as well.

ii. Plain error

Having found that the trial court erred in admitting the lay opinion testimony, I now turn to the question of whether such error was prejudicial to defendant and had a probable impact on the jury's finding of guilt.

Defendant specifically asserts prejudice as he believes the opinion testimony was the only evidence tending to show his guilt. Defendant further argues that he was prejudiced by the trial court's failure to charge the jury with interpreting the video. I agree.

Here, the State maintains that it presented sufficient evidence to establish defendant's guilt notwithstanding the erroneous testimony. The State relies on (1) the fact that the jury viewed the surveillance

STATE v. HESTER

[224 N.C. App. 353 (2012)]

video on a large screen during deliberations, (2) Officer Long's testimony that King accused defendant of committing the larceny, and (3) defendant's payment of restitution.

However, I do not agree that above evidence in *toto* would have led to defendant's conviction absent the admission of the opinion testimony. The jury was able to view the surveillance video during deliberations; however, the trial court failed to charge them with interpreting the video. As such, the witnesses' interpretation of the video was likely highly persuasive, especially considering the fact that the copy entered into evidence was blurry. Furthermore, in *Buie* we emphasized the fact that the trial court "repeatedly" instructed the jury to interpret the video. *Id.* at 734, 671 S.E.2d at 356. In the case *sub judice*, the trial court never provided such instruction.

Moreover, Officer Long's testimony that King accused defendant of committing the larceny is not persuasive evidence of defendant's guilt. First, King did not testify at trial. Second, King was present during the commission of the larceny and, therefore, would naturally accuse defendant so as to avoid becoming a suspect himself. Finally, while defendant admitted to paying restitution, he testified that he did so because he was responsible for hiring King, whom he believed committed the larceny.

Additionally, it is important to note that Officer Long conducted no further investigation and gathered no physical evidence linking defendant to the crime. Thus, he relied solely on the images in the video when issuing a warrant for defendant's arrest. As such, without the admission of the opinion testimony, the State failed to establish beyond a reasonable doubt that defendant was guilty.

After careful review of the evidence, I conclude that defendant was prejudiced by the admission of the lay opinion testimony. Moreover, per N.C. Gen. Stat. § 15A-1443, defendant has shown a reasonable probability that the jury would have reached a different result had the testimony been excluded from trial. Accordingly, I would reverse the judgment of the trial court and order a new trial. I concur in all other aspects of the majority opinion.

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

STATE OF NORTH CAROLINA

v.

ROBERT MICHAEL REDMAN

No. COA12-142

Filed 18 December 2012

1. Larceny—felonious—value of vehicle taken—testimony of owner—reference to loan

The trial court did not err by denying defendant's motion to dismiss the charge of felony larceny because there was insufficient evidence that the vehicle taken was valued at more than one-thousand dollars. An owner's testimony as to the value of his property is competent evidence to be considered by the jury; although the owner in this case referred to the loan on the vehicle, his answer was nonetheless evidence of the vehicle's value.

2. Appeal and Error—preservation of issues—issue not raised at trial

By failing to raise the issue at trial, defendant waived his right to appeal the issue of a variance between an indictment for injury to personal property and the evidence at trial concerning the amount of damage.

3. Constitutional Law—effective assistance of counsel—record not sufficient—motion for appropriate relief

Defendant's contention that he received ineffective assistance of counsel based on advice to reject a favorable plea offer was dismissed without prejudice where the record was not sufficient to determine that counsel's performance was deficient and prejudicial. Defendant may file a motion for appropriate relief at the trial level, enabling the trial court to conduct an evidentiary hearing.

Appeal by Defendant from judgment entered 28 September 2011 by Judge Marvin K. Blount, III, in Currituck County Superior Court. Heard in the Court of Appeals 15 August 2012.

Roy Cooper, Attorney General, by Susannah P. Holloway, Assistant Attorney General for the State.

Staples Hughes, Appellate Defender, by Kathleen M. Joyce, Assistant Appellate Defender for the defendant.

THIGPEN, Judge.

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

Defendant appeals from a judgment entered upon a jury verdict convicting him of breaking or entering a motor vehicle, felony larceny, and injury to personal property, arguing that there was insufficient evidence to support the felony larceny conviction, that there was a fatal variance between the indictment and the proof with respect to the injury to personal property conviction, and that Defendant received ineffective assistance of counsel during plea negotiations. We find no error, in part; however, we dismiss Defendant's ineffective assistance of counsel claim, without prejudice, so that Defendant may properly raise the issue on a motion for appropriate relief at the trial level.

The evidence of record tends to show the following: On 6 October 2010, Stanley Murphy ("Murphy") drove his 2003 Ford van from Virginia Beach, Virginia, to Knotts Island, North Carolina, and spent the night at the home of a friend. Murphy left his spare keys in the van and did not remember whether he locked the van.

The next morning, the van was gone. Murphy reported the missing van to the police; he also told his son, Audie Murphy ("Audie"), who worked in the area, that his van was missing. Audie received a lead from his co-workers that Robert Redman ("Defendant") had taken the van and moved it to a wooded area.

On 13 October 2010, after receiving the information from his co-workers, Audie and several other people went to look for the van in the wooded area at Carova Beach, abutting the Currituck National Wildlife Refuge. There, they found the missing van and called the police. The van had multiple dents and a flat tire; its back glass was shattered; and its front glass was cracked. However, the van was still drivable, and nothing was missing from the van. Audie testified that the damage to the van amounted to "\$5,200-and-some dollars." Murphy testified that the van was worth "[§]30,000 plus interest, you know, paying by the month." The van had 30,000 miles on it.

Five months later, Defendant was questioned about the van, and he said he had been drinking that night. After Defendant noticed that the door to the van was unlocked and that the keys were visible, Defendant said he took the van, without permission. Defendant was arrested on 14 March 2011 and indicted on charges of breaking or entering a motor vehicle, felony larceny, and injury to personal property causing under \$200 damage. Defendant was also indicted on a charge of having attained the status of an habitual felon.

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

The State offered Defendant a plea arrangement, proposing that the State would dismiss the habitual felon indictment if Defendant would plead guilty to breaking or entering, felony larceny, and injury to personal property. Defendant, on the advice of counsel, rejected the plea arrangement.

Defendant moved to dismiss the breaking or entering a motor vehicle and larceny charges at trial, and his charge of attaining the status of an habitual felon, but the court denied his motions. Defendant did not challenge the sufficiency of the evidence to support the injury to personal property charge. The jury returned guilty verdicts on all charges. The trial court entered a consolidated judgment convicting Defendant of breaking or entering a motor vehicle, felony larceny, injury to personal property, and of having attained the status of an habitual felon. The court sentenced Defendant to 88 to 115 months incarceration. From this judgment, Defendant appeals.

I: Motion to Dismiss—Felony Larceny

[1] In Defendant’s first argument, he contends the trial court erred by denying his motion to dismiss the charge of felony larceny because there was insufficient evidence that the van was valued at more than one-thousand dollars. We disagree.

The standard of review on appeal from the trial court’s denial of a defendant’s motion to dismiss is “whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.” *State v. Harris*, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002) (quotation marks omitted). “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, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002) (citation omitted). “In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State’s case.” *Id.* (citation omitted).

The elements of felony larceny are “that defendant, acting alone or in concert with some other person, took and carried away another person’s property, without such person’s consent, from a building after a breaking and entering, knowing he was not entitled to take it and intending to permanently deprive the victim of its use.” *State v. Roseboro*, 344 N.C. 364, 377-78, 474 S.E.2d 314, 321 (1996) (citation

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

omitted). However, “[w]here neither larceny from the person nor by breaking and entering is involved, an indictment for the *felony* of larceny must charge, *as an essential element of the crime*, that the value of the stolen goods was more than [1,000.00] dollars.” *State v. Jones*, 275 N.C. 432, 436, 168 S.E.2d 380, 383 (1969) (citations omitted); *see also State v. Owens*, 160 N.C. App. 494, 500, 586 S.E.2d 519, 523-24 (2003) (stating, “[t]o convict a defendant of felonious larceny, it must be shown that he: (1) took the property of another, (2) with a value of more than \$1,000.00, (3) carried it away, (4) without the owner’s consent, and (5) with the intent to deprive the owner of the property permanently”) (citations omitted). In this case, the State proceeded on a theory of felonious larceny based on the van being worth more than \$1,000.00, and Defendant challenges the sufficiency of the evidence of only that element on appeal.

“Value as used in [N.C. Gen. Stat. §] 14-72 means fair market value.” *State v. McCambridge*, 23 N.C. App. 334, 336, 208 S.E.2d 880, 881 (1974). “Stolen property’s fair market value is the item’s reasonable selling price at the time and place of the theft, and in the condition in which it was when [stolen].” *State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 714 (2009) (quotation omitted) (alteration omitted). “It is not necessary that a witness be an expert in order to give his opinion as to value. A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services.” *State v. Cotten*, 2 N.C. App. 305, 311, 163 S.E.2d 100, 104 (1968) (quotation omitted).

On appeal, Defendant cites *State v. Holland*, 318 N.C. 602, 350 S.E.2d 56 (1986), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987), for the proposition that the evidence in this case was insufficient on the question of whether the van was worth more than \$1,000.00. We believe *Holland* is distinguishable. In *Holland*, the Court ruled that the following evidence was insufficient:

Although the State offered no direct evidence of the Cordoba’s value, there is in the record evidence tending to show that the victim owned two automobiles and that the 1975 Chrysler Cordoba was his favorite one of which he took especially good care, always keeping it parked under a shed, and that a picture of this automobile was exhibited to the jury for the purpose of establishing the location of the automobile when discovered after its theft.

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

Id. at 610, 350 S.E.2d at 61.

In this case, the evidence of record shows that the van was a 2003 Ford Model 250 van with four-wheel drive, oversized tires, and a lift suspension system. The van had 30,000 miles on it. Murphy also gave the following testimony:

Q: Do you recall how much that vehicle is worth?

A: Probably [\$]30,000 plus interest, you know, paying by the month.

Q: Did you say \$30,000?

A: Yeah, that's what it costs.

This Court has previously held that an owner's testimony as to the value of his property is "competent evidence to be considered by the jury." *State v. Cotten*, 2 N.C. App. 305, 311, 163 S.E.2d 100, 104 (1968) (holding that the owner's testimony that "I could get a thousand dollars for it" was competent evidence such that the question of whether the property was valued in excess of \$200.00 was appropriately for the jury). Although Murphy referenced the loan on the vehicle in response to the question regarding the vehicle's value, Murphy's answer is nonetheless evidence of the vehicle's value. This case is therefore distinguishable from *Holland*, and more akin to *Cotton*, as the owner here gave an actual number regarding what he believed the vehicle was worth, albeit based on what the owner owed; in *Holland*, the only evidence of value pertained to the manner of care given to the vehicle, and no numerical value was provided. Thus, we conclude the trial court did not err by denying Defendant's motion to dismiss for lack of sufficient substantial evidence that the van was worth in excess of \$1,000.00.

II. Indictment—Fatal Variance

[2] In Defendant's second argument, he contends the trial court erred by entering judgment on the injury to personal property offense because there was a fatal variance between the indictment, which charged there was under \$200 of damage, and the evidence, upon which Defendant was convicted of causing over \$200 of damage. The State concedes this argument; however, we do not believe the argument has been properly preserved for appeal.

To preserve the issue of a fatal variance for review, a defendant must state at trial that a fatal variance is the basis for the motion to

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

dismiss. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010). In *Curry*, the Court held that because the “defendant failed to argue a variance between his indictment and the evidence presented at trial or even to argue generally the sufficiency of the evidence regarding the [element at issue] to the trial court, he has waived this issue for appeal.” *Id.* at 385-86, 692 S.E.2d at 138 (citing N.C.R. App. P. 10(b)(1)).

Here, although Defendant made a motion to dismiss the charges of breaking or entering a motor vehicle and felony larceny, Defendant said the following of the injury to personal property charge: “Your Honor, I believe the State has presented sufficient evidence on the count of injury to personal property.” We believe Defendant waived his right to appeal the fatal variance issue by failing to raise the issue at trial. *See Id.* (citing N.C.R. App. P. 10(b)(1)). We therefore decline to address the issue.

III: Ineffective Assistance of Counsel

[3] In Defendant’s final argument, he contends he received ineffective assistance of counsel because his counsel advised him to reject a favorable plea offer. We dismiss this issue, without prejudice, so that Defendant may file a motion for appropriate relief at the trial level, thus enabling the trial court to conduct an evidentiary hearing.

A criminal defendant has a constitutional right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted).

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel’s performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. However, the fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

State v. Batchelor, 202 N.C. App. 733, 739, 690 S.E.2d 53, 57 (2010) (citations and quotation marks omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984). Our appellate courts “engage[] in a presumption that trial counsel’s representation is within the boundaries of acceptable professional conduct” when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted).

“During plea negotiations defendants are entitled to the effective assistance of competent counsel.” *Lafler v. Cooper*, ___ U.S. ___, ___, 182 L. Ed. 2d 398, 406 (2012) (quotation omitted). “In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.” *Id.* at ___, 182 L. Ed. 2d at 407.

[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id.

In this case, Defendant specifically argues that counsel’s performance fell below an objective standard of reasonableness because he advised Defendant to reject the favorable plea offer and proceed to trial. The State offered to dismiss the habitual felon indictment in exchange for Defendant’s guilty plea to the three substantive offenses—breaking or entering, felony larceny, and injury to personal property. Counsel advised Defendant not to take the plea offer because he believed there were problems with the habitual felon indictment necessitating its dismissal. Counsel knew that there “ha[d] been problems” with the Virginia judgments the State relied upon in the indictment.

On the morning of trial, however, the State moved to amend the indictment, and counsel for Defendant objected, stating the following:

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

Your Honor, I received a motion on the morning of trial and have not had an adequate opportunity to advise my client regarding this. I mean, I advised him based on the NCIC that I received. The NCIC was flawed, that is the only thing that I received in discovery. And I based my advice to him on the record that I obtained in discovery.

The court overruled counsel's objection.

At the close of the State's evidence, counsel moved to dismiss the charge of having attained the status of an habitual felon based on the inaccuracies in the original indictment:

Your Honor, we feel that the notice requirement is to give . . . the defendant notice of not only what he is charged with but where to go as far as trying the case or—as Your Honor well knows, if the State did not have all its ducks in a row as far as the judgments themselves, they would not be able to prove this through an NCIC record. Without these judgments their case falls on its face. And I definitely took that into consideration and made my client aware of the fact that there have been problems with Virginia judgments previously. And he took that into account, the decision to take this case to trial.

The trial court also denied this motion.

On appeal, Defendant argues the following:

The court allowed both amendments [to the habitual felon indictment], ruling that they did not constitute substantial alterations to the indictments. This should not have surprised the attorney [for Defendant]. Even a cursory review of the case law would have revealed that the State's motion to amend the indictments and the court's ruling permitting the amendments were both supported by North Carolina law. When [Defendant's] attorney failed to recognize that amendment was possible and, based on that error, advised him to reject a plea offer that would have spared him a lengthy habitual felon sentence, the attorney deprived him of his constitutional right to the effective assistance of counsel.

In other words, regarding performance, Defendant argues counsel was deficient by promoting a trial strategy for the habitual felon

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

indictments that demonstrated a misunderstanding of the law of amendments to indictments¹; and Defendant argues he was prejudiced by the increased sentence imposed on his convictions of breaking or entering, felony larceny, and injury to personal property as an habitual felon. Defendant further argues that if he had taken the State's offer to dismiss the habitual felon indictment, and pled guilty to breaking or entering, felony larceny, and injury to personal property—as per the State's plea agreement—then, the presumptive range for sentencing on the three convictions, if the trial court entered a consolidated judgment, would have been approximately a quarter of the length of the actual sentence imposed. Defendant argues that even if the trial court had not consolidated the convictions for sentencing, but instead entered a judgment sentencing Defendant consecutively, then, the maximum total sentence would have only been thirty-one months, as compared to the 88 to 115 months Defendant received after rejecting the plea bargain.

We believe *Lafler v. Cooper*, ___ U.S. ___, 182 L. Ed. 2d 398 (2012), is instructive in this case. In *Cooper*, the U.S. Supreme Court stated the following:

Respondent has satisfied *Strickland's* two-part test. Regarding performance, perhaps it could be accepted that it is unclear whether respondent's counsel believed respondent could not be convicted for assault with intent to murder as a matter of law because the shots hit Mundy below the waist, or whether he simply thought this would be a persuasive argument to make to the jury to show lack of specific intent. And, as the Court of Appeals for the Sixth Circuit suggested, an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. Here, however, the

1. The record supports the proposition that counsel did not believe the indictment could be amended to correct the following "problems." Two convictions listed in the habitual felon indictment were inaccurate. First, Defendant was convicted of *attempted* grand larceny in Virginia Beach, but the indictment alleged Defendant was convicted of grand larceny. Second, Defendant committed the crime of felony assault and battery on 9 March 2004, but the indictment alleged that Defendant committed the crime on 10 March 2004, which was actually the date of Defendant's arrest. The State filed a motion to amend the foregoing inaccuracies in the indictment and provided authority allowing an amendment to a date, *see State v. Lewis*, 162 N.C. App. 277, 590 S.E.2d 318 (2004), and allowing an amendment to the word "attempted," *see State v. Van Trusell*, 170 N.C. App. 33, 612 S.E.2d 195, *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005). The trial court granted the State's motion to amend the indictment.

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

fact of deficient performance has been conceded by all parties. The case comes to us on that assumption, so there is no need to address this question.

As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 1/2 times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied.

Id., ___ U.S. at ___, 182 L. Ed. 2d at 413-14 (citation omitted).

The present case is similar in many respects to *Cooper*. However, here, the State does not concede that counsel's performance was deficient. Instead, the State posits that when counsel stated that Defendant "took *that* into account" in making his "decision to take this case to trial[.]" it is not clear what counsel was referencing by "that[.]" Upon our review of the record, we agree that it is not clear whether Defendant rejected the plea based entirely, or in large part, on counsel's advice pertaining to the Virginia judgments. The appropriate question, as stated in *Cooper*, is whether evidence of record shows the following: "[B]ut for the ineffective advice of counsel[.]" there is a reasonable probability that the plea offer would have been presented to the court[.] . . . that the defendant would have accepted the plea and the prosecution would not have withdrawn it[.] . . . [and] that the court would have accepted its terms[.]" *Id.* at ___, 182 L. Ed. 2d at 407. The record is silent on the specific advice counsel gave Defendant regarding the plea rejection. Moreover, Defendant's basis for rejecting the plea, other than that Defendant considered counsel's advice that there were "problems" with the Virginia judgments, is not clear. The State suggests that a more complete record would aid in understanding Defendant's reasons for rejecting the plea, and the State proposes that the appeal should be dismissed without prejudice to allow Defendant to file a motion for appropriate relief in the trial court. We agree with the State that an evidentiary hearing at the trial level is necessary to determine the proper resolution to Defendant's question of whether he received ineffective assistance of counsel. Our Courts have held that the following is the proper remedy on direct appeal:

STATE v. REDMAN

[224 N.C. App. 363 (2012)]

[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Therefore, on direct appeal we must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding.

State v. Campbell, 359 N.C. 644, 691, 617 S.E.2d 1, 30 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006) (citation and quotation marks omitted).

Consistent with *Cooper*, ___ U.S. at ___, 182 L. Ed. 2d at 406, and *Campbell*, 359 N.C. at 691, 617 S.E.2d at 30, we believe the evidence contained in the record is insufficient for this Court to determine that counsel's performance, in advising Defendant to reject the plea offer because the habitual felon indictment could not be amended and would be dismissed for inaccuracies, was deficient, and that "but for the ineffective advice of counsel[,] there is a reasonable probability that the plea offer would have been presented to the court[,] . . . that the defendant would have accepted the plea and the prosecution would not have withdrawn it[,] . . . [and] that the court would have accepted its terms[.]" *Cooper*, ___ U.S. at ___, 182 L. Ed. 2d at 407. Therefore, we conclude the appropriate remedy is to dismiss Defendant's ineffective assistance of counsel claim without prejudice. Defendant may reassert his ineffective assistance of counsel claim in a subsequent motion for appropriate relief.

NO ERROR, in part; DISMISSED, in part.

Judges BRYANT and STEPHENS concur.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

STATE OF NORTH CAROLINA

v.

ELLIS ROYSTER, JR.

No. COA12-458

Filed 18 December 2012

1. Search and Seizure—vehicle stop—motion to suppress—reasonable articulable suspicion—speeding

The trial court did not err in a feloniously carrying a concealed weapon case by denying defendant's motion to suppress evidence arising from a vehicle stop based on an officer's alleged lack of reasonable articulable suspicion. Since there was a reasonable suspicion that defendant was speeding, any evidence resulting from the stop need not have been suppressed.

2. Identification of Defendants—driver of speeding vehicle—motion to suppress—reasonable suspicion

The trial court did not err in a feloniously carrying a concealed weapon case by denying defendant's motion to suppress based on alleged insufficient evidence identifying defendant as the driver of a speeding vehicle. Although the officer lost sight of defendant, the amount of time was minimal, approximately thirty seconds, and when the officer saw the vehicle again, he recognized both the car and the same driver immediately.

Appeal by Defendant from judgment entered 27 October 2011 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2012.

Roy Cooper, Attorney General, by David B. Shick, Associate Attorney General, for the State.

James N. Freeman, Jr., for Defendant.

THIGPEN, Judge.

Ellis Royster, Jr., ("Defendant") appeals from a judgment entered convicting him of feloniously carrying a concealed weapon, after Defendant's no contest plea, challenging the denial of his motion to suppress the evidence arising from the stop in this case. We conclude the trial court did not err by denying Defendant's motion to suppress.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

The evidence of record tends to show the following: At approximately 5:00 p.m. on 31 October 2009, Sergeant Scott Sherwood (“Sergeant Sherwood”) of the Charlotte-Mecklenburg Police Department observed a man, later identified as Defendant, driving a gray 2001 Cadillac SLS in the lane of traffic opposite to him near The Plaza in Charlotte, North Carolina. Sergeant Sherwood “recognized that [Defendant] was going above the [speed] limit[.]” After observing Defendant for 3 to 5 seconds, Sergeant Sherwood estimated that Defendant’s speed was 52 miles per hour. Sergeant Sherwood made a U-turn and pursued Defendant[,] but Defendant “just maintained his speed and kept going outbound[.]” Sergeant Sherwood lost sight of Defendant at a left-hand curve, and after failing to spot Defendant in the straight stretch of roadway following the curve, Sergeant Sherwood concluded, “the only logical place for his car to be . . . [was that Defendant took] a right-hand turn[.]” Sergeant Sherwood turned right and immediately saw Defendant, who had turned his car around and started driving back in the direction from which he had come.

Sergeant Sherwood stopped Defendant, smelled marijuana coming from the vehicle, and discovered that Defendant was carrying a concealed weapon. Defendant was arrested. On 12 July 2010, Defendant was indicted on one count of feloniously carrying a concealed gun in violation of N.C. Gen. Stat. § 14-269 (2011).¹ Defendant filed a motion to suppress the evidence arising from the stop, and the motion came on for hearing at the 24 October 2011 session of Mecklenburg County Superior Court. The trial court denied Defendant’s motion to suppress in open court. Defendant preserved his right to appeal the denial of his motion to suppress, after which Defendant pled no contest to the charge of carrying a concealed weapon. The trial court entered a judgment in open court, consistent with the plea agreement, convicting Defendant of feloniously carrying a concealed weapon. Defendant gave notice of appeal from this judgment in open court. The trial court entered a judgment on 27 October 2011.

I. 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) (citation omitted). “The trial court’s findings are conclusive on

1. The speeding and marijuana citations against Defendant were voluntarily dismissed by the State.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 828 (2009) (citation and quotation marks omitted). “Conclusions of law are reviewed *de novo* and are subject to full review.” *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (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.” *Id.*

In this case, the trial court did not enter a written order denying Defendant’s motion to suppress. Rather, the trial court made the following ruling from the bench:

THE COURT: All right. Based upon the evidence presented and the Court’s review of the case law cited by the defense as well as some case law the Court has from the earlier order in a similar case, the Court perceives that the motion to suppress should be denied and has concluded that there’s probable cause to support the stop for speeding; that upon the finding of the marijuana, that effectively would give probable cause to search the car, also will permit a reasonable officer to remove the defendant from the vehicle and to frisk him under the *Terry* standard. Plus it may well be enough that the smelling of the marijuana in the car conceivably could create probable cause for an arrest. And that portion I have to defer to further research, but I don’t think that changes the outcome.

As a preliminary matter, we note that N.C. Gen. Stat. § 15A-977(f) (2011) requires that “[t]he judge must set forth in the record his findings of facts and conclusions of law.” *Id.* However, N.C. Gen. Stat. § 15A-977(f), 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). “If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress.” *Id.* In this case, although the trial court did not enter a written order, it provided the aforementioned rationale for its ruling in open court. Moreover, Sergeant Sherwood was the only testifying witness; therefore, there was no material conflict in the evidence. As such, the necessary findings are implied from the denial of the motion to suppress. *Id.*

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

On appeal, Defendant argues the trial court erred by denying his motion to suppress evidence. Specifically, Defendant contends the trial court erred in concluding that the initial stop was supported by a reasonable articulable suspicion because (1) there was insufficient evidence that Defendant was speeding, and (2) there was insufficient evidence supporting the identification of Defendant as the driver of the allegedly speeding vehicle. We conclude these arguments are meritless.

II. Reasonable Suspicion

[1] In Defendant's first argument on appeal, he contends the trial court erred by denying his motion to suppress evidence arising from the stop because Sergeant Sherwood lacked a reasonable articulable suspicion. We disagree.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. The North Carolina Constitution provides similar protection. N.C. Const. art. I, § 20. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.'" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation omitted). "Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).'" *Id.* (citation omitted). "[A] traffic stop is permitted if the officer has a 'reasonable, articulable suspicion² that criminal activity is afoot.'" *Id.* (citation omitted).

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that [t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, [a] court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

Id., 362 N.C. at 414, 665 S.E.2d at 439-40 (internal citations and quotation marks omitted). "[A]n investigatory-type traffic stop is justified

2. The trial court in this case concluded there was probable cause, rather than a reasonable suspicion, that Defendant was speeding. However, a reasonable suspicion is all that is required to permit a stop. *Styles*, 362 N.C. at 414, 665 S.E.2d at 439-40.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot.” *State v. Wilson*, 155 N.C. App. 89, 95, 574 S.E.2d 93, 98 (2002), *overruled on other grounds*, *Styler*, 362 N.C. at 415, 665 S.E.2d at 440 (citation and quotation marks omitted).

The totality of the circumstances test must be viewed through the prism of a reasonable police officer standard; that is, the reviewing court must take into account an officer’s training and experience. Thus, a police officer must have developed more than an “ ‘unparticularized suspicion or hunch’ ” before an investigatory stop may occur.

State v. Willis, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997) (citations omitted).

In this case, Defendant specifically argues that Sergeant Sherwood’s observation of Defendant’s vehicle traveling for three to five seconds in the opposite direction, and the lack of any testimony by Sergeant Sherwood regarding the distance he saw Defendant travel at such speed, does not constitute facts sufficient to establish that Sergeant Sherwood had a reasonable opportunity to judge the vehicle’s speed. Therefore, these facts, Defendant argues, could not be the basis for a reasonable suspicion that Defendant was speeding.

“[A]ny person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle.” *State v. Barnhill*, 166 N.C. App. 228, 232, 601 S.E.2d 215, 218, *disc. review denied*, 359 N.C. 191, 607 S.E.2d 646 (2004). “[W]here the witness does not have a reasonable opportunity to judge the speed, it is error to permit such testimony.” *Smith v. Stocks*, 54 N.C. App. 393, 398, 283 S.E.2d 819, 822 (1981). “The observation must be for such a distance and over such a period of time as to enable the witness to do more than merely hazard a guess as to speed.” *Id.*

State v. Barnhill, 166 N.C. App. 228, 601 S.E.2d 215 (2004), is instructive in the present case. In *Barnhill*, this Court upheld the admission of testimony by a police officer, as being sufficient to establish probable cause,³ on the following facts:

3. After the United States Supreme Court’s ruling in *Whren v. United States*, 517 U.S. 806, 810, 135 L. Ed. 2d 89, 95 (1996), there was some question as to whether probable cause or a reasonable suspicion was sufficient, in the context of readily observ-

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

Officer Malone had an unobstructed view of the vehicle, as well as ample opportunity to observe defendant's progress up Fourth Street. Furthermore, Officer Malone's personal observation of the speed of defendant's truck, coupled with the sound of the engine racing and the bouncing of the car as it passed through the intersection, furnished him with a sufficient blend of circumstances to establish there was a fair probability that defendant was exceeding a speed greater than was reasonable and prudent under the conditions existing at that time in violation of N.C. Gen. Stat. § 20-141(a). Thus, Officer Malone had probable cause to stop defendant's vehicle.

Id. at 233, 601 S.E.2d at 218. Based on these facts, this Court concluded that "the stop did not violate defendant's right to be free from unreasonable search and seizure[;] [s]ince the stop was valid, any evidence which resulted from the stop need not be suppressed." *Id.*

Defendant cites *McNeil v. Hicks*, 119 N.C. App. 579, 581, 459 S.E.2d 47, 48-49 (1995), for the proposition that the stop in this case was not justified. The Court in *Hicks* concluded eyewitness testimony was inadmissible on the issue of speed, because the eyewitness did not have a reasonable opportunity to judge speed. *Id.* Her observation was not for such a distance and over such a period of time as to enable her to do more than merely hazard a guess as to speed. *Id.* In *Hicks*, the following facts were pertinent to this question:

[T]he plaintiff's vehicle was stopped on Utah Drive at the intersection with Cole Drive in Forsyth County. Defendant Hicks (Hicks) was traveling south on Cole Drive. As Hicks approached the intersection at which plaintiff was stopped, she swerved into the right shoulder of Cole Drive to avoid an oncoming car and struck plaintiff's car on the driver's side, causing plaintiff to suffer physical injury and lost wages. The driver of the car which Hicks attempted to avoid was never identi-

able traffic offenses, to be the basis for a stop. However, in *Styles*, 362 N.C. at 415, 665 S.E.2d at 440, our Supreme Court held, in accordance with every other federal circuit to have then considered the issue, that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *Id.* Nonetheless, *Barnhill* is instructive in this case, as the Court concluded the facts in *Barnhill* established probable cause, and a reasonable suspicion is a less exacting standard.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

fied. Plaintiff subsequently brought suit against Hicks for her alleged negligence in causing the collision[.]

Id. at 580, 459 S.E.2d at 48. The Court in *Hicks* concluded the plaintiff's testimony concerning the speed of the defendant's vehicle was inadmissible:

Plaintiff testified that she did not have time to form an opinion of the speed at which Hicks was traveling when she first saw her in the ditch, and that it was about three seconds from the time she saw Hicks' car in the ditch until the time it hit her. Since plaintiff's testimony clearly established that she had no reasonable opportunity to observe Hicks' vehicle and judge its speed, we hold that the trial court correctly excluded plaintiff's testimony.

Id. at 581, 459 S.E.2d at 48.

We believe *Hicks* is distinguishable from this case. Here, Sergeant Sherwood gave the following testimony on the issue of whether he had a reasonable opportunity to observe Defendant's speed:

I was traveling inbound on The Plaza at about the 53[00], 5200 block of The Plaza. As I was traveling inbound, I observed a gray 2001 Cadillac SLS traveling outbound. At that time, I estimated the speed at 52 in a 35. . . . I worked The Plaza as part of Hickory Grove and at the time North Tryon. So I was very familiar with The Plaza. And as I'm traveling inbound, he was coming toward me in the opposite lane of travel. It's a four-lane road so it's usually—it's mostly moderate traffic, unless it's late at night. And I observed that he was speeding based on all the traffic conditions and the environment at the time.

When asked, "How long did you observe the car prior to determining that he was doing 52 in that 35?" Sergeant Sherwood responded, "It would have been three to five seconds." Moreover, Sergeant Sherwood also supplied testimony that after he made a U-turn and pursued Defendant, Defendant "maintained his speed and kept going outbound on The Plaza." However, Sergeant Sherwood gave no testimony as to the distance he observed Defendant travel in excess of the speed limit.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

In this case, Sergeant Sherwood was also a radar certified officer, and to receive such certification, Sergeant Sherwood had to undergo the following training:

It's a . . . one-week school. There's, like any other classes, a book portion where you learn the speeding laws. And they have changed over the years as far as the curriculum for speeding. At the end of the week, you go on a practical day where you practice clocking cars with the radar. . . . [A]s part of the way any officer is trained in speeding, you have to visually estimate a vehicle. You have to call out that speed to your instructor. And without looking at your radar equipment, whichever equipment you're being trained on, you have to estimate the speed, lock the speed—well, estimate speed, tell your instructor what you think the speed is, and then lock the speed in. And then you uncover what the actual speed is indicated on the radar. And to get certified, you have to do this 12 times. . . . So it's a series of 12 different clocks in that fashion where you estimate speed, call it out to your instructor and then reveal the speed to your instructor. Through that process, you're not allowed to miss any one clock or estimation by more—by more than 12 miles an hour. And you can't miss an overall error any more than 36 so that averages out to two to three miles an hour per clock. They have a margin of error when you get certified. . . . Every . . . three years you have to be re-certified and go back through that process. And it's a shorter period. You don't have to go back through the week-long school. You have to go through a . . . three-day school.

Sergeant Sherwood became certified on 31 October 2009.

Here, almost every fact is distinguishable from the facts of *Hicks*, except the amount of time Sergeant Sherwood and the eyewitness in *Hicks* observed the vehicle, which in both cases was approximately three seconds. In *Hicks*, however, those three seconds occurred immediately prior to the eyewitness' vehicle being struck by the Defendant's vehicle. In this case there is further testimony showing that Defendant "maintained his speed" after Sergeant Sherwood made a U-turn and began pursuing Defendant. Moreover, even though Sergeant Sherwood did not testify as to a specific distance he observed Defendant travel, some distance was implied by Sergeant

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

Sherwood's testimony regarding the U-turn he made and the curve in the road, during which time Defendant "maintained his speed," and after which Sergeant Sherwood briefly lost sight of Defendant. Furthermore, though "it is not necessary that an officer have specialized training to be able to visually estimate the speed of a vehicle[,] [and] [e]xcessive speed of a vehicle may be established by a law enforcement officer's opinion as to the vehicle's speed after observing it[.]" *Barnhill*, 166 N.C. App. at 233, 601 S.E.2d at 218, in this case, Sergeant Sherwood did have specialized training in visual speed estimation.

In this case, the trial court provided its rationale for denying the motion to suppress from the bench, and there were no material conflicts in the evidence presented at the suppression hearing. As such, the necessary findings of fact were implied by the denial of the motion to suppress. *See Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395. These findings support the trial court's conclusion of law that there was a reasonable suspicion that Defendant was speeding. Based on the totality of the circumstances, including Sergeant Sherwood's particularized training in estimating the speed of vehicles, we believe the stop did not violate Defendant's right to be free from unreasonable search and seizure on the basis that there was no reasonable suspicion that Defendant had committed a traffic violation. Since there was a reasonable suspicion that Defendant was speeding, any evidence which resulted from the stop need not be suppressed on this basis, and the trial court did not err by denying Defendant's motion to suppress on this ground.

III. Identification

[2] In Defendant's second argument on appeal, he contends the trial court erred by denying his motion to suppress evidence because there was insufficient evidence identifying Defendant as the driver of the allegedly speeding vehicle due to the short period of time during which Sergeant Sherwood lost sight of Defendant. On this basis, Defendant challenges the trial court's conclusion that there was a reasonable suspicion to support the stop. We disagree.

The standard of review on the question of whether there was a lack of sufficient identification of Defendant, such that there was no reasonable suspicion to stop him, is the same as the standard of review on the question addressed in the previous section, i.e., "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878. In this case, because the

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

trial court provided its rationale for denying the motion to suppress from the bench, and because there were no material conflicts in the evidence presented at the suppression hearing, the necessary findings of fact were implied by the denial of the motion to suppress. See *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395. “Conclusions of law are reviewed de novo and are subject to full review.” *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citation omitted). “A traffic stop is permitted if the officer has a ‘reasonable, articulable suspicion that criminal activity is afoot.’” *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (citation omitted).

Defendant cites *State v. Lindsey*, ___ N.C. App. ___, 725 S.E.2d 350, *disc. review allowed*, ___ N.C. ___, 726 S.E.2d 177 (2012), and *State v. Steelman*, 62 N.C. App. 311, 302 S.E.2d 637 (1983), in support of his argument that there was insufficient evidence identifying Defendant as the driver of the allegedly speeding vehicle in this case.⁴

In *Lindsey* ___ N.C. App. ___, 725 S.E.2d 350, this Court held, in the context of a motion to dismiss, there was not substantial evidence of the defendant’s identity as the perpetrator of the offense charged. Evidence was conflicting as to the description of the van driven by the perpetrator. One officer testified that the van was “bluish.” *Id.* at ___, 725 S.E.2d at 353. When asked what type of van it was, the officer responded, “I don’t know what type, but it was a mini-van from what I saw of it.” *Id.* A different officer, however, testified that the van Defendant was driving was “greenish-bluish” and had a silver stripe on the side of it. *Id.* On direct, when the first officer was shown the photograph of the van, he stated, “I recognized it’s bluish—well, except for the silver. Like I said, at that time, I only got a split second look at the vehicle. I didn’t notice that. I remembered the tag, the first letter was a W, and the vehicle was bluish.” *Id.* The officer did not see

4. As a preliminary matter, we note that the two cases cited by Defendant on appeal pertain to a defendant’s motion to dismiss the charge against him, not a motion to suppress evidence. On a motion to dismiss, this Court applies a different standard of review, analyzing the question de novo to determine “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Lindsey*, ___ N.C. App. ___, ___, 725 S.E.2d 350, 353 (2012). The State also does not provide any authority for the specific question presented by Defendant—identification in the context of a motion to suppress—but, instead, focuses its argument on distinguishing the cases cited by Defendant. We also further note that Judge Steelman authored a dissenting opinion in *Lindsey* on the issue of whether the evidence in that case gave rise to a reasonable inference that the defendant was the operator of the mini-van, and the decision of this Court in *Lindsey* is currently being reviewed by the North Carolina Supreme Court.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

the driver, because he “[n]ever got close.” *Id.* at ____, 725 S.E.2d at 354. On these basic and additional facts, the *Lindsey* Court held that there was not substantial evidence that the defendant was the perpetrator of the offense, such that the trial court erred in denying the defendant’s motion to suppress.

Defendant next attempts to distinguish *State v. Steelman*, 62 N.C. App. 311, 302 S.E.2d 637 (1983), in which this Court held that the trial court did not err in denying Defendant’s motion to dismiss based on a lack of substantial evidence that the defendant in *Steelman* was the perpetrator of the offense, based on the following evidence:

Wilkesboro police officer Gary Parsons observed a red 1972 Toyota traveling at a high rate of speed on U.S. 421. The driver, who was male, did not appear to be wearing a shirt. There was a female passenger in the vehicle. The vehicle turned right at a traffic light without stopping and then failed to stop at a stop sign. Parsons turned on the blue light and siren in his patrol car and pursued the Toyota down U.S. 421. Parsons was traveling 85 m.p.h. and was not gaining on the vehicle. The Toyota then turned down another road, ran onto a traffic island, and hit a sign. While traveling approximately 75 m.p.h., it passed several cars in a no passing 35 m.p.h. zone. The officer lost sight of the vehicle when it turned again onto a logging road. He was unable to follow the vehicle down that road, due to brush and a pine tree which was lying across the road. He drove on to where the logging road came out, just off Country Club Road, which by way of the logging road would have been about a 3/4 mile drive. Meanwhile, a highway patrolman spotted the Toyota on Country Club Road about 9:00 p.m. and followed it to where it pulled off onto a private drive and wrecked in a garden. The driver, who was not wearing a shirt, and a female passenger got out of the car and ran off. The patrolman identified defendant as the driver.

Steelman, 62 N.C. App. at 312, 302 S.E.2d at 637. Based on the foregoing facts, the Court in *Steelman* held that there was substantial evidence of the defendant’s being the perpetrator of the offense, such that the defendant’s motion to dismiss was properly denied:

[T]here was apparently a period of time when no one saw the car involved in the offenses. The defendant in

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

this case theorizes that during that interval, the driver and passenger could have switched positions. This argument ignores the incontroverted fact that Officer Parsons and the highway patrolman both described the driver as male and the passenger as female. The defendant also submits that some unknown third person could have got out from behind the wheel and let defendant drive. We recognize that there are numerous possibilities as to what might have happened on the logging road that night. For circumstantial evidence to be sufficient to overcome a motion to dismiss, it need not, however, point unerringly toward the defendant's guilt so as to exclude all other reasonable hypotheses. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). The evidence is sufficient to go to the jury if it gives rise to "a reasonable inference of defendant's guilt."

Id. at 313, 302 S.E.2d at 638-39.

Although there are obvious differences between the facts of the present case as compared to either of the foregoing cases cited by Defendant on appeal, we find the facts of *Steelman* more analogous to this case than the facts of *Lindsey*. In this case, the following testimony by Sergeant Sherwood supported Defendant's identification as the perpetrator of the alleged speeding offense, despite the fact that Sergeant Sherwood lost sight of Defendant for a brief period of time, such that we believe Sergeant Sherwood had a reasonable suspicion warranting his stop:

As I was traveling inbound, I observed a gray 2001 Cadillac SLS traveling outbound. At that time, I estimated the speed at 52 in a 35, which The Plaza is part of.

Sergeant Sherwood initially observed the car for three to five seconds, after which he made a U-turn and followed Defendant until Defendant turned into the curve. At this point, Sergeant Sherwood lost sight of Defendant. Sergeant Sherwood said then the following happened:

I saw that the gray Cadillac I observed was not on the stretch. And by estimating his speed and realizing that he hadn't sped up—I didn't notice him speed up or slow down—the only logical place for his car to be would be he turned down Shannonhouse—made a right-hand turn down Shannonhouse.

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

Sergeant Sherwood further explained:

[A]t that point when I come around the curve and I don't see the vehicle, only two things could have happened. Either he must have sped up at a great rate of speed to get out of sight by going straight or slowed down and turned down Shannonhouse.

Q. So what did you do after you made that—after you had that thought?

A. I slowed down and made the right-hand turn.

Q. On Shannonhouse?

A. Correct.

Q. Okay. What did you observe as you turned down to Shannonhouse?

A. As soon as I made the turn down Shannonhouse, I observed that the gray Cadillac I estimated the speed on was actually coming right at me, head to head. Not actual head to head but –

Q. Shannonhouse is a two-lane road?

A. Right. Shannonhouse is a two-lane road.

When asked, “How long was it from the time that you made the U-turn on The Plaza till the time that you saw the Cadillac on Shannonhouse?” Sergeant Sherwood responded, “There was a pause for traffic at the U-Turn so I had to stop and wait. That was only four to five seconds, I imagine. And then getting up The Plaza and then actually coming to confront the car on Shannonhouse, probably close to 20 seconds, 30 seconds.” Sergeant Sherwood then stated, “As soon as I saw the car, I recognized it immediately, activated my blue lights and started edging over.” Sergeant Sherwood also gave the following detailed testimony regarding his identification of Defendant:

As part of the estimating vehicles and traffic stops, that sort of thing, it's also part of the training that when you estimate a car, you know, it[]s vehicle identification. So you always try and pick up the make and model. And obviously the color is an important issue and the occupants in the vehicle. When I first estimated the speed and there's that moment when the vehicle passes, I also noticed that there was only one vehicle—one passenger,

STATE v. ROYSTER

[224 N.C. App. 374 (2012)]

which was the driver—one person in the vehicle, the driver. It was a shorter black male. And that was also part of my identification on Shannonhouse once I made the stop.

Sergeant Sherwood also identified Defendant in Court and gave the following testimony specifically pertaining to the question presented by Defendant on appeal:

A. I believe it was the defendant based on the short time and the location of the stop and—

Q. But you don't know that for certain, do you?

A. I do.

Sergeant Sherwood elaborated:

A. . . . I know the person I saw driving was the defendant. You asked if someone could have gotten in or out of the car. And during that time it is conceivable. Somebody could have.

Q. Could have. It could have been a different driver on Shannonhouse than it was on The Plaza; correct?

A. No.

Q. It could have.

A. You asked if it was possible. I said yes, it's possible. And then you asked if it was the same driver. And yes, it is the same driver that I observed on The Plaza.

Based on the necessary implied findings of facts, *see Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395, and considering the totality of the circumstances, we believe the trial court's conclusion that Defendant was the person driving the vehicle was not error. The amount of time Sergeant Sherwood lost sight of Defendant was minimal, approximately thirty seconds. Moreover, when Sergeant Sherwood saw the vehicle again, he recognized both the car and the "same driver," "immediately[.]" The stop did not violate Defendant's right to be free from unreasonable search and seizure on the basis that there was an insufficient identification of Defendant as the perpetrator of the traffic violation to establish a reasonable suspicion.

NO ERROR.

Judges McGEE and BRYANT concur.

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

HENRY O. YOUNG, III, PLAINTIFF

v.

JENNIFER MARIE YOUNG (NOW HOPPER), DEFENDANT

No. COA12-484

Filed 18 December 2012

1. Child Custody and Support—motion for modification—failure to show substantial change in circumstance

The trial court did not err by granting defendant's motion for directed verdict on plaintiff's motion for modification of child support. Plaintiff failed to meet his burden of showing a substantial change in circumstance. Plaintiff failed to prove either that his sustained unemployment was involuntary, given his lack of proof with regard to his job search effort and his self-imposed restrictions on his search, or that, even if voluntary, it was in good faith.

2. Appeal and Error—preservation of issues—untimely appeal—failure to include order or transcript in record

Although plaintiff contended that the trial court erred by failing to hear several of his motions, the Court of Appeals was without jurisdiction to review these claims. Plaintiff did not meet the required timeline with respect to appealing the 18 April 2011 order. Further, plaintiff failed to include either the 10 March 2011 order or the transcript from that proceeding in the record.

3. Constitutional Law—right to court-appointed counsel—failure to prove indigence

The trial court did not err by denying plaintiff's motion for court-appointed counsel in defendant's motion for contempt and attorney fees. Plaintiff failed to meet his burden of proving his indigence. Further, the court stated that it provided plaintiff with several continuances so that he might speak with counsel.

4. Contempt—civil—violation of separation agreement

The trial court did not err by finding plaintiff in contempt of court for a violation of the separation agreement that was allegedly not incorporated into a court order. However, plaintiff overlooked that it was incorporated into the 18 April 2011 order.

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

Appeal by Plaintiff from orders entered 9 November 2011, 2 December 2011, and 4 January 2012 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 25 September 2012.

The Law Office of Colon & Associates, PLLC, by Arlene L. Velasquez-Colon, for Plaintiff-Appellant.

Sharpe, Mackritis & Dukelow, P.L.L.C., by Lisa M. Dukelow, for Defendant-Appellee.

BEASLEY, Judge.

Henry O. Young, III, (Plaintiff) appeals from an order granting Defendant's motion for directed verdict on Plaintiff's motion for modification of child support, a commitment order, and an order for contempt. For the following reasons, we affirm the orders of the trial court.

Plaintiff and Defendant were married on 3 November 2001, separated on 13 August 2007, and subsequently divorced. They have three children together. On 26 June 2008, Plaintiff filed a complaint for child custody. Defendant answered and filed a counterclaim for custody as well. The parties entered a Separation and Property Settlement Agreement on 31 October 2008. On 19 December 2008, the parties agreed to a Consent Judgment with respect to child support and child custody. This order gave primary physical custody to Defendant, but legal custody remained shared.

Plaintiff lost his job on 29 September 2010. He began collecting unemployment benefits in the amount of \$506 per week. On 29 October 2010, Plaintiff filed financial and wage affidavits. On 2 December 2010, Plaintiff filed a motion for Modification of Child Support, *pro se*. Defendant filed financial and wage affidavits on 3 and 4 March 2011. Defendant filed a Motion for Contempt and Attorney's Fees and a Motion for Modification of Child Custody, which was heard by the court, after several continuances, on 10 March 2011. The trial court's order from this hearing, dated 18 April 2011, found Plaintiff in contempt for failure to pay child support and ordered payment of the mortgage in accordance with the Separation Agreement. It also awarded Defendant sole legal custody. Plaintiff's Motion for Modification was dismissed by the court on 19 July 2011 for failure to file a financial affidavit. On 22 August 2011, Plaintiff filed a Rule 60 motion providing proof of timely filing of a financial affidavit. Defendant filed another Motion for Contempt and Attorney's Fees on 25 October 2011. Plaintiff's Rule 60 motion was granted and

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

a hearing on modification was held on 9 November 2011. At the close of Plaintiff's evidence, Defendant made a Rule 58 Motion for a Directed Verdict, alleging Plaintiff failed to present evidence of a substantial change. The trial court denied Plaintiff's Motion for Modification, finding no substantial change of circumstance, thereby granting Defendant's Motion for Directed Verdict ("Order 1").

On 2 December 2011, the trial court heard Defendant's Motion for Contempt and Attorney's Fees. Plaintiff requested the assistance of court-appointed counsel due to the risk of incarceration, but was denied. At the close of the hearing, the trial court issued a civil commitment order ("Order 2") requiring the first of several scheduled payments by 5 p.m. that day or Plaintiff was to be taken into custody. In a court order filed 4 January 2012 ("Order 3"), the trial court found Plaintiff in contempt for violating the Consent Judgment of 19 December 2008 and the court order of 18 April 2011.

I.

[1] Plaintiff first argues that the trial court erred in granting Defendant's motion for directed verdict and thereby dismissing Plaintiff's motion for modification of child support in Order 1. We disagree.

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005).

"[A]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party[.]" N.C. Gen. Stat. § 50-13.7(a) (2011).

Modification of an order requires a two-step process. First, a court must determine whether there has been a substantial change in circumstances since the date the existing child support order was entered. . . .

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

. . . .

Upon finding a substantial change in circumstances, the second step is for the court to enter a new child support order that modifies and supersedes the existing child support order.

Head v. Mosier, 197 N.C. App. 328, 333-34, 677 S.E.2d 191, 196 (2009) (citations omitted). “The trial court only moves to the second step if the court finds there has been a substantial change in circumstances.” *Johnston County ex rel. Bugge v. Bugge*, ___ N.C. App. ___, ___, 722 S.E.2d 512, 514 (2012)(citation omitted). A substantial change in circumstances may be demonstrated by proving the non-custodial parent suffered “a substantial and involuntary decrease in income[,]” or either parent, in good faith, suffered “a voluntary decrease in income” and the child’s financial needs changed. *Frey v. Best*, 189 N.C. App. 622, 631-32, 659 S.E.2d 60, 68 (2008)(citation omitted). However, “[t]he fact that a husband’s salary or income has been reduced substantially does not automatically entitle him to a reduction.” *Wolf v. Wolf*, 151 N.C. App. 523, 526, 566 S.E.2d 516, 518 (2002)(citing *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E.2d 591 (1983)). “When the evidence shows that a party has acted in ‘bad faith,’ the trial court may refuse to modify the support awards.” *See Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519 (citing *Chused v. Chused*, 131 N.C. App. 668, 671, 508 S.E.2d 559, 561–62 (1998)).

Plaintiff contends that the trial court erred in failing to find that Plaintiff’s motivation in not looking for employment in good faith was to avoid child support obligations. The trial court concluded that Plaintiff failed to meet his burden of showing a substantial material change in circumstances that would warrant a modification. Thus, the trial court found Plaintiff failed to satisfy the first step of review. It supported this conclusion with the following findings of fact, all supported by the evidence: Plaintiff only provided the court with proof of five job applications over the previous year and provided no evidence of others, outside of his testimony; Plaintiff failed to apply for seasonal work; Plaintiff failed to provide evidence of employment sought in other fields outside his own area of expertise; Plaintiff chose to move to a rural area with fewer job opportunities and claimed the expense of a commute limited his job search, despite continuing to travel often to the Raleigh/Durham area to see his children; Plaintiff failed to report income received from the Navy for participation in Voluntary Drills; and Plaintiff chose to purchase an

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

additional insurance policy for his children despite the fact that Defendant's policy from her employment covered the children. Additionally, the trial court found that Plaintiff's testimony regarding employment was contradictory and "was not completely honest." We find that these facts sufficiently support the trial court's conclusion that Plaintiff failed to meet his burden of showing a substantial change in circumstance. Plaintiff failed to prove either that his sustained unemployment is involuntary, given his lack of proof with regard to his job search effort and his self-imposed restrictions on his search, or that, even if voluntary, it was in good faith. *See Frey*, 189 N.C. App. at 631-32, 659 S.E.2d at 68. Defendant's argument is overruled.

Plaintiff additionally argues that the trial court should have heard his evidence regarding Defendant's failure to submit a financial affidavit or other necessary information to determine whether a change had occurred. However, Defendant's financial status has no bearing on Plaintiff's ability to meet his support obligations due to his unemployment. According to the two-step process of review, if Plaintiff is not able to establish the grounds of this change in good faith, it is not necessary to reassess the child support allocations between the parents. *See Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519 (citation omitted). Further, the trial court properly denied review and consideration of these documents dated 5 August 2008 because they predated the most recent order from March of 2011. *See Shipman v. Shipman*, 25 N.C. App. 213, 216, 212 S.E.2d 415, 417 (1975)(finding it necessary to review the circumstances of the case only since the most recent decree, not since the initial order).

Last, Plaintiff refers to the Child Support Guidelines to claim that he has suffered more than a fifteen percent reduction in income since the support order, which constitutes a change in circumstances warranting a modification. However, this presumption only applies in the event three years have passed since the initial order. As such, this presumption does not apply here.

II.

[2] Plaintiff makes several other assertions with regard to his 2 December 2010 Motion for Modification. Particularly, Plaintiff argues the trial court erred by failing to hear this motion in conjunction with Defendant's motions for contempt, attorney's fees, and modification, heard on 10 March 2011. Plaintiff further contends that the 18 April 2011 contempt order stemming from Defendant's motion lacked suf-

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

ficient findings of his ability to comply with the 19 December 2008 support order. We are without jurisdiction to review these claims.

“A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). According to the North Carolina Rules of Appellate Procedure, Plaintiff had thirty days from the entry of judgment on these orders to file an appeal. N.C. R. App. P. 3(c). “The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal.” *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997).

Plaintiff did not meet the required timeline with respect to appealing the 18 April 2011 order. Thus, we are without jurisdiction to review the claim that this order lacked sufficient findings independent of a review of a properly appealed order. Further, Plaintiff failed to include either the 10 March 2011 order or the transcript from that proceeding in the record, so we are unable to determine whether the trial court properly declined to hear his motion at that time. N.C. R. App. P. 9(a) (stating that appellate “review is solely upon the record on appeal”).

III.

[3] Plaintiff next argues that the trial court erred in denying his motion for court-appointed counsel in Defendant’s motion for contempt and attorney’s fees and that such error violated Plaintiff’s due process rights. 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). “Under the requirements of due process, a defendant should be advised of his or her right to have appointed counsel where the defendant cannot afford counsel on his own, and ‘where the litigant may lose his physical liberty if he loses the litigation.’” *King v. King*, 144 N.C. App. 391, 393, 547 S.E.2d 846, 847 (2001)(quoting *Lassiter v. Dept. of Social Services of Durham Cty.*, N.C., 452 U.S. 18, 25, 68 L. Ed. 2d 640, 648 (1981)). The burden of proof is on the litigant facing contempt to show “(1) he is indigent, and (2) his liberty interest is at stake.” *Id.*

[I]n order to protect the defendant’s due process rights . . . the trial court should at the outset: (1) determine how likely it is that the defendant will be incarcerated;

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

(2) if it is likely, the court should inquire of the defendant if he desires counsel, and determine his ability to pay for representation; and (3) if the defendant desires counsel but is indigent at the time, the court is to appoint counsel to represent him.

Id. at 394, 547 S.E.2d at 848 (citing *McBride v. McBride*, 334 N.C. 124, 132, 431 S.E.2d 14, 19 (1993)).

Here, we first note that Plaintiff fails to claim that he was indeed incarcerated, and the record is devoid of any indication of such an incarceration. However, Plaintiff was facing possible incarceration, and thus we will review the merits of his claim.

Plaintiff points to the United States Supreme Court's recent decision in *Turner v. Rogers*, ___ U.S. ___ 180 L. Ed. 2d 452 (2011), as support for his assertion that due process required he be provided with counsel. However, *Turner* clearly states that "the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened." *Turner*, ___ U.S. at ___, 180 L. Ed. 2d at 457. The Court employed a balancing test weighing the interest involved with the available procedural safeguards to determine whether the proceeding was fair. *Id.* Contrary to Plaintiff's assertion, *Turner* does not stand for the proposition that counsel is not required only when the opposing party is also unrepresented; rather it finds both that in such a scenario, counsel is not required if there are appropriate safeguards in place, and that counsel is not "automatically require[d]" in all civil contempt hearings for child support from indigent litigants. *Id.*

Yet the key element in *Turner*, just like the key element found in North Carolina's own precedent, is that the litigant claiming the right to counsel must in fact be indigent. *Id.*; *King*, 144 N.C. App. at 393, 547 S.E.2d at 847. North Carolina places the burden of establishing indigence on the party claiming it. *King*, 144 N.C. App. at 393, 547 S.E.2d at 847.

Here, Plaintiff informed the court that he had found steady employment and he provided the court with financial disclosures covering his period of unemployment. The court determined that Plaintiff had the ability to pay. As such, Plaintiff failed to meet his burden of proving his indigence. Further, the court stated that it provided Plaintiff with several continuances so that Plaintiff might speak with counsel. Consequently, we find Plaintiff's rights were not violated and the trial court did not err in failing to appoint counsel.

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

IV.

[4] Last, Plaintiff claims that the trial court erred in finding Plaintiff in contempt of court for a violation of the separation agreement that was not incorporated into a court 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. ‘Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.’” *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)) (citation omitted).

“A marital separation agreement which has not been incorporated into a court order is ‘generally subject to the same rules of law with respect to its enforcement as any other contract.’” *Condellone v. Condellone*, 129 N.C. App. 675, 681, 501 S.E.2d 690, 695 (1998)(quoting *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979)). “As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform.” *Id.* at 682, 501 S.E.2d at 695 (internal quotation marks omitted).

When “the court incorporates by reference a separation agreement into a consent judgment, making the agreement a part of the judgment and ordering compliance with its terms, the agreement merges into the consent judgment and is superseded by the court’s decree, any language to the contrary notwithstanding.” *Marks v. Marks*, 316 N.C. 447, 454, 342 S.E.2d 859, 863 (1986)(citations omitted). “All separation agreements approved by the court as judgments of the court will be treated . . . as court ordered judgments. These . . . are modifiable, and enforceable by the contempt powers of the court[.]” *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). The court’s power to enforce an agreement through contempt proceedings extends only to those provisions submitted to the court for approval. *Id.* at 386-87, 298 S.E.2d at 342. A contempt order is appropriate where the litigant has failed to comply with an order of the court which “remains in force[.]” has a purpose that “may still be served by compliance with the order[.]” and where the litigant “is able to comply” but willfully fails to do so. N.C. Gen. Stat. § 5A-21(a) (2011).

YOUNG v. YOUNG

[224 N.C. App. 388 (2012)]

Plaintiff correctly asserts that the 19 December 2008 Consent Judgment incorporates only those provisions applying to child custody and child support. Paragraph 15 of that order, stating that any violation of the Separation Agreement may be “enforced by the court . . . [via] a Motion for Contempt[,]” is specifically enumerated as applying only to the child custody and child support provisions of the Separation Agreement. Thus, Plaintiff’s agreement to pay the mortgage on the marital home was not incorporated in the court order. *Walters*, 307 N.C. at 386–87, 298 S.E.2d at 342. However, Plaintiff overlooks that it was incorporated into the 18 April 2011 order.

In the 18 April 2011 order, the court acknowledged the parties’ Separation Agreement provision requiring Plaintiff to pay the mortgage on the marital home. It did not find Plaintiff in contempt for failure to make these payments; contempt was only found with regard to Plaintiff’s failure to make child support payments as required by the Consent Judgment. The trial court instead ordered the Plaintiff to make the mortgage payments he agreed to. It also found that Plaintiff’s failure to do so had been willful, and thus not due to his inability to comply. While not using this precise language, the 18 April 2011 order properly ordered Plaintiff’s specific performance of his agreement to make mortgage payments under the Separation Agreement, thereby incorporating this provision going forward.

The trial court made sufficient findings of fact in the 4 January 2012 order to hold Plaintiff in contempt. It found that Plaintiff failed to comply with the 18 April 2011 order with respect to failure to make the mortgage payments or to reimburse Defendant for the same. This order remained in force and carried a purpose that could still be met by reimbursing Defendant for the money she paid of Plaintiff’s agreed share of the mortgage. The trial court further found that Plaintiff was able to make such payments based on his monthly income and expenses, and that his failure to do so was willful. *See* N.C. Gen. Stat. § 5A-21(a) (2011). It therefore provided a sufficient factual basis for concluding that Plaintiff was in contempt of the 18 April 2011 order. Consequently, the trial court did not err in its 4 January 2012 order in finding Plaintiff in contempt.

Affirmed.

Judges MCGEE and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 DECEMBER 2012

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| ALCORN v. BLAND No. 12-613 | Pitt (11CVS2063) | Affirmed |
| BARR v. GOODYEAR TIRE & RUBBER CO. No. 12-557 | Indus. Comm. (X57228) | Dismissed |
| BLAKENEY v. UNIV. OF N.C. AT CHARLOTTE No. 12-471 | Mecklenburg (11CVS242) | Affirmed |
| BROUGHTON v. CNTY. COMM'N OF WAKE CNTY. No. 12-287 | Wake (10CVD20602) | Affirmed |
| BRYANT & ASSOCS., LLC v. EVANS No. 12-732 | Clay (11CVS31) | Affirmed in Part, Reversed in Part and Remanded |
| COPELAND v. COPELAND No. 11-1602 | Rockingham (09CVD1658) | Affirmed in part, reversed and remanded in part |
| DIGH v. DIGH No. 12-506 | Burke (98CVD89) | Affirmed |
| HAMILTON v. MORTG. INFO. SERVS., INC. No. 12-584 | Wake (08CVS15102) | Affirmed |
| IN RE BEAUCHEMIN No. 12-230 | Jackson (11SP138) | Affirmed |
| IN RE C.C.B. No. 12-875 | Mecklenburg (09J13-14) | Affirmed |
| IN RE D.D.H. No. 12-606 | Alexander (97JA8) | Dismissed |
| IN RE D.N.W. No. 12-765 | Sampson (10JT16) | Affirmed |
| IN RE K.C.H. No. 12-1013 | Caldwell (09J106) | Vacated |

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| IN RE K.L.T.G. No. 12-539 | Gaston (10JT129) | Affirmed |
| IN RE L.E.M.T. No. 12-743 | Cumberland (09JT432-433) | Reversed and Remanded |
| IN RE M.L.M. No. 12-984 | Sampson (10JT73) | Affirmed |
| IN RE N.C. YADKIN HOUSE, LLC No. 12-630 | Property Tax Commission (10PTC901) | Affirmed |
| IN RE R.J.U. No. 12-806 | Durham (10J32-33) | Affirmed |
| IN RE T.W.B. No. 12-615 | Rockingham (10JT81) | Affirmed |
| IN RE Y.B. No. 12-721 | McDowell (11JA73-79) | Affirmed |
| N.C. II LP v. BRANCH BANKING & TRUST CO. No. 12-898 | Forsyth (12CVS842) | Affirmed |
| PROPERTIES OF S. WAKE, LLC v. THE FID. BANK No. 12-611 | Wake (11CVS6373) | Affirmed |
| RAYFIELD PROPERTIES, LLC v. BUS. INSURERS OF THE CAROLINAS, INC. No. 12-791 | Orange (10CVS1834) | Affirmed |
| SOLLIS v. HOLMAN No. 12-712 | Onslow (10CVS4815) | Affirmed |
| STATE v. ALEXANDER No. 12-242 | Catawba (10CRS57159) | Dismissed |
| STATE v. ARRIAGA No. 12-413 | Buncombe (98CRS55373) | No Error |
| STATE v. BAIRD No. 12-407 | Mecklenburg (10CRS247395) | No Error |
| STATE v. BEAN No. 12-697 | Randolph (08CRS56156) | No prejudicial error |

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| STATE v. BROOKS No. 12-747 | Johnston (11CRS50226) (11CRS607) | No Error |
| STATE v. BROWN No. 12-84 | Randolph (08CRS51730) | No Error |
| STATE v. DARDEN No. 12-595 | Cumberland (09CRS54594) | No Error |
| STATE v. DEBRUHL No. 12-773 | Buncombe (10CRS10428) (10CRS61555) | No error as to trial; remanded for resentencing |
| STATE v. GLOVER No. 12-361 | Mecklenburg (10CRS232289-91) | No Error |
| STATE v. KRIEGER No. 12-730 | Stanly (10CRS51356) | No Error |
| STATE v. MANSON No. 12-205 | Vance (10CRS177) (10CRS51064) | Affirmed |
| STATE v. MCDARIS No. 12-476 | Mecklenburg (09CRS233345) (09CRS233346) | No prejudicial error |
| STATE v. MCFADDEN No. 12-302 | Mecklenburg (10CRS223638) (10CRS223640-42) | No Error |
| STATE v. MEEKINS No. 11-1305 | Forsyth (07CRS60089) (08CRS17229) (09CRS51911) | Affirmed |
| STATE v. OWENS No. 12-251 | Buncombe (10CRS52760) | No Error |
| STATE v. PARKS No. 12-460 | Lincoln (08CRS52519-20) (10CRS1137) | No plain error |
| STATE v. PARTIDA-RODRIGUEZ No. 12-632 | Mecklenburg (10CRS232530-31) | Remand for entry of judgment consistent with this opinion |
| STATE v. PATTON No. 12-507 | Buncombe (07CRS12446) (07CRS60506-08) (07CRS638) | Affirmed |

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|---|---|--------------------------|
| STATE v. PITTMAN No. 12-510 | Edgecombe (09CRS52989) | No Error |
| STATE v. ROBERTS No. 12-360 | Forsyth (10CRS28980) (10CRS58982) | No Error |
| STATE v. SASSER No. 12-446 | Columbus (10CRS51332) | No Error |
| STATE v. SLAUGHTER No. 12-631 | Mecklenburg (10CRS205201) (10CRS205208) | No Error |
| STATE v. SORRELL No. 12-572 | Wake (10CRS207962) (11CRS11870) | No Error |
| STATE v. SPRINGS No. 12-578 | Forsyth (02CRS21524) (02CRS56074) | Affirmed |
| STATE v. WILLIAMS No. 12-596 | Mecklenburg (11CRS204129) (11CRS30472) | No Error |
| STATE v. WRIGHT No. 12-633 | Mecklenburg (09CRS237182) (09CRS237186) (09CRS68806) | No Error |
| TURNER v. THE HAMMOCKS BEACH CORP. No. 11-1420 | Wake (06CVS18173) | Reversed and Remanded |
| WAUGHTOWN LEASING CO., LLC v. CITY OF WINSTON-SALEM No. 12-654 | Forsyth (10CVS5334) | Dismissed |
| WOOLARD v. ROBERTSON No. 12-384 | Craven (11CVS1127) | Affirmed |

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

AUSTIN MAINTENANCE & CONSTRUCTION, INC., PLAINTIFF

v.

CROWDER CONSTRUCTION COMPANY AND STEVE LANIER, DEFENDANTS

No. COA12-201

Filed 18 December 2012

1. Fiduciary Relationship—breach of fiduciary duty—employer-employee relationship—no exercise of dominion

The trial court did not err by granting summary judgment in favor of defendant Lanier with respect to plaintiff's breach of fiduciary duty claim. There was no genuine issue of material fact regarding whether defendant Lanier owed a fiduciary duty to plaintiff as a result of their employer-employee relationship as defendant Lanier's status as the foreman of a four-person crew did not "uniquely position" him to exercise dominion over plaintiff.

2. Contracts—tortious interference with contract—existence of valid contract

The trial court did not err by granting summary judgment in favor of defendants with respect to plaintiff's tortious interference with contract claim. Plaintiff failed to forecast evidence tending to show the existence of a valid contract between plaintiff and a third person which conferred upon plaintiff a contractual right against a third person, the first element required to establish a tortious interference with contract claim.

3. Unfair Trade Practices—workforce not surreptitiously raided—arguments meritless

The trial court did not err by granting summary judgment in favor of defendants with respect to its unfair or deceptive trade practices claim. The record failed to support plaintiff's assertion that defendants "surreptitiously raided" plaintiff's workforce and plaintiff's remaining arguments were meritless.

4. Conspiracy—civil conspiracy—injunctive relief

The trial court did not err by granting summary judgment in favor of defendants with respect to its civil conspiracy claim and its request for injunctive relief. Having already considered and rejected the arguments upon which plaintiff based these claims, plaintiff's argument was meritless.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

Appeal by plaintiff from judgments entered 2 November 2011 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2012.

Moye, O'Brien, O'Rourke, Pickert & Dillon, LLP, by J. Andrew Williams, Stephen W. Pickert, and Peter C. Anderson, for plaintiff-appellant.

Erwin, Bishop, Capitano & Moss, P.A., by Joseph W. Moss, Jr., for defendant-appellee Steve Lanier.

Johnston, Allison & Hord, P.A., by Michael L. Wilson and Kerry L. Traynum, for defendant-appellee Crowder Construction Company.

ERVIN, Judge.

Plaintiff Austin Maintenance & Construction, Inc., appeals from orders granting summary judgment in favor of Defendants Steve Lanier and Crowder Construction Company with respect to Plaintiff's breach of fiduciary duty claim, which had been asserted solely against Mr. Lanier; Plaintiff's claims for tortious interference with contract, unfair or deceptive trade practices, and civil conspiracy, which had been asserted against both Defendants; and Plaintiff's request for injunctive relief. On appeal, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendants on the grounds that the record reveals the existence of genuine issues of material fact concerning whether Mr. Lanier breached a fiduciary duty that he owed Plaintiff and whether Defendants tortiously interfered with a contract between Plaintiff and The Timken Company, engaged in unfair or deceptive trade practices, and participated in a civil conspiracy, and on the grounds that Plaintiff was entitled to injunctive relief. After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Background

A. Substantive Facts

Timken operates a "tapered roller bearing" manufacturing plant in Randleman, a town near Asheboro. Timken personnel refer to this facility as the Asheboro plant. Between 2006 and 2010, Sanders Brothers Inc. provided construction-related maintenance services at Timken's Asheboro plant and several other Timken plants pursuant to

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

a Master Service Agreement (MSA). The MSA set out the general terms and conditions which would apply to specific contracts into which Timken and Sanders might enter in the future. The MSA did not provide for the provision of specific services or obligate either party to enter into specific contracts; instead, the MSA provided that Timken would execute Purchase Orders memorializing any future contracts between the parties.

In 2010, Sanders experienced serious financial difficulties. At that point, Rick Flickinger, the manager of Timken's Asheboro plant, investigated the possibility of procuring construction-related maintenance services from a different company. In the course of that process, Crowder, which competes with Plaintiff in the construction maintenance business, made Mr. Flickinger's "short list." However, after Sanders Brothers assigned its rights under the MSA to Plaintiff effective on 9 June 2010, Plaintiff assumed responsibility for providing construction-related maintenance services at Timken's Asheboro plant instead.

At the time that Plaintiff began providing construction maintenance services at the Asheboro plant, Mr. Lanier had been employed at that facility for twelve years, with the last six years of that period having been spent as a Sanders Brothers employee. Mr. Lanier supervised a crew consisting of three other men who had also worked at the plant for at least five years—James Moore, Willard McDaniel, and Earl Turner.¹ The crew performed various tasks at the direction of Mr. Flickinger, including welding, metal fabrication, wiring, repairing the water pipes and coolant system, pipe fitting, and performing other machine repairs. In addition, Timken had a "tendency to rearrange machines" in the Asheboro plant, so Mr. Lanier's crew was involved in implementing these "machine moves" as well. The machines were very large; moving them required a complex series of procedures including the performance of some construction-related work.

After Plaintiff purchased Sanders Brothers' rights under the MSA, it hired Mr. Lanier and the other members of the crew as hourly, at-will employees. Mr. Lanier continued to serve as crew foreman after coming into Plaintiff's employment; his immediate supervisor was Jack Richardson, one of Plaintiff's General Managers. As crew superintendent and Plaintiff's highest ranking employee at the Asheboro

1. Mr. Lanier's crew originally included a janitor named Juan Estrada. However, Crowder did not hire Mr. Estrada because of questions about his immigration status. As a result, all references to Mr. Lanier's crew throughout the remainder of this opinion should be understood as encompassing only the four individuals named in the text.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

plant, Plaintiff had additional responsibilities over and above those assigned to the other crew members. Among other things, Mr. Lanier supervised the crew, coordinated their work on specific projects, and had the right to select crew members and request pay raises. Mr. Lanier also had certain record-keeping responsibilities, including documenting compliance with safety regulations, overseeing weekly employee time sheets, and preparing documents that Plaintiff used to generate invoices and prepare other reports. Finally, Mr. Lanier functioned as the primary source of communication between his crew and the individuals directly responsible for operating Timken's Asheboro plant and Plaintiff. Mr. Lanier did not work from an office; instead, he performed his supervisory tasks while working with the rest of the crew on construction-related maintenance projects. Neither Mr. Lanier nor any other member of the crew was asked to sign a non-competition agreement, a non-solicitation agreement, or a confidentiality agreement.

Within a month after becoming employed by Plaintiff, the members of the crew became dissatisfied with the manner in which Plaintiff handled certain administrative issues, the amount of paperwork that Plaintiff required, and the manner in which Plaintiff responded to their concerns. As a result, all four crew members began looking for other employment during the summer of 2010.

On 14 July 2010, James Moore called Brian Gossett, a Crowder employee with whom James Moore had worked when both were employed by Sanders Brothers at the Asheboro plant. At that time, James Moore, who wanted to "get away from [Plaintiff]," asked Mr. Gossett if he might obtain employment at Crowder. After Mr. Gossett indicated that Crowder was always looking for good workers, James Moore gave him Mr. Lanier's phone number. Mr. Gossett, in turn, agreed to provide Mr. Lanier's phone number to Tracy Moore, who held a management position with Crowder.

On the following day, Tracy Moore called Mr. Lanier. At that time, Mr. Lanier and Tracy Moore discussed the possibility that Mr. Lanier's entire crew would begin working for Crowder. During that conversation, Mr. Lanier asked Tracy Moore to send him information concerning the salary and benefit package that Crowder would be in a position to offer to members of the crew.

Mr. Lanier also talked to Mr. Flickinger about the possible change. Among other things, Mr. Lanier told Mr. Flickinger that he did not want to continue working for Plaintiff and that the crew com-

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

plained about Plaintiff “several times a week.” After speaking with his supervisors, Mr. Flickinger informed Mr. Lanier that, instead of being contractually obligated to work with Plaintiff, Timken was free to procure specific construction-related maintenance services from Crowder rather than Plaintiff. In addition, Mr. Flickinger told Mr. Lanier that he would like the crew to stay at the Asheboro plant regardless of whether they were employed by Plaintiff, Crowder, or some other company. After receiving this information, Crowder provided salary and benefits information to Mr. Lanier, submitted a proposal under which Crowder would perform work at Timken’s Asheboro plant to Mr. Flickinger, and completed the documentation required for Crowder to become qualified to provide construction-related maintenance services at the Asheboro plant.

Between July and October of 2010, the crew had frequent discussions concerning their dissatisfaction with Plaintiff and the possibility that they might begin working for Crowder instead. On 23 August 2010, Mr. Richardson received an email from Caleb Rice, one of Plaintiff’s safety managers, in which Mr. Rice stated that:

I just wanted to send you guys a note reflecting on my visit with Steve Lanier at Timken Asheboro last week. . . . I would regret not letting you know the concerns that Steve has voiced to me, and knowing Steve as a very honest and straightforward person, these are not idle threats. . . . Steve is looking at other contactors to work for in the Timken Asheboro plant, and right now the only thing stalling the change is which company will offer the best pay and benefits. First of all, Steve says that he does not want to change companies, he feels that they have been through enough without having to go through another change, but the crew up there will not continue working with all of these issues. The following are some of the issues that he has had over the last two months. . . .

On the following day, Mr. Richardson traveled to the Asheboro plant and met with Mr. Lanier, Mr. Flickinger, and the other members of the crew for the purpose of discussing issues that were of concern to the crew. However, the crew continued to be dissatisfied with their status as employees of Plaintiff.

On 27 September 2010, the members of the crew met with Tracy Moore to discuss working for Crowder. Although the benefits offered

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

by Crowder were not as favorable as those already provided by Plaintiff, the entire crew decided to quit working for Plaintiff and to go to work for Crowder. As a result, on 7 October 2010, the crew traveled to Crowder's Spartanburg, South Carolina, office, where they completed job applications and were hired to work for Crowder beginning on 18 October 2010.

The crew was involved in moving a very large and complex machine during the following week. On 14 October 2010, which was a Thursday, they worked three hours overtime in order to make sure that the machine move had been sufficiently completed that a regular Timken employee or contractor could finish the job without a loss of production capability if something prevented the crew from returning on Monday as Crowder employees. After finishing work on 14 October 2010, Mr. Lanier called Mr. Richardson and informed him that he, Mr. McDaniel, Mr. Turner, and Mr. Moore were resigning. On the following Monday, 18 October 2010, Mr. Lanier and the other crew members returned to work at the Asheboro plant as Crowder employees.

B. Procedural History

On 3 November 2010, Plaintiff filed a complaint in which it sought damages from both Defendants based on claims sounding in tortious interference with contractual relations, unfair or deceptive trade practices, and civil conspiracy and an additional claim against Mr. Lanier for breach of fiduciary duty. In addition, Plaintiff sought the issuance of a permanent injunction barring Crowder from providing construction-related maintenance services at the Asheboro plant. On 3 January 2011, Defendants filed separate answers in which they denied the material allegations of Plaintiff's complaint; asserted various affirmative defenses; sought dismissal of Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); and requested an award of attorneys' fees. On 20 April 2011, Judge Richard D. Boner entered an order denying Defendants' dismissal motions and allowing Plaintiff's request to amend its complaint.

On 26 April 2011, Plaintiff filed an amended complaint in which it asserted the same claims that had been asserted in its original complaint. In essence, Plaintiff alleged that Defendants had "knowingly conspired" to "implement a predatory scheme" by which the crew would resign "*en masse*" in "the middle of a critical machine move" on 14 October 2010 and that, given that set of circumstances, Mr. Flickinger "had no choice" but to use Mr. Lanier's crew, in their capacity as Crowder employees, for needed construction-related mainte-

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

nance services. On 1 June 2011, Defendants filed answers in which they denied the material allegations of the amended complaint, asserted various affirmative defenses, sought dismissal of Plaintiff's claims for failure to state a claim for which relief could be granted, and requested an award of attorneys' fees.

On 2 September 2011, Defendants filed motions seeking the entry of summary judgment in their favor with respect to all of Plaintiff's claims. The trial court conducted a hearing for the purpose of addressing the issues raised by Defendants' summary judgment motions on 14 September 2011. On 2 November 2011, the trial court entered summary judgment orders in favor of Defendants with respect to all of the claims that had been asserted in the amended complaint. Plaintiff noted a timely appeal to this Court from the trial court's orders.

II. Legal Analysis

A. Standard of Review

An award of 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 of material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citing *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). However, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001).

"A genuine issue of material fact arises when 'the facts alleged . . . are of such nature as to affect the result of the action.'" *N.C. Farm*

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

Bureau Mut. Ins. Co. v. Sadler, 365 N.C. 179, 182, 711 S.E.2d 114, 116 (2011) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (citation and quotation marks omitted)). “On a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial.” *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161-62 (1976) (citations omitted). “‘When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)).

The “standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998), *mod. on other grounds, Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). A trial court’s decision to grant a summary judgment motion is reviewed on a *de novo* basis. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). We will now utilize this standard of review for the purpose of analyzing the appropriateness of the trial court’s decision to grant summary judgment in favor of Defendants.

B. Breach of Fiduciary Duty

[1] In its first challenge to the trial court’s order, Plaintiff contends that the trial court erred by granting summary judgment in favor of Mr. Lanier with respect to Plaintiff’s breach of fiduciary duty claim. In support of this argument, Plaintiff asserts that the record discloses the existence of genuine issues of material fact regarding the extent to which Mr. Lanier owed a fiduciary duty to Plaintiff and whether he breached that duty. Plaintiff’s argument lacks merit.²

“For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which ‘there has been a spe-

2. Although Plaintiff makes much of allegedly unsupported “findings” of undisputed fact in the trial court’s order, we need not address its specific complaints about these “findings” given that we have been able, based on our own review of the record, to determine what the undisputed record evidence tends to show.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

cial 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 in which there is confidence reposed on one side, and resulting domination and influence on the other.’ ” *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707-08 (citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984), and quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). “ [I]n North Carolina . . . there are two types of fiduciary relationships: (1) those that arise from legal relations such as attorney and client, broker and client . . . partners, principal and agent, trustee and *cestui que* trust, and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.’ ” *Ellison v. Alexander*, 207 N.C. App 401, 408, 700 S.E.2d 102, 108 (2010) (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (internal citation omitted)).

Business partners, for example, are each other’s fiduciaries as a matter of law. In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. Thus, the relationship can arise in a variety of circumstances . . . and may stem from varied and unpredictable factors.

Hajmm Co. v. House of Raeford Farms, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991) (citing *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954) (other citation omitted)).

The undisputed evidence tends to show that Mr. Lanier was the foreman of a crew that consisted of four men, including himself; that his job duties were confined to performing various tasks related to the provision of construction-related maintenance services; and that his employment was terminable at will by Plaintiff. Under that set of circumstances, we have no difficulty in concluding that Mr. Lanier did not occupy the type of fiduciary relationship with Plaintiff that arises by operation of law, such as that inherent in an attorney-client relationship. As a result, the only way in which a fiduciary relationship between Plaintiff and Mr. Lanier could have existed would be if Plaintiff reposed trust and confidence in Mr. Lanier, resulting in a situation in which Mr. Lanier exercised “superiority and influence” over Plaintiff.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

Although our appellate jurisprudence does not precisely define when a fiduciary relationship of this second type does or does not exist, “the broad parameters accorded the term have been specifically limited in the context of employment situations. Under the general rule, ‘the relation of employer and employee is not one of those regarded as confidential.’” *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (quoting *King v. R.R.*, 157 N.C. 44, 62-63, 72 S.E. 801, 808 (1911) (other citation omitted)). As a result, in the absence of some unusual set of facts that would suffice to differentiate the relationship between Plaintiff and Mr. Lanier from other employer-employee relationships, Mr. Lanier did not have a fiduciary relationship with Plaintiff.

According to the record, Plaintiff’s corporate parent has over 7,000 employees and an annual income of approximately \$300,000,000.00 to \$500,000,000.00, of which Plaintiff’s work at Timken’s Asheboro plant generated approximately \$2,000,000.00, or .04 percent to .06 percent. Of these 7,000 or so employees, only five were working at the Asheboro plant, which Plaintiff characterizes as a “remote” company site. As we have already noted, Mr. Lanier was an hourly, at-will employee charged with supervising a four-person crew. The record contains no evidence tending to show that Mr. Lanier played any role within Plaintiff’s organization except for that of a foreman overseeing a crew performing construction-related maintenance services. In light of that set of facts, we conclude that any confidence that Plaintiff reposed in Mr. Lanier consisted of nothing more than relying on him to competently perform his assigned duties. Simply put, given that the record demonstrates that Mr. Lanier was a relatively small cog in a very large operation, we have no hesitation about concluding that Mr. Lanier exercised little or no control over Plaintiff’s overall operations and that Mr. Lanier did not owe any fiduciary duties to Plaintiff.

In attempting to persuade us to reach a contrary conclusion, Plaintiff stresses the degree of responsibility and authority assigned to a foreman such as Mr. Lanier and argues that he had considerable responsibility for, and authority over, the other crew members. However, the fact that Mr. Lanier had responsibility for ensuring the proper performance of construction-related maintenance tasks assigned to his crew by Mr. Flickinger simply does not make him Plaintiff’s fiduciary. As the Supreme Court observed in *Dalton*:

... [T]he managerial duties of Camp were such that a certain level of confidence was reposed in him by Dalton; and (2) as a confidant of his employer, Camp

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

was therefore bound to act in good faith and with due regard to the interests of Dalton. In our view, such circumstances, as shown here, merely serve to define the nature of virtually all employer-employee relationships; without more, they are inadequate to establish Camp's obligations as fiduciary in nature. No evidence suggests that his position in the workplace resulted in "domination and influence on the other [Dalton]," an essential component of any fiduciary relationship. Camp was hired as an at-will employee to manage the production of a publication. . . . [H]is responsibilities were not unlike those of employees in other businesses and can hardly be construed as uniquely positioning him to exercise dominion over Dalton.

Dalton at 651-52, 548 S.E.2d at 708 (quoting *Abbitt*, 201 N.C. at 598, 160 S.E. at 906). Thus, for essentially the same reasons that underlie the Supreme Court's decision in *Dalton*, we conclude that Mr. Lanier's status as the foreman of a four-person crew did not "uniquely position" him to exercise dominion over Plaintiff.

We have carefully considered Plaintiff's remaining arguments in support of its claim that Mr. Lanier breached his fiduciary duty owed to Plaintiff, and conclude that they lack merit as well. For example, Plaintiff contends that there are disputed issues of fact regarding the scope of Mr. Lanier's responsibilities and authority given Plaintiff's contention that Mr. Lanier "participated in any discussions [with] plaintiff's officers concerning management level decisions or operations of the company concerning cash flow, lines of credit, issuance of stock or debt and the like." However, the only evidentiary support that Plaintiff has offered for this argument is the fact that Mr. Lanier had supervisory responsibility for a four-person crew and that he reported to Mr. Richardson, one of Plaintiff's managers. The undisputed record evidence shows that Mr. Lanier only interacted with Mr. Richardson concerning matters affecting his four-person crew; nothing in the record suggests that Mr. Lanier was ever involved in making any "management level decisions" as that term is ordinarily understood. Similarly, Plaintiff asserts that issues of fact regarding the extent to which Mr. Lanier owed a fiduciary duty to Plaintiff arise from language in the MSA spelling out Plaintiff's obligation to employ on-site supervisory personnel. However, the relevant language from the MSA, which has no binding effect unless Timken actually con-

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

tracted with Plaintiff to perform specific work at the Asheboro plant, provides no additional basis for concluding that Mr. Lanier had a fiduciary relationship with Plaintiff. Moreover, Plaintiff argues that the fact that Mr. Lanier was an hourly at-will employee and had not been asked to sign a non-competition agreement or similar documents is “immaterial to whether [Plaintiff] reposed trust and confidence in [Mr.] Lanier resulting in [his] domination and influence on [Plaintiff] at the Timken Asheboro plant site.” In view of the fact that the presence or absence of such agreements did shed light on the nature of the relationship between Plaintiff and Mr. Lanier, we believe that the trial court properly considered these factors in determining whether to grant summary judgment in favor of Mr. Lanier. As a result, none of Plaintiff’s attempts to persuade us that there were genuine issues of material fact concerning the extent, if any, to which Mr. Lanier owed a fiduciary duty to Plaintiff have any merit.

Similarly, we are unable to agree with Plaintiff’s contention that the Supreme Court’s decision in *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308, *rehearing denied*, 351 N.C. 191, 541 S.E.2d 716 (1999), supports its contention that Mr. Lanier breached a fiduciary duty that he owed Plaintiff. In *Sara Lee*, the defendant’s job description required him to provide the plaintiff “‘with the best possible pricing, availability, and support of hardware and services.’” In violation of this obligation, the defendant started his own company and “engaged in self-dealing by supplying Sara Lee with computer parts and services at allegedly excessive cost while concealing his interest in these businesses.” *Sara Lee*, 351 N.C. at 29, 519 S.E.2d at 309. On these facts, we upheld the trial court’s conclusion “that defendant owed a fiduciary duty to Sara Lee with respect to his role in recommending the purchase and ordering of computer parts and related services for Sara Lee and that defendant breached that fiduciary duty[.]” *Sara Lee* at 30, 519 S.E.2d at 310. However, the alleged breach of fiduciary duty at issue in *Sara Lee* is very different from the alleged breach of fiduciary duty at issue here. According to Plaintiff:

The record evidence establishing that the self-dealing [Mr.] Lanier was a fiduciary of [Plaintiff] is even stronger than that of the employee in *Sara Lee*. [Plaintiff] entrusted and authorized its Site Manager [Mr.] Lanier to interact with its valued customer Timken and to manage and supervise the other [Plaintiff] employees at the site. [Mr.] Lanier maintained and repaired unique machinery for [Plaintiff’s] customer

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

Timken. For [Plaintiff's] benefit he was supposed to maintain a strong relationship with [Mr.] Flickinger and provide other support as needed. . . . Instead, [Mr.] Lanier acted to benefit himself to the strong detriment of his employer, [Plaintiff].

However, the record contains no evidence that Mr. Lanier failed to “manage and supervise the other [Plaintiff] employees at the site,” to “maintain a strong relationship with [Mr.] Flickinger,” to perform any other duty arising from his job description, or to refrain from engaging in self-dealing. On the contrary, the sole basis for Plaintiff’s claim that Mr. Lanier engaged in “self-dealing” and acted “to benefit himself to the strong detriment of his employer” is the fact that Mr. Lanier resigned from his employment with Plaintiff in order to work for Crowder because he “was clearly not happy working for [Plaintiff]” and saw a “switch to Crowder as being in his long-term best interests from a job satisfaction perspective.” However, the fact that an at-will employee stops working for one employer, as the result of personal dissatisfaction with his existing position, and goes to work for another, who then takes over work that had previously been performed by the employee’s original employer, is not consistent with any recognized definition of “self-dealing,” *see* Black’s Law Dictionary 1390 (8th ed. 2004) (defining self-dealing as “[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty”), and does not bear any significant resemblance to the facts at issue in *Sara Lee*.

In addition, Plaintiff points out that the Supreme Court stated in *Dalton* that the defendant, although not a fiduciary, was “bound to act in good faith and with due regard to the interests of” his employer. Similarly, Plaintiff argues that it “placed its trust and confidence in [Mr.] Lanier and that [he] used that trust, confidence and resulting power to dominate [Plaintiff] and [Plaintiff’s] other employees and, surreptitiously, from the inside, stole away the very business he was supposed to service and safeguard for [Plaintiff].” However, the record contains no evidence tending to show that Mr. Lanier had any responsibility, beyond the adequate performance of his job duties, for safeguarding Timken’s decision to contract with Plaintiff, instead of some other entity, for the provision of construction-related maintenance services at the Asheboro plant. As a result, we do not believe that Plaintiff’s argument in reliance upon *Dalton* has any merit.

We have carefully examined Plaintiff’s factual contentions regarding the circumstances surrounding the resignation of Mr.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

Lanier and his co-workers from their employment with Plaintiff and Timken's decision to transfer construction maintenance service work from Plaintiff to Crowder and have concluded that these contentions lack adequate record support. For example, Plaintiff contends that Mr. Lanier "leveraged the trust and confidence reposed in him by [Plaintiff] to pressure both [Plaintiff's] other employees and [Mr.] Flickinger into submitting to a conspiracy with Crowder to replace [Plaintiff] with Crowder at the Timken Asheboro plant site." In addition, Plaintiff repeatedly asserts that Mr. Lanier "pressured" his co-workers and Mr. Flickinger to work with Crowder instead of Plaintiff and contends that, in order to "achieve his self-dealing goal, [Mr.] Lanier directed the crew to . . . resign *en masse* from [Plaintiff] in the middle of a critical machine move." Finally, Plaintiff contends that Mr. Lanier "filtered and provided the information that he thought would best advance his self-dealing conspiracy with Crowder to steal the Timken business."

After thoroughly reviewing the evidentiary materials that were submitted for the trial court's consideration, we find no evidence that Mr. Lanier "pressured" his crew to resign their employment with Plaintiff or to begin working for Crowder or that Plaintiff "filtered" the information that they received prior to deciding to change employers. As we have already noted, each crew member testified that, even before learning of a possible position at Crowder, they were planning to leave Plaintiff's employment. None of the crew members testified that Mr. Lanier "pressured" them into resigning their employment with Plaintiff; in fact, the record is completely devoid of any evidence that Mr. Lanier suggested that the members of the crew should work for Crowder rather than Plaintiff. Similarly, there is no evidence that Mr. Lanier concealed or "filtered" information in order to "pressure" his crew into leaving Plaintiff's employment. Although the record does reflect that Tracy Moore sent copies of Crowder's benefits package to Mr. Lanier for delivery to the members of the crew and subsequently met with the crew to answer any questions they might have, nothing in the record reflects that Mr. Lanier did anything to put pressure on his fellow crew members to leave their employment with Plaintiff and to begin working with Crowder.

Similarly, we find no indication that Mr. Lanier "pressured" Mr. Flickinger into using Crowder rather than Plaintiff for the purpose of providing construction-related maintenance services at the Asheboro plant. Mr. Flickinger testified that he had worked with Mr. Lanier for over ten years, that "[Mr. Lanier's] work is always top-notch," and

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

that, “[p]ersonally[,] I think he’s [] very honest[.]” During the four months that Mr. Lanier worked for Plaintiff at Timken’s Asheboro plant, he and his crew did a good job and were “very conscientious” about safety regulations. After the crew began to have problems with Plaintiff, Mr. Flickinger consulted with Timken’s management about changing construction-related maintenance providers and learned that he had no contractual obligation to continue using Plaintiff’s services. When Mr. Lanier spoke with Mr. Flickinger about the possibility that Crowder would assume responsibility for performing construction-related maintenance work at the Asheboro plant, Mr. Flickinger indicated that he was open to a proposal from Crowder. In fact, Mr. Flickinger testified that he intended to continue working with Mr. Lanier’s crew regardless of whether they were employed by Plaintiff, Crowder, or some other company. Simply put, nothing in the present record in any way tends to show that Mr. Flickinger’s preference for working with Mr. Lanier’s crew had any source other than his satisfaction with the quality of their work.

In addition, although Plaintiff argues that the crew timed its resignation from Plaintiff’s employment in such a way as to force Mr. Flickinger’s hand “by scheduling the . . . crew’s *en masse* resignation in the middle of a planned critical machine move,” the record simply does not support this assertion. Instead, the undisputed evidence in the record indicates that Mr. Lanier’s crew worked several hours overtime on 14 October 2010 for the sole purpose of preventing any production delays in the event that the crew was unable to return to the Asheboro plant on the following Monday as employees of Crowder. In essence, Mr. Flickinger testified that, when Mr. Lanier left on 14 October 2010, the work being done on the machine had reached “a point it would be operational so if no one was there Monday . . . we could continue operations;” that the crew “finished the work that the mechanical contractor would have needed to that day, so if no one showed up Monday, we could have continued to work with our associates and made product;” and that, when the members of the crew resigned from Plaintiff’s employment, their part in the machine move was essentially “complete.” Similarly, Mr. Lanier testified that the crew worked on 14 October 2010 in order to “get that machine back where somebody could finish it if something happened.” As a result, we conclude that there is no record support for Plaintiff’s contention that Mr. Flickinger was forced to stop using Plaintiff for the provision of construction maintenance services

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

based upon pressure from Mr. Lanier, the timing of the crew's resignation, or any other similar factor.³

Plaintiff also asserts that Mr. Lanier acted "secretly" and that he "secretly recruited the entire work force and betrayed [Plaintiff] in persuading [Mr.] Flickinger to switch to the company that best suited him, to the detriment of [Plaintiff]." A careful examination of the record reveals no indication that Mr. Lanier or his crew made any effort to hide their dissatisfaction with Plaintiff. Mr. Lanier discussed the crew's complaints with Mr. Flickinger, who testified that, every time Mr. Richardson visited the plant, "[he] would tell him, the guys aren't happy, you need to try to help[.]" In addition, the record reflects that Mr. Rice met with Mr. Lanier in mid-August 2010 and, at Mr. Lanier's request, informed Plaintiff of the crew's dissatisfaction. On 23 August 2010, Mr. Rice sent Mr. Richardson an email that specifically informed him that Mr. Lanier was "looking at other contactors to work for in the Timken Asheboro plant, and right now the only thing stalling the change is which company will offer the best pay and benefits." The fact that Mr. Richardson claims not to have noticed this portion of the email does not in any way detract from the fact that it was sent. As a result, the record contains no indication that Mr. Lanier acted secretly.

In addition, such an allegation, even if proven, would not necessarily constitute evidence of wrongdoing. Plaintiff has not cited any authority tending to suggest that Mr. Lanier had an obligation to keep Plaintiff apprised of his desire to quit, his discussions with co-workers about changing jobs, or his negotiations with Crowder. "In North Carolina, 'in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason.'" *Elliott v. Enka-Candler Fire and Rescue*, ___ N.C. App ___, ___, 713 S.E.2d 132, 135 (2011) (quoting *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991), cert. denied, 331 N.C. 119, 415 S.E.2d 200 (1992)) (other citations omitted). As the Supreme Court has recognized, "[t]o restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 222-23, 367 S.E.2d 647, 651, rehearing denied, 322 N.C. 486, 370 S.E.2d 227

3. Mr. Richardson testified that he had no personal knowledge of the status of the machine move as of 14 October 2010.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

(1988) (citation omitted). As a result, for all of these reasons, we conclude that the trial court did not err by granting summary judgment in favor of Mr. Lanier with respect to Plaintiff's breach of fiduciary duty claim.

C. Tortious Interference with Contract

[2] Secondly, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendants with respect to Plaintiff's tortious interference with contract claim. In support of this contention, Plaintiff contends that the record reflects the existence of a genuine issue of fact concerning the extent to which "Defendants conspired to pressure [Mr.] Flickinger not to perform the MSA with Austin and to hire Crowder instead" and to which "Defendants acted without justification." Once again, we conclude that Plaintiff's arguments lack merit.

"The tort of interference with contract has five elements: (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 Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 674 84 S.E. 2d 176, 182-83 (1954)). A careful study of the record compels the conclusion that Plaintiff has failed to forecast evidence tending to show the existence of the first element required to establish a tortious interference with contract claim.

As we have already noted, the MSA sets out the terms and conditions under which Plaintiff and Timken agreed to do business. "It is common practice for companies and contractors to enter into master service agreements, the specific terms of which govern future work performed by the contractor pursuant to individual work orders or authorizations." *John E. Graham & Sons v. Brewer (In re John E. Graham & Sons)*, 210 F.3d 333, 341, *rehearing denied*, 2000 U.S. App. LEXIS 15071 (5th Cir. La. May 22, 2000). "Typically, they first sign a 'blanket contract' that may remain in place for an extended period of time. Later, they issue work orders for the performance of specific work, which usually incorporate[] the terms of the blanket contract." *Grand Isle Shipyards Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 787 n.6 (5th Cir. La. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3386, 177 L. Ed. 2d 302 (2010). "A master service agreement contemplates as

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

yet unspecified and wholly contingent performance in the future. The agreement standing alone obligates neither party to perform any services. The issuance of a specific work order triggers the obligation to perform.” *Burnham v. Sun Oil Co.*, 618 F. Supp. 782, 785-86 (W.D. La. 1985).

Consistently with the pattern outlined above, the MSA defines Timken as the “Buyer” and Plaintiff (standing in Sanders Brothers’ shoes) as the “Contractor,” provides for a seven year term, and defines a “Purchase Order” as the “document or electronic notification through which Service(s) and/or Merchandise shall be requested by Buyer.” The MSA “shall be incorporated into and made a part of each Buyer’s Purchase Order issued to Contractor, whether or not expressly incorporated by reference in the Purchase Order,” and, “together with . . . Purchase Order(s) . . . and other documents specifically incorporated by reference . . . [,] comprise the entire agreement between the parties.” The MSA does not include an agreement by Timken or Plaintiff to enter into any particular number of contracts for the provision of construction-related maintenance services; instead, the MSA expressly states that “Contractor acknowledges that this Agreement is not a commitment by Buyer to purchase any Service(s) and/or Merchandise from Contractor on an exclusive basis or otherwise.” As a result, we conclude that the MSA does not obligate Timken to enter into any Purchase Orders with Plaintiff, a fact which requires a finding that Timken’s decision to award specific construction-related maintenance service contracts to Crowder did not breach the MSA.

In seeking to persuade us that the record did, in fact, reflect the existence of a genuine issue of material fact with respect to this issue, Plaintiff relies solely on Mr. Richardson’s testimony concerning the existence of “verbal agreements” that were allegedly entered into outside the scope of the MSA. The principal problem with this argument is that the MSA contains a merger clause which clearly provides that the MSA, taken in conjunction with other pertinent written documents, constitutes the entire agreement between the parties. In addition, Plaintiff directs our attention to Mr. Richardson’s belief that the provision to the effect that the MSA “is not a commitment by Buyer to purchase any Service(s) and/or Merchandise from Contractor on an exclusive basis or otherwise” should be understood to mean that Timken was obligated to contract with Plaintiff for the provision of construction-related maintenance services while retaining the ability to employ specialty contractors as necessary. This “interpretation”

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

is, however, contrary to the literal language of the relevant MSA provision, so we decline to adopt it.

In addition, Plaintiff disputes Defendants' contention that the MSA does not require Timken to obtain construction-related maintenance services exclusively from Plaintiff. This aspect of Plaintiff's argument rests upon Article 36 of the MSA, which states that "[t]he Contractor agrees to supply the listed Services and/or Merchandise to all Buyers, and Buyer's subsidiaries' facilities, including but not limited to" Timken bearing and alloy steel plants located in certain specified states. This provision, which simply specifies the geographical scope of the agreement, does not operate to override the remainder of the agreement, which clearly requires separate Purchase Orders in the event that Timken wished Plaintiff to perform any specific service. Moreover, although Article 36 obligates Plaintiff to supply construction-related maintenance services to a list of locations, it does not obligate Timken to contract for these services at any of those locations. Thus, this aspect of Plaintiff's argument fails as well.

As a result, in light of our review of the MSA, we conclude that (1) the MSA does not require Timken to contract with Plaintiff for provision of construction maintenance services, either at its Asheboro plant or elsewhere; (2) the MSA does not confer any specific contractual rights upon Plaintiff until Timken and Plaintiff executed a Purchase Order which required Plaintiff to provide specific construction maintenance services;⁴ and (3), as Mr. Richardson conceded during his deposition, Timken did not breach the MSA by beginning to use Crowder, rather than Plaintiff, to perform construction maintenance services at Timken's Asheboro plant. As a result, given that the MSA conferred no contractual rights on Plaintiff until the execution of a specific Purchase Order and given that Plaintiff failed to adduce any evidence that Timken failed to perform any of its obligations under the MSA, we conclude that Plaintiff failed to produce evidence that the MSA "confers upon the plaintiff a contractual right against a third person." *United Laboratories*, 322 N.C. at 661, 370 S.E.2d at 387. Thus, the trial court did not err by granting summary judgment in favor of Defendants with respect to Plaintiff's tortious interference with contract claim.

4. Plaintiff does not assert that Timken violated any specific Purchase Order as a result of Defendants' conduct. Instead, Plaintiff's tortious interference claim relies solely on alleged violations of the MSA.

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

D. Unfair or Deceptive Trade Practices

[3] Thirdly, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendants with respect to its unfair or deceptive trade practices claim. In support of this contention, Plaintiff argues that Defendants “interrupted the commercial relationship between Austin and Timken,” that “their actions of hiring away the entire work force and inducing non-performance of the Austin/Timken MSA by Timken” constituted unfair and deceptive trade practices, and that Mr. Lanier “surreptitiously raided the entire Austin workforce to his and Crowder’s benefit and to the clear detriment of Austin.” We do not find Plaintiff’s arguments persuasive.

“The extent of trade practices deemed as unfair and deceptive is summarized in [N.C. Gen. Stat.] § 75-1.1(a) (‘the Act’), which . . . was intended to benefit consumers[.] . . . [T]he Act does not normally extend to run-of-the-mill employment disputes[, unless] . . . an employee’s conduct: (1) involved egregious activities outside the scope of his assigned employment duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce.” *Dalton*, 353 N.C. at 655-56, 548 S.E.2d at 710-11 (citing *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986), *HAJMM Co.*, 328 N.C. at 593, 403 S.E.2d at 492, and *Sara Lee*, 351 N.C. at 34, 519 S.E.2d at 312). For example, in *Dalton*, 353 N.C. at 658, 548 S.E.2d at 712, in which the defendant formed a company for the purpose of competing with his employer before resigning and then obtaining the contract previously held by his employer, the Supreme Court held:

That [the defendant] failed to inform his employer of the ongoing negotiations and resigned after signing the KFI deal may be an unfortunate circumstance; however, in our view, such business-related conduct, without more, is neither unlawful in itself. . . . nor aggravating or egregious enough to overcome the longstanding presumption against unfair and deceptive practices claims as between employers and employees.

Similarly, in this case, the undisputed evidence showed that (1) by July or August, 2010, before they were provided with information concerning Crowder, Mr. Lanier and the crew working with him had each made the independent decision to look for a new employer; (2) Mr. Lanier discussed the crew’s complaints with Mr. Flickinger and

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

Mr. Richardson; (3) at Mr. Lanier's request, Mr. Rice informed Mr. Richardson that the crew was looking for a company to replace Plaintiff at Timken's Asheboro plant; and (4) the crew decided to work for Crowder despite a reduction in the level of their employer-provided benefits. As a result, we conclude that the record fails to support Plaintiff's assertion that Defendants "surreptitiously raided" Plaintiff's workforce and that neither the decision by Mr. Lanier and his crew members to become Crowder employees nor the manner in which Crowder obtained the right to perform construction-related maintenance work previously performed by Plaintiff supported a finding of liability under N.C. Gen. Stat. § 75-1.1.

In urging us to reach a contrary result, Plaintiff cites *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222 (2005), *disc. review dismissed*, 360 N.C. 296, 629 S.E.2d 289 (2006). According to Plaintiff, *Sunbelt* "expressly prohibits as an unfair trade practice the surreptitious and intentional use of employees to solicit other employees while both the soliciting and solicited employees are still employed by the same company." Aside from the fact that we do not read *Sunbelt* as enunciating a *per se* rule of the nature described by Plaintiff and the fact that *Sunbelt* is readily distinguishable from this case on a factual basis, the record does not contain any evidence tending to show that Defendants engaged in "the surreptitious and intentional use of employees to solicit other employees."

In *Sunbelt*, the president and other key executives of a corporation resigned in order to work for a competitor. Subsequently, they secretly recruited more than seventy key managerial employees at various locations to join them. The result of this series of activities was that the plaintiff's "branches were severely impacted, or 'crippled,' to the point [that the plaintiff's] opportunity and ability to compete for key employees on a level playing field was completely eliminated." *Sunbelt*, 174 N.C. App at 51, 60, 620 S.E.2d at 225, 230. In addition, the defendants misappropriated trade secrets by sharing certain confidential information with this competitor. On the other hand, in this case a four-man work crew, all of whom were at-will employees responsible for performing construction-related maintenance services, became dissatisfied with Plaintiff and left to work for a different company. Aside from the fact that the resignation of these four men from an organization employing over 7,000 employees differs dramatically from the situation at issue in *Sunbelt*, the record does not establish that the events in question involved the disclosure

AUSTIN MAINT. & CONSTR., INC. v. CROWDER CONSTR. CO.

[224 N.C. App. 401 (2012)]

of confidential information, had significant impact on Plaintiff's financial situation, or caused damage to Plaintiff's competitive position. Thus, we do not believe that *Sunbelt* has any significant bearing on the proper resolution of this case.

In addition, Plaintiff cites *Songwooyarn Trading Co. v. Sox Eleven*, ___ N.C. App ___, 714 S.E.2d 162, *disc. review denied*, 365 N.C. 360, 718 S.E.2d 396 (2011), in support of its attempt to establish the validity of its unfair or deceptive trade practices claim. In *Songwooyarn*, the defendant misappropriated funds belonging to his employer and secretly diverted monies that were supposed to be paid to one of his employer's corporate affiliates for his own use. On appeal, we upheld the trial court's decision to direct a verdict in favor of the plaintiff with respect to its unfair and deceptive trade practices claim. *Songwooyarn* is easily distinguished from the facts of the present case and does not control its outcome.

Although Plaintiff's unfair and deceptive trade practices claim rests on allegations that Defendants "secretly pressured" Plaintiff's employees to change jobs, thereby "induc[ing]" Timken to breach the MSA, the record does not, as we have already demonstrated, support these assertions. As a result, none of the arguments upon which Plaintiff relies in challenging the trial court's decision to grant summary judgment in Defendants' favor with respect to Plaintiff's unfair and deceptive trade practices claim have merit.

E. Civil Conspiracy and Injunctive Relief

[4] Finally, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendants with respect to its civil conspiracy claim and its request for injunctive relief. Plaintiff has not, however, advanced any specific arguments directed in opposition to the trial court's rulings with respect to these claims. Instead, Plaintiff simply asserts that, "[f]or the reasons discussed" in addressing its other challenges to the trial court's rulings, the trial court erred by granting summary judgment with respect to Plaintiff's civil conspiracy claim and by denying Plaintiff's request for the issuance of a permanent injunction. Having already considered and rejected these arguments, we necessarily conclude that the trial court did not err by granting summary judgment in Defendants' favor with respect to Plaintiff's civil conspiracy claim and rejecting its request for injunctive relief.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by entering orders granting summary judgment in favor of Defendants and denying Plaintiff's request for the issuance of a permanent injunction. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges McGEE and STEELMAN concur.

KENNETH W. BAKER, JR., AS ADMINISTRATOR OF THE ESTATE OF
KEITH ALLEN BAKER, PLAINTIFF

v.

CARSON H. SMITH, JR. IN HIS OFFICIAL CAPACITY AS SHERIFF OF PENDER COUNTY,
GLENDA SIMPSON INDIVIDUALLY AND OFFICIALLY, FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, AS SURETY, NEW HANOVER REGIONAL MEDICAL CENTER AND DR.
PATRICK MARTIN, M.D., D/B/A PATRICK MARTIN & ASSOCIATES, DEFENDANTS

No. COA12-560

Filed 18 December 2012

1. Immunity—public official—assistant jailers

Assistant jailers are public officials entitled to immunity because they exercise the power of the State and carry out a statutory duty delegated by one whose position is constitutionally created, use discretion in doing so, and take an oath of office.

2. Immunity—public official—assistant jailer—no allegation of corrupt activities

Plaintiff did not overcome defendant assistant jailer's immunity, and the assistant jailer was entitled to summary judgment, where plaintiff did not allege that the actions of which plaintiff complained were malicious, corrupt, or outside the scope of her duties.

Appeal by defendant Glenda Simpson from order entered 2 February 2012 by Judge Jay D. Hockenbury in Superior Court, Pender County. Heard in the Court of Appeals 14 November 2012.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

Tin Fulton Walker & Owen, PLLC by S. Luke Largess, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, LLP by Christopher J. Geis, Sonny S. Haynes and Kristen Y. Riggs, for defendant-appellant Glenda Simpson.

Edmond W. Caldwell, Jr. and Julie B. Smith, for North Carolina Sheriffs' Association.

North Carolina Prisoner Legal Services by Mary S. Pollard and Twiggs, Strickland & Rabenau, P.A by Jesse H. Rigsby, IV, for North Carolina Advocates for Justice.

STROUD, Judge.

I. Procedural History

On or about 21 May 2010, Kenneth Baker, Jr., acting as administrator for his brother's estate, ("plaintiff") filed a complaint in Pender County alleging that New Hanover Medical Center and Dr. Patrick Martin negligently released Keith Baker ("decedent") from involuntary commitment and thereby caused his death. The complaint also alleged that Pender County Sheriff Carson Smith and Assistant Jailer Glenda Simpson negligently supervised decedent while he was in their custody. Plaintiff filed suit against Sheriff Smith and Ms. Simpson in their official capacity and therefore also filed a claim against the Sheriff's bond held by Fidelity and Deposit Company of Maryland ("Fidelity") as surety. Plaintiff also filed suit against Officer Simpson ("defendant") in her individual capacity.

On 6 January 2012, defendants Smith, Simpson, and Fidelity moved for summary judgment on the grounds that they are immune from suit and that defendant Simpson is immune from individual liability as a public official. By order entered 2 February 2012, the trial court denied defendant Simpson's motion for summary judgment as to the claim against her in her individual capacity, concluding that she was not a public official, denied Fidelity's motion for summary judgment, and denied summary judgment for Sheriff Smith and Officer Simpson as to any amount less than the surety bond, but granted summary judgment to defendants Smith and Simpson in their official capacities as to any amount in excess of the bond. Defendant Simpson filed timely notice of appeal on 28 February 2012.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

II. Factual Background

On 9 September 2006, Mr. Keith Baker was committed to New Hanover Regional Medical Center after having attempted suicide. The doctor who treated Mr. Baker released him the next day. Mr. Baker's wife had taken out a restraining order against him and filed charges alleging that he had threatened her with a knife. As a result, Mr. Baker was arrested upon being released from the hospital and transported to Pender County Jail.

Once in the jail, Mr. Baker acted erratically, frightening some of the other detainees, who alerted the jailers to his strange behavior. Defendant was the shift leader on duty that night, so she screened Mr. Baker for suicide risk. Mr. Baker explained his concerns about his legal troubles and the possibility of losing custody of his son. Officer Simpson then placed Mr. Baker in a holding cell under a suicide watch. The jailers gave him a tough, thick blanket and a suicide prevention vest. Defendant Simpson checked on Mr. Baker periodically throughout the night; the precise timing of these observations is a matter of dispute.¹ At around 2:30 A.M., Officer Simpson checked on Mr. Baker and saw that he had hanged himself in the holding cell using a strip of the blanket he had been given. Officer Simpson began CPR and called for an ambulance. When the Emergency Medical Technicians arrived, Mr. Baker was unresponsive but still had a heart-beat. Once transported to the hospital, the medical staff determined that Mr. Baker had suffered brain damage and would not recover. He was taken off life support and died shortly thereafter.

Plaintiff alleges that Defendant Simpson failed to properly supervise Mr. Baker that night and accuses her of altering the supervision logs after the fact to make it appear otherwise. Defendant contends that she properly supervised Mr. Baker that night in line with the local and State regulations, but that even if she was negligent, as a public official she is immune from suit against her in her individual capacity.

III. Jurisdiction

[1] Defendant appeals from the trial court's order denying her motion for summary judgment as to the claim against her in her indi-

1. There was also evidence before the trial court at summary judgment regarding what information was received by jail staff upon decedent's transport to and arrival at the jail. Additionally, there was a great deal of evidence submitted by both parties concerning how defendant and the other jailers on duty supervised Mr. Baker on the night in question. This evidence, while clearly relevant to issues of negligence, is not relevant to the issue at hand, so we do not address it.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

vidual capacity. She filed timely notice of appeal to this Court. Defendant argues that the trial court erred in denying her motion for summary judgment because she is entitled to public official immunity.

[W]e note that the trial court's order denying defendant's motion for summary judgment is interlocutory, and thus, not generally subject to immediate appeal. Orders denying summary judgment based on public official immunity, however, affect a substantial right and are immediately appealable. Thus defendant's appeal is properly before this Court.

Fraleay v. Griffin, ___ N.C. App. ___, ___, 720 S.E.2d 694, 696 (2011) (citations and quotation marks omitted).

IV. Standard of Review

We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Beeson v. Palombo, ___ N.C. App. ___, ___, 727 S.E.2d 343, 346-47 (2012).

V. Public Official Immunity

The only question presented on appeal is whether defendant, an assistant jailer, qualifies as a public official entitled to immunity from suit in an individual capacity.² This question is one of first impression in North Carolina.

It is settled in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury. Public officials receive immunity because it would be difficult to find

2. The question of whether defendant or any of her co-defendants were negligent is not before this Court.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion.

Isenhour v. Hutto, 350 N.C. 601, 609-10, 517 S.E.2d 121, 127 (1999) (citations and quotation marks omitted).

In distinguishing between a public official and a public employee, our courts have held that (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. Additionally, an officer is generally required to take an oath of office while an agent or employee is not required to do so.

Fraleley, ___ N.C. App. at ___, 720 S.E.2d at 696 (citation, quotation marks, and brackets omitted); *see also Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (describing the above elements as “basic distinctions between a public official and a public employee”).

The parties agree that a chief jailer is clearly entitled to public official immunity. *See Slade v. Vernon*, 110 N.C. App. 422, 424, 428, 429 S.E.2d 744, 747 (1993) (applying public official immunity to a sheriff and a chief jailer). The question here is whether an *assistant* jailer is entitled to the same immunity.

Defendant argues that she should be considered in the same light as a deputy sheriff or a prison correctional officer in the Department of Correction (now the Division of Adult Correction, part of the N.C. Department of Public Safety), who both have public official immunity. Plaintiff argues that assistant jailers hold a position not created by statute with much less discretion and responsibility than law enforcement officers who have the general power of arrest. Because no case has specifically decided this question, we must apply the elements laid out in *Isenhour* and *Fraleley* to determine whether assistant jailers qualify as public officials entitled to immunity.

Defendant argues that as a law enforcement officer, she is automatically entitled to public official immunity and we need not address the factors as stated in *Isenhour* and *Fraleley*, but many of the cases upon which she relies fail to address public official immunity. It is true that our Supreme Court has called an assistant jailer a “law

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

enforcement officer” for purposes of deciding whether a defendant committed assault with a firearm upon a law enforcement officer, see *State v. Dix*, 282 N.C. 490, 491, 502, 193 S.E.2d 897, 898, 904 (1973), and we have said that law enforcement officers are public officials, *State ex rel. Jacobs v. Sherard*, 36 N.C. App. 60, 65, 243 S.E.2d 184, 188, *disc. rev. denied*, 295 N.C. 466, 246 S.E.2d 12 (1978) (“defendants are law enforcement officers and as such are ‘public officers’ ”), but these cases do not address the issue of public official immunity. In *State ex rel. Jacobs*, contrary to defendant’s argument, we did not declare that every person employed by a law enforcement agency is automatically entitled to public official immunity. See *id.* Rather, we simply restated that police officers are so entitled. See *id.* at 61, 65, 243 S.E.2d at 186, 188. Further, although defendant cites multiple cases in which either this Court or our Supreme Court have referred to jailers as public officers, we have never addressed this question in the context of public official immunity.

Therefore, as with any other public position for which this Court or our Supreme Court has not addressed the question of public official immunity, we must consider the position under the elements of one entitled to public official immunity as outlined in *Isenhour* and *Fraleley*. See *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127; *Fraleley*, ___ N.C. App. at ___, 720 S.E.2d at 696.

A. Position created by statute

Defendant first argues that the position of assistant jailer is created by statute for purposes of public official immunity. We agree.

A position is considered “created by statute” when “the officer’s position ha[s] a clear statutory basis *or the officer ha[s] been delegated a statutory duty by a person or organization created by statute*” or the Constitution. *Fraleley*, ___ N.C. App. at ___, 720 S.E.2d at 696 (citation and quotation marks omitted) (emphasis added). The positions of sheriff and jailer are positions of common law origin whose powers and responsibilities are defined both by statute and by the common law. *Gowens v. Alamance County*, 216 N.C. 107, 109, 3 S.E.2d 339, 340 (1939). The position of sheriff is explicitly created by our Constitution. N.C. Const. art. VII, § 2.

Plaintiff stresses that because the position of jailer “is one of common law origin [which] has existed from time immemorial” it could not have been created by statute. *Gowens*, 216 N.C. at 109, 3 S.E.2d at 340. Yet this court has also noted that despite its common law origins, “the duties of the jailer are those prescribed by statute

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

and those recognized at common law.” *State v. Jones*, 41 N.C. App. 189, 190, 254 S.E.2d 234, 236 (1979) (emphasis added). The positions of sheriff and deputy are of similar common law origins, yet both are considered public officials for purposes of immunity. *See Messick v. Catawba County*, N.C., 110 N.C. App. 707, 718, 431 S.E.2d 489, 496 (1993). Thus, the common law origin of a position is not dispositive as to whether it has been “created by statute.”³

N.C. Gen. Stat. § 162-22 establishes that sheriffs have the duty to operate the jail and the power to “appoint[] the keeper thereof.” N.C. Gen. Stat. § 162-22 (2011). Plaintiff and Advocates for Justice, in an amicus brief, argue that this statute only refers to a single designee—the chief jailer—not to assistant jailers. Defendant counters that the term “the keeper” of the jail must be read to include assistant jailers.

Regardless of whether we read § 162-22 to include assistant jailers, that statute establishes the duty of the sheriff to operate the jail. N.C. Gen. Stat. § 162-24 permits a sheriff to “appoint a deputy *or employ others to assist him in performing his official duties.*” N.C. Gen. Stat. § 162-24 (2011) (emphasis added). Read together with § 162-22, it is clear that the legislature intended to permit the sheriff to “employ others”—plural—to help perform his official duties, including his duty to take “care and custody of the jail.” N.C. Gen. Stat. § 162-22.

That statutory duty defines the role of an assistant jailer. Assistant jailers are “charged with the care, custody, and maintenance of prisoners.” *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003). The same article that vests the sheriff and chief jailer with their powers also vests them with the authority to appoint subordinates, such as assistant jailers. *See* N.C. Gen. Stat. § 162-24. Our legislature, in a different article, described detention officers, i.e. jailers, as “[a] person, who through the special trust and confidence of the sheriff, has been appointed as a detention officer by the sheriff.” N.C. Gen. Stat. § 17E-2 (2011). Indeed, the jail cannot operate without “custodial personnel” to “supervise” and “maintain safe custody and control” of the prisoners. N.C. Gen. Stat. § 153-224(a) (2011) (“No person may be confined in a local confinement facility unless custodial personnel are present and available to provide con-

3. In fact, a tremendous amount of our law has common law origins but has later been adopted or modified by statute. *See, e.g., State v. Weaver*, 359 N.C. 246, 251-55, 607 S.E.2d 599, 602-04 (2005) (discussing common law origins and later statutory developments of the crime of embezzlement).

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

tinuous supervision in order that custody will be secure . . .”)⁴ Thus, assistant jailers are delegated the statutory duty to take care of the jail and the detainees therein by the sheriff — a position created by our Constitution. N.C. Const. art. VII, § 2. We therefore conclude that assistant jailers meet the first element of a public official for purposes of immunity. *See Fraley*, ___ N.C. App. at ___, 720 S.E.2d at 696 (citation and quotation marks omitted).

B. Exercise of sovereign power

Plaintiff does not contest that assistant jailers exercise sovereign power. Although jailers are generally not deputies with the power of arrest, the jailer’s authority is similarly derived from the sovereign powers delegated to the sheriff. N.C. Gen. Stat. § 162-22 (giving sheriff power to appoint jailer); *see Meeds v. Carver*, 30 N.C. 218, 220, 8 Ired. 298, 301 (1848) (“the gaoler is the sheriff’s deputy . . . a detention by the gaoler is justified, if one by the sheriff himself would have been by the same process.”). Assistant jailers exercise a portion of this sovereign power by detaining misdemeanants and those awaiting trial in the jail.

C. Discretion

Defendant argues that she exercises discretion in the performance of her duties. Plaintiff counters that the extensive regulations and jail protocol dictate her actions, making her position ministerial.

[I]mmunity has never been extended to a mere employee of a government agency . . . since the compelling reasons for the nonliability of a public officer, clothed with discretion, are entirely absent. Of course, a mere employee doing a mechanical job . . . must exercise some sort of judgment in plying his shovel or driving his truck—but he is in no sense invested with a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character.

Miller v. Jones, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945). “Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising

4. We note that the statutory duty imposed by § 153-224(a) refers to “custodial personnel”, which, by its plain meaning, encompasses detention officers beyond the chief jailer.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

from fixed and designated facts.” *Meyer v. Walls*, 347 N.C. 97, 113, 489 S.E.2d 880, 889 (1997) (citations and quotation marks omitted).

Plaintiff argues that *Fraleley v. Griffin* is controlling on this point. In *Fraleley*, this Court held that an Emergency Medical Technician (“EMT”) is not a public official entitled to immunity.⁵ *Fraleley*, ___ N.C. App. at ___, 720 S.E.2d at 697. The plaintiff in *Fraleley* sued an EMT employed by Orange County for wrongful death. *Id.* at ___, 720 S.E.2d at 695-96. The defendant claimed that he was a public officer, in part because he exercised discretion. *Id.* at ___, 720 S.E.2d at 697. The evidence showed that an EMT has fairly little discretion because he must follow detailed treatment protocols and must seek approval from a doctor to deviate from those protocols. *Id.* We therefore concluded that an EMT holds a ministerial position. *Id.*

Assistant jailers do not set policy like the chief jailer or sheriff does. Further, they are subject to detailed regulations and protocol issued by the chief jailer, the county sheriff, and the State. In the context of suicide watch protocol, plaintiff’s argument under *Fraleley* is quite convincing, for the actions of the assistant jailer are mandated to within a fifteen minute interval—a level of detail not found in the EMT regulations at issue in *Fraleley*. *See id.* Yet we do not consider just one duty or one aspect of the assistant jailer’s duties in deciding whether she exercises discretion. Rather, we must consider her duties as a whole.

5. We also note that *Fraleley* is distinguishable as it first held that the position of EMT is not created by statute (unlike the positions of jailer or sheriff) and then held that the lack of discretion was also a basis for its holding that EMTs do not have public officer immunity. *Fraleley*, ___ N.C. App. at ___, 720 S.E.2d at 696-97. Although the cases are not entirely clear on whether all three of the *Isenhour* factors must be present for public officer immunity to exist (an oath of office is not absolutely necessary), the better view seems to be that all three must exist, and if so, *Fraleley*’s holding that an EMT does not exercise discretion could be considered dicta, since the Court had already eliminated the first factor by holding that the position of EMT was not created by statute. *But see Murray v. County of Person*, 191 N.C. App. 575, 579-80, 664 S.E.2d 58, 61-62 (2008) (addressing all three elements in finding no public officer immunity for Registered Sanitarians). Thus, the determination that the EMT does not exercise discretion was not necessary for the *Fraleley* holding. “Language in an opinion not necessary to the decision is obiter dictum and later decisions are not bound thereby.” *Trustees of Rowan Tech. College v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). *Fraleley* also does not address the element of “exercise of sovereign power” at all, despite the fact that the defendants in that case argued that EMTs do exercise a portion of the sovereign power by carrying out the governmental duty of providing emergency medical transport and care. *Fraleley*, ___ N.C. App. at ___, 720 S.E.2d at 696-97.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

Although detailed, the regulations concerning how an assistant jailer is to manage detainees in general are broader than those concerning the management of those who are potentially suicidal. The State requires each jail to have an operations manual which covers, among other topics, inmate rules and discipline, administration, sanitation, emergency plans, and grievance procedures. 10A N.C. Admin. Code § 14J.0203 (1990).⁶ The regulations and the Pender County Jail's official policy mandate that the jailer check on the detainees at least twice per hour. The precise schedule for checking on the detainees, however, is largely left to the discretion of the jailer on duty. Indeed, the checks are supposed to be irregular. Similarly, although assistant jailers are required to record and report unusual activity to the chief jailer or sheriff, decisions on which inmates to screen for suicide watch and how to immediately deal with troublesome detainees are largely left to the discretion of the individual assistant jailer.

Further, although plaintiff asserts that the discretion of an assistant jailer is like that of an EMT and Sheriff Smith explained in his deposition that the duties of an assistant jailer are different from and more limited in scope than those of a deputy sheriff, it is difficult to imagine that they are much, if at all, different from those of a prison guard.

In *Price v. Davis*, we held, without analysis, that the defendants in that case—a correctional sergeant and an assistant superintendent of the state prison—were entitled to public official immunity. *Price v. Davis*, 132 N.C. App. 556, 562, 512 S.E.2d 783, 787 (1999).⁷ In *Farrell*, we explained the holding in *Price* by noting that the power of the Department of Correction to supervise inmates is delegated to prison guards, “who exercise discretion in carrying it out.” *Farrell ex rel.*

6. The general protocol for supervision of inmates in Pender County Jail mirrors the language in the Administrative Code.

7. The absence of detailed analysis of immunity in *Price* is not surprising, as it was a *pro se* appeal based upon an inmate's claim that a correctional sergeant wrongfully “confiscated twenty-six solid-barrel ball point pens, nine highlighters, and a padlock from plaintiff” and that an assistant superintendent had “refused to permit plaintiff to receive various legal texts which had been brought to him by a visitor.” *Price*, 132 N.C. App. at 557-58, 512 S.E.2d at 785. It is without question that plaintiff's loss in this case—Mr. Baker's tragic death—was infinitely greater than the deprivation of some office supplies. In addition, the arguments presented to this Court by the parties and *amici* on both sides are almost certainly substantially more skilled and thorough—and thus of more assistance to the Court—than those presented by a *pro se* appellant.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

Farrell v. Transylvania County Bd. of Educ., 199 N.C. App. 173, 178, 682 S.E.2d 224, 229 (2009).⁸

Jailers are similarly delegated the sheriff's power to detain and exercise discretion in carrying out that power. The chief jailer has a "duty to investigate or 'check' on the prisoners in his charge, and any disturbance on the premises." *State v. Jones*, 41 N.C. App. 189, 190, 254 S.E.2d 234, 236 (1979). In the absence of the chief jailer, this duty is delegated to the assistant jailers.

Although jailers are subject to detailed regulations, as EMTs are, their duties are far more similar to those of a prison guard than they are an EMT. Both jailers and prison guards are "charged with the care, custody and safekeeping of inmates." *Shepherd*, 156 N.C. App. at 607, 577 S.E.2d at 344 (quotation marks omitted). Further, like county jails, prisons are subject to detailed regulations and policies. *See, e.g.*, North Carolina Dep't of Corr., Div. of Prisons, Policy and Procedures Manual F.1600 (22 March 2012), *available at* http://www.doc.state.nc.us/dop/policy_procedure_manual/F1600.pdf (last visited 15 November 2012) (establishing Division of Prisons policy for the management of security posts and supervision of inmates). An assistant jailer, like a bailiff, chief jailer, or prison guard is "charged with the care, custody and safekeeping of anyone assigned to him, any inmate that might be in [the government's] custody," *Shepherd*, 156 N.C. App. at 607, 577 S.E.2d at 344 (quotation marks omitted). We see no reason to differentiate between those "charged with the care, custody and safekeeping of" detainees in the county jail and those "charged with the care, custody and safekeeping" of inmates in state prisons. *Id.* Therefore, we hold that assistant jailers exercise discretion to carry out their duties for purposes of public official immunity.

D. Oath of Office

Finally, although not required to be considered a public official, public officials often take an oath of office. *See Fraley*, ___ N.C. App.

8. Plaintiff points out that the defendants in *Price* were not entry-level correctional officers, but supervisory officers. In our analysis in *Farrell*, however, we did not distinguish between a correctional sergeant and other correctional officers of greater or lesser rank. *See Farrell*, 199 N.C. App. at 178, 682 S.E.2d at 229 (observing that the custodial duty of the Department of Correction is "delegated to *prison guards*" (emphasis added)). The discussion of the importance of supervisory authority in *Farrell* is limited to the analysis of the defendant's claim of "qualified immunity" for the federal claim under 42 U.S.C. § 1983, an issue which is not raised by this case. *Id.* at 181-82, 682 S.E.2d at 230-31.

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

at ____, 720 S.E.2d at 696. Consistent with our analysis above, assistant jailers take an oath of office, just as sheriffs' deputies do. The taking of an oath of office solemnizes the trust and discretion vested in an assistant jailer as one charged with the sheriff's statutory and common law duty to keep the jail.

E. Policy Considerations

Both parties and the *amici* discuss the policy implications of our holding in the present case. Plaintiffs highlight the tragedy of suicides in our jails and prisons, *see generally* Bureau of Justice Statistics, U.S. Dep't of Justice, Suicide and Homicide in State Prisons and Local Jails (August 2005), and argue that immunity would make jailers unaccountable. Defendants counter that if we were to deny assistant jailers immunity that people would be less likely to accept an already dangerous and underappreciated job. *See State v. Primes*, 314 N.C. 202, 211, 333 S.E.2d 278, 284 (1985) (observing that "[a] detention facility is a unique place fraught with serious security dangers." (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L.Ed.2d 447, 481 (1979))).

The policy concerns of both parties are valid and of great importance, but we recognize that our legislature has attempted to balance these interests through the extensive statutory and regulatory framework surrounding the operation of the confinement facilities in our State, *see* 10A N.C. Admin. Code § 14J (containing regulations for county jails), and by providing for a waiver of immunity through the sheriff's bond, *see Smith v. Phillips*, 117 N.C. App. 378, 381-84, 451 S.E.2d 309, 312-14 (1994) (discussing waiver of immunity through the purchase of insurance and actions on a sheriff's bond), *and* N.C. Gen. Stat. § 58-76-5 (2011) (providing for civil actions on an official bond).

Defining assistant jailers as public officials entitled to immunity does not undermine this framework; nor does it lead to unaccountable jailers, given the extensive regulations, the ability of injured parties to sue on the sheriff's bond, the potential criminal penalties for jailers who injure those in their care, *see* N.C. Gen. Stat. § 162-55 (2011), as well as internal discipline for those jailers who violate policies and procedures.

F. Conclusion

Based on the *Isenhour* elements, and for the reasons outlined above, we hold that assistant jailers are public officials entitled to immunity because they exercise the power of the State and carry out a statutory duty delegated by one whose position is constitutionally

BAKER v. SMITH

[224 N.C. App. 423 (2012)]

created, use discretion in doing so, and as with other public officials, take an oath of office.

VI. Malice, Corruption, and Scope of Authority

[2] “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.” *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) (citation and quotation marks omitted).

On appeal, plaintiff alleges that defendant altered the logbook of her supervision rounds to make it appear that she was in compliance with regulations and argues that this act constitutes malice or corruption and was an action outside the scope of her duties. Plaintiff did not allege in her complaint, however, that defendant acted maliciously, corruptly, or outside the scope of her official authority. Therefore, plaintiff has failed to allege an element necessary to overcome defendant’s affirmative defense of public official immunity. As a result, we hold that defendant is entitled to summary judgment and reverse the trial court’s order to the contrary. *See Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (stating that the movant is entitled to summary judgment “if the non-moving party is unable to overcome an affirmative defense offered by the moving party” (citation omitted)).

VII. Conclusion

We hold that Officer Simpson is entitled to public official immunity as an assistant jailer in Pender County. We further hold that plaintiff is unable to overcome defendant’s immunity as he has failed to allege that the actions for which plaintiff claims Officer Simpson is liable were malicious, corrupt, or outside the scope of her duties. Accordingly, we reverse the trial court’s order denying defendant’s motion for summary judgment as to the claim against her in her individual capacity and remand to the trial court with instructions to enter an order granting defendant’s motion for summary judgment as to that claim.

REVERSED and REMANDED.

Judges ELMORE and BEASLEY concur.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

SHERYL BOYLAN, EMPLOYEE, PLAINTIFF

v.

VERIZON WIRELESS, EMPLOYER, SEDGWICK CMS, CARRIER, DEFENDANTS

No. COA12-856

Filed 18 December 2012

1. Appeal and Error—preservation of issues—no ruling on objection

The issue in a workers' compensation case of whether a witness could testify as an expert was not preserved for appellate review where defendants did not obtain a ruling on their objection.

2. Workers' Compensation—findings—attendant care

Competent evidence supported the Industrial Commission's finding in a workers' compensation case that plaintiff would medically benefit from attendant care and the finding justified the Commission's conclusion awarding plaintiff the costs of attendant care. Determining the credibility and weight of conflicting testimony is solely the responsibility of the Commission, not the appellate court.

3. Workers' Compensation—findings—attendant care—spinal cord stimulator

The Industrial Commission in a workers' compensation case made the findings necessary to support its conclusions concerning attendant care even if it did not make specific findings about the effectiveness of treatment with a spinal cord stimulator.

4. Workers' Compensation—findings—contrary evidence—conclusive on appeal

Despite evidence to the contrary, competent evidence in a workers' compensation case supported the Industrial Commission's finding that eight hours of attendant care would be medically beneficial to plaintiff. That finding was conclusive on appeal and supported the award.

5. Workers' Compensation—attendant care—payment rate for family member

Evidence in a workers' compensation case concerning the rate paid for professional attendant care supported an award of a lesser amount to an unskilled family member.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

6. Workers' Compensation—findings—wheelchair ramps

The evidence in a workers' compensation case was competent and supported the Industrial Commission's findings that plaintiff's wheelchair ramps should be replaced and the front ramp extended. Those findings justified the Commission's conclusion ordering defendants to pay for the work. Defendants' arguments concerning contrary medical opinions were unavailing.

7. Workers' Compensation—attendant care—choice of provider

The Industrial Commission did not err in a workers' compensation case by not allowing defendants to choose plaintiff's attendant care provider. Assuming that the selection of a surgeon (as in a prior case) is sufficiently similar to the selection of an attendant care provider, there was absolutely no evidence that defendants directed plaintiff to their chosen attendant care provider in a prompt and adequate manner, as they were required to do. Furthermore, all of plaintiff's attendant care providers were approved by the Commission.

8. Workers' Compensation—interest—prior award—no out-of-pocket expenses

The Industrial Commission erred in a worker's compensation case by concluding that plaintiff was not entitled to interest on a prior award for attendant care benefits. The legitimate legislative purposes of preventing unjust enrichment to defendant and promoting settlement are advanced by the award of interest, even where the worker has not shown out-of-pocket expenses during the appeal.

Judge BEASLEY concurring in part and dissenting in part.

Cross-appeals by defendants and plaintiff from Opinion and Award entered 7 March 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 November 2012.

The Hodgman Law Firm, PA by Heather Hodgman Jahnes and Robert S. Hodgman, for plaintiff-appellee/cross-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP by Vachelle D. Willis and M. Duane Jones, for defendants-appellants/cross-appellees.

STROUD, Judge.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

I. Background

On 21 July 2003, Sheryl Boylan (“plaintiff”) was injured while working for Verizon Wireless, which is insured by Sedgwick CMS (“defendants”). The facts surrounding plaintiff’s injury and subsequent treatment are laid out in *Boylan v. Verizon Wireless*, 201 N.C. App. 81, 685 S.E.2d 155 (2009) (“*Boylan I*”), *disc. rev. denied*, 363 N.C. 853, 693 S.E.2d 918 (2010), and we will not repeat them here.

The only issues on appeal concern plaintiff’s entitlement to attendant care, the details thereof, whether plaintiff is entitled to home modifications relating to her disability, and whether she is entitled to interest on her prior attendant care award.

On 23 April 2004, Misty Boylan, plaintiff’s daughter, began taking care of her mother’s daily needs, including cooking, cleaning, and other daily chores that plaintiff could not do on her own because of her compensable back injury. When Misty Boylan moved away in October 2007, Regina and Nathan Locklear began providing plaintiff’s attendant care. On 16 January 2008, the initial hearing in this matter was held before Deputy Commissioner Houser. A hearing was then held before the Full Commission, which, by Opinion and Award entered on 9 December 2008, awarded all of plaintiff’s attendant care providers \$8 per hour for past attendant care provided and stated that the Locklears were entitled to that same amount for ongoing attendant care provided to plaintiff. Defendants appealed on this issue, among others, to this Court and we affirmed the award of attendant care. *Boylan I*, 201 N.C. App. at 88, 685 S.E.2d at 160.

On 12 April 2009, Misty Boylan moved back into her mother’s house and took over attendant care responsibilities from the Locklears. As the Commission had not provided for any future changes in attendant care providers, defendants did not pay Misty Boylan for her attendant care services. Plaintiff and defendants both filed a Form 33 requesting a hearing on this issue.

A hearing was held on 14 January 2011 before Deputy Commissioner Houser. The parties then appealed to the full Industrial Commission which entered its Opinion and Award on 7 March 2012. The Commission awarded plaintiff \$8 per hour for eight hours per day for attendant care services provided before 12 April 2009 by Misty Boylan, and \$10 per hour for eight hours per day for ongoing care, whether provided by Misty Boylan, the Locklears, or if they were

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

unable to provide care, a professional caregiver.¹ The Commission also awarded plaintiff modifications to her home at defendants' expense. The Commission denied plaintiff's request for interest on her attendant care award from 23 August 2004 to 12 April 2009. Defendant appeals from the award of attendant care and home modifications; plaintiff appeals from the denial of interest on the prior attendant care award.

II. Standard of Review

[R]eview of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This court reviews the Commission's conclusions of law *de novo*.

McLaughlin v. Staffing Solutions, 206 N.C. App. 137, 143, 696 S.E.2d 839, 844 (2010) (citation and quotation marks omitted).

III. Defendant's Appeal

Defendant appeals from the Award and Opinion of the Full Commission awarding plaintiff attendant care from 12 April 2009 onward and awarding plaintiff replacement wheelchair ramps for her home, claiming there was insufficient competent evidence to support the Commission's factual findings and that the factual findings did not support the conclusions of law.

A. Attendant Care

[1] This Court has previously addressed nearly the same question between these two parties. In *Boylan I*, this Court affirmed the Industrial Commission's 2008 Award and Opinion ordering defendants to pay for plaintiff's attendant care. In its October 2008 Award and Order, affirmed by this Court in *Boylan I*, the Industrial Commission found that attendant care, which had previously been performed by Misty Boylan, Regina Locklear, and Nathan Locklear, was medically beneficial. Because Misty Boylan had ceased providing care for her mother at the time of the 2008 award, the Full Commission only awarded her compensation for past attendant care services, while

1. The Commission found that the evidence indicated that a certified nursing assistant would cost approximately \$20.28 per hour.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

awarding past and ongoing attendant care compensation to the Locklears. On 19 October 2009, defendants filed a Form 33 Request for Hearing alleging that plaintiff's claim for attendant care has been "rendered moot by Defendant's modifications to plaintiff's home and Plaintiff's medical improvements." When the Locklears stopped providing attendant care to Mrs. Boylan, Misty Boylan resumed caring for her mother, but Defendants refused to compensate her for ongoing attendant care, as it had not been specifically addressed in the prior award.

[2] Defendants argue that there was no competent evidence to support the Commission's finding that plaintiff would "benefit medically" from Misty Boylan's attendant care. Defendants challenge findings of fact 21, 22, 24, 31, 32, and 33. Defendants do not challenge any other finding of fact and therefore they are binding on appeal. *Garner v. Capital Area Transit*, 208 N.C. App. 266, 271, 702 S.E.2d 319, 323 (2010). Defendants also assert that "the Commission failed to make the necessary findings of fact and conclusions of law as to whether Plaintiff's medical improvement from the spinal cord stimulator and home improvements nullified any medical need for the attendant care requested." For the following reasons, we hold that there was competent evidence to support the Commission's findings of fact and that the findings of fact justify the conclusions of law as to attendant care for plaintiff.

The Commission made the following relevant findings of fact²:

5. Plaintiff's back pain and other symptoms vary daily

...

8. Regarding the activities of daily living, due to her physical disabilities plaintiff testified that she requires assistance while getting into the shower, dressing, ambulation, taking her medication, preparing meals, cleaning, doing laundry, and performing yard work. When not assisted by her family, plaintiff is unable to safely prepare food or meals. Also, plaintiff is currently

2. Many of the Commission's findings were not true findings of fact, but recitations of evidence or testimony. See *Lane v. American National Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) ("This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony."), *disc. rev. denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). Fortunately, there were also findings of fact that did not merely recite testimony.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

unable to drive, and she requires assistance running errands, shopping, and filling her prescriptions.

....

15. On April 12, 2009, Ms. Misty Boylan moved back into plaintiff's home and resumed the role of assisting plaintiff with the activities of daily living.

....

32. Based on the preponderance of the evidence in view of the entire record, the Full Commission finds that plaintiff would benefit medically from ongoing attendant care services for eight (8) hours per day. Further, Ms. Misty Boylan is an appropriate person to provide future attendant care to plaintiff. The Full Commission finds that plaintiff would benefit medically from future services to be provided by Ms. Misty Boylan, including assisting plaintiff with: showering, including transferring into and out of the shower; dressing; cooking; cleaning her home and with laundry; transporting heavy or hot items; ambulating; and driving and shopping. For these ongoing services a reasonable rate of compensation for Ms. Misty Boylan is \$10.00 per hour, an increase from the 2008 amount by \$2.00 per hour.

The Commission then concluded:

3. . . . The Full Commission concludes as a matter of law that plaintiff is entitled to compensation for the attendant care services provided to her for eight (8) hours per day by Ms. Misty Boylan from April 12, 2009, through the date of this Opinion and Award. N.C. Gen. Stat. §§ 97-2(19); 97-25. For these services, plaintiff is entitled to have Ms. Misty Boylan paid by defendants \$8.00 per hour. *Id.*

4. Plaintiff is entitled to ongoing attendant care services for eight (8) hours per day to be provided at the expense of defendants. N.C. Gen. Stat. §§ 97-2(19); 97-25; 97-25.1. The Full Commission concludes that Ms. Misty Boylan is an appropriate person to provide these services, and plaintiff is entitled to have Ms. Misty Boylan paid by defendants \$10.00 per hour. *Id.* If Ms. Misty Boylan stops providing attendant care to plaintiff and

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

Ms. Regina Locklear and/or Mr. Nathan Locklear resume caring for plaintiff, then plaintiff is entitled to have defendants pay the Locklears \$10.00 per hour. *Id.* If plaintiff stops receiving care from Ms. Misty Boylan and stops receiving care from the Locklears, then plaintiff is entitled to eight (8) hours per day of attendant care to be provided by a professional caregiver. *Id.*

Much relevant testimony was given by Ms. Weiss, a certified life care planner and registered nurse. Defendants contend that Ms. Weiss's testimony was not competent evidence because they objected to her tender as an expert in the field of life care planning. The Industrial Commission never ruled on defendants' objection. On appeal, defendants only state that Ms. Weiss's testimony is inadmissible because they objected and the Commission did not find that Ms. Weiss was an expert.

Even assuming that Ms. Weiss's testimony was improperly admitted, defendants have failed to preserve this issue for our review.

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

N.C.R. App. P. 10(a)(1) (emphasis added). It was defendants' duty to obtain a ruling on their objection to Ms. Weiss's qualifications. Because defendants failed to do so this issue is not preserved for our review.

Ms. Weiss observed plaintiff in her home, including how Misty Boylan assisted plaintiff, and considered the medical reports from plaintiff's treating physicians. Ms. Weiss watched as plaintiff attempted to navigate a daily routine, including entering and exiting the shower, sitting in bed, loading and unloading her washing machine, and other daily chores. Ms. Weiss stated that plaintiff suffered from several problems which limit her ability to function in the home and that plaintiff's physical limitations presented a high risk of falling. She therefore concluded that plaintiff required eight to nine hours of assistance in daily functioning, much of which "is for supervisory care for safety."

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

Ms. Weiss' testimony was corroborated by that of Cheryl Yates, an occupational nurse, and the report filed by Melissa Fuller, an Occupational Therapist. Ms. Yates testified that plaintiff had difficulty walking and could not get into or out of the bathtub without assistance. Ms. Fuller observed that plaintiff had difficulty navigating the bathtub and her kitchen safely or doing her laundry without assistance.

Defendants argue that this evidence is insufficient to support the Commission's finding that plaintiff would medically benefit from attendant care because Dr. Rauck disagreed with Ms. Weiss's assessment and because she did not consult the other doctors in preparing her report. Determining credibility and weight to be given to conflicting testimony is solely the responsibility of the Commission, not this Court. *Rawls v. Yellow Roadway Corp.*, ___ N.C. App. ___, ___, 723 S.E.2d 573, 578 (2012). We hold that the above competent evidence supports the Commission's finding that plaintiff would medically benefit from attendant care and that such a finding justifies the Commission's conclusion awarding plaintiff costs of attendant care.

[3] Defendants also contend that the Industrial Commission failed to make findings as to "whether Plaintiff's medical improvement from the spinal cord stimulator and home improvements nullified any medical need for the attendant care requested."

The Full Commission must make definitive findings to determine the critical issues raised by the evidence, and in doing so must indicate in its findings that it has "considered or weighed" all testimony with respect to the critical issues in the case. It is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission. . . . Such "negative" findings are not required.

Bryant v. Weyerhaeuser Co., 130 N.C. App. 135, 139, 502 S.E.2d 58, 61-62 (citations and quotation marks omitted), *disc. rev. denied*, 349 N.C. 228, 515 S.E.2d 58 (1998).

While it is true that the Commission did not make any specific findings of fact as to how effective the spinal cord stimulator treatment has been, the Commission made those findings of fact necessary to support its conclusions as to attendant care. The Commission noted in Finding 4 that the spinal cord stimulator had been implanted by Dr. Rauck in July 2009, but also made the findings noted above

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

regarding Ms. Boylan's abilities and need for care after this treatment. By finding that Mrs. Boylan medically benefitted from attendant care, the Commission necessarily dismissed the idea that any medical improvement from the spinal cord stimulator was substantial enough to eliminate the medical benefits of attendant care. The Commission was not required to make specific findings as to an absence of medical improvements from the spinal cord stimulator. *See id.* Even if Mrs. Boylan suffers less pain because of the spinal cord stimulator or if she was able to reduce the amounts of pain medications, the relevant question is still whether she would benefit medically from attendant care. Ms. Weiss testified that even if plaintiff's pain were completely gone, she would still require substantial attendant care. The Commission clearly credited Ms. Weiss's testimony and found that plaintiff would benefit medically from attendant care. As we held above, that finding is supported by competent evidence.

[4] Defendants next challenge the Commission's finding that plaintiff would benefit medically from eight hours of attendant care per day. There was testimony from Ms. Weiss that plaintiff required eight to nine hours of attendant care per day to assist her in daily activities such as cleaning, cooking, and bathing, as well as to lessen her risk of falling and suffering greater injury. Although Ms. Weiss indicated that it might be possible to reduce the number of hours, she stated that doing so might endanger plaintiff. She recommended a bare minimum of six to eight hours of attendant care per day, even ignoring plaintiff's pain issues. This competent evidence supports the Commission's finding that eight hours of attendant care would be medically beneficial to plaintiff, so that finding is conclusive on appeal. *McLaughlin*, 206 N.C. App. at 143, 696 S.E.2d at 844. The fact that evidence to the contrary was also presented to the Commission does not change our conclusion. The Commission's finding that plaintiff would benefit medically from eight hours of attendant care, in turn, supports the Commission's conclusion awarding eight hours of attendant care per day.

[5] Defendants also argue that the Commission's findings on the compensation rate for plaintiff's attendant care was not supported by competent evidence. The Commission found that "a reasonable rate of compensation for Misty Boylan is \$10.00 per hour, an increase from the 2008 amount by \$2.00 per hour." Ms. Weiss testified that she determined that hiring a private assistant to help plaintiff with her daily activities would cost on average about \$20 per day by looking at the prices for two companies who provide the type of care plaintiff would

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

require if her daughter were not available to help. Defendants contend that this testimony does not support a finding that Misty Boylan, plaintiff's daughter and caregiver, should be paid \$10 per hour for her attendant care services because Ms. Boylan is not a professional. There was no evidence on the compensation rate for unskilled nursing care.

We confronted the same argument in *Chandler ex rel. Harris v. Atlantic Scrap & Processing*, ___ N.C. App. ___, 720 S.E.2d 745 (2011), *disc. rev. granted*, ___ N.C. ___, 731 S.E.2d 141 (2012). In that case, we held that there was competent evidence to support a finding that \$11 per hour was a reasonable compensation rate for a husband providing unskilled attendant care for his wife when the evidence before the Commission indicated that the compensation rate for professional attendant care was between \$10 and \$20 per hour. *Chandler*, ___ N.C. App. at ___, 720 S.E.2d at 752-53. In *Chandler*, as here, the attendant caregiver was an unskilled family member and the evidence before the court only addressed the compensation rate for the kind of skilled assistant that would be needed to replace the family member.

Thus, as in *Chandler*, we hold that the above evidence was competent and supports the Commission's finding that \$10 per hour was a reasonable compensation rate for Misty Boylan, even though the evidence only addressed compensation rates for professional caregivers. Further, this finding justifies the Commission's conclusion awarding Misty Boylan \$10 per hour for her attendant care services.

B. Replacement of Wheelchair Ramps

[6] Defendants further argue that the Commission erred in concluding that plaintiff is entitled to replacement of her wheelchair ramps because the evidence fails to show that plaintiff needs a wheelchair and both physician witnesses did not recommend repairs to the wheelchair ramp. Both Ms. Weiss and Ms. Yates testified to plaintiff's mobility limitations. Ms. Fuller, plaintiff's occupational therapist, recommended fixing plaintiff's rear ramp, extending the front ramp, and recommended a wheelchair-accessible pantry. Ms. Weiss, Ms. Yates, and Ms. Fuller all indicated that plaintiff benefitted from the use of a rolling walker to get around. Further, Ms. Weiss explicitly recommended fixing the ramps because they present safety hazards in their current condition.

Again, defendants' arguments concerning contrary medical opinions are unavailing. The above evidence was competent and supports

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

the Commission's finding that plaintiff's wheelchair ramps should be replaced and the front ramp extended. Those findings justify the Commission's conclusion ordering defendants to pay for replacement wheelchair ramps and an extension of plaintiff's front wheelchair ramp.

C. Commission's Failure to Allow Defendants to Choose Plaintiff's Attendant Caregiver

[7] Defendants lastly argue that the Industrial Commission erred in not allowing defendants to choose plaintiff's attendant care provider.

The case cited by defendants, *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 540 S.E.2d 785 (2000), disposes of their argument on this point. In *Kanipe*, we observed that the employer had the right to direct the employee's treatment and choose the medical provider where the employer has accepted liability and promptly and adequately directed the employee to a provider of their choosing. *Kanipe*, 141 N.C. App. at 624-26, 540 S.E.2d at 788-89. Even if we assume that the selection of a surgeon is sufficiently similar to the selection of an attendant care provider, there is absolutely no evidence that defendants directed plaintiff to their chosen attendant care provider "in a prompt and adequate manner." *Id.* at 626, 540 S.E.2d at 789. Instead, defendants have done just the opposite by resisting plaintiff's claims for attendant care at every step, even after the Commission's first award of attendant care, this Court's affirmation of the award, and the Supreme Court's denial of discretionary review. In fact, Ms. Boylan has required attendant care, as noted in *Boylan I*, since 23 August 2004, *Boylan I*, 201 N.C. App. at 88, 685 S.E.2d at 160, but defendant has yet to direct her to any attendant care provider. Further, "even in the absence of an emergency or the employer's failure to direct timely and adequate treatment, an employee still may select his or her own physician if such selection is approved by the Commission." *Kanipe*, 141 N.C. App. at 626, 540 S.E.2d at 789. All of plaintiff's attendant care providers have been approved by the Commission—in both the 2008 Opinion and Award and the 2011 Opinion and Award. Therefore, defendants' argument on this point is without merit.³

3. The record before us does not reveal why defendant would prefer to pay over twice as much for a professional caregiver instead of paying one of plaintiff's family members \$10 per hour.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

D. Conclusion

We hold that there was competent evidence to support all of the Commission's challenged findings regarding plaintiff's attendant care and house modifications and that those findings support the Commission's conclusions of law as to those issues. We therefore affirm the Industrial Commission's 2011 Order and Award granting plaintiff continuing attendant care and the repair and extension of plaintiff's wheelchair ramps at defendants' expense.

IV. Plaintiff's Appeal

[8] Plaintiff cross-appeals from the Commission's Award and Opinion, arguing that the Commission erred in failing to award her interest on the portion of her attendant care award from 23 August 2004 until 12 April 2009. Plaintiffs challenge the Commission's findings of fact and conclusions of law on this issue.⁴ Defendants counter that plaintiff is not entitled to interest because she had no out-of-pocket expenses and awarding interest here would act only as a punishment for appeal and serve no compensatory purpose. For the following reasons, we hold that the Commission's conclusion of law was erroneous because it required plaintiff to show out-of-pocket expenses or prejudice.

The Commission made the following relevant finding of fact:

38. There is no evidence that plaintiff suffered loss of use, out of pocket expenses, or other disadvantage by defendants' appeal, and the resulting delay in payment, of the Full Commission's December 9, 2008 award of attendant care benefits from August 23, 2004 to April 12, 2009. Accordingly, the Full Commission finds that there is not a compensatory purpose in awarding interest to plaintiff on attendant care provided to her during this time period.

The Commission then concluded:

9. The Industrial Commission may require a defendant to pay interest on a plaintiff's outstanding medical expenses. *Childress v. Trion, Inc.*, 125 N.C. App. 588, 590-92, 481 S.E.2d 697, 698-99, *disc. review denied*, 346

4. Plaintiff does not challenge the Commission's denial of interest for the period between April 12, 2009 and the 2011 Opinion and Award because the language of the 2008 Opinion and Award specified that plaintiff was entitled to attendant care by the Locklears, but failed to mention ongoing attendant care by Misty Boylan.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

N.C. 276, 487 S.E.2d 541 (1997); N.C. Gen. Stat. §97-86.2 However, absent a compensatory purpose, an award of interest under N.C. Gen. Stat. § 97-86.2 creates a penalty for employers and carriers, and ignores the overall purpose of the Worker's Compensation Act. *Sprinkle v. Lilly Industries, Inc.*, 193 N.C. App. 694, 699, 668 S.E.2d 378 (2008) *review denied*, 363 N.C. 130, 673 S.E.2d 363 (2009). The compensatory purpose of an interest award seeks to compensate an employee for loss of the use of a damage award or for disadvantage caused by the delay in payment. *Childress*, 125 N.C. App. at 592, 481 S.E.2d at 699. Here, there is no evidence that plaintiff suffered loss of use, out of pocket expenses, or other disadvantage by defendants' appeal of the Full Commission's December 9, 2008 award of attendant care benefits from August 23, 2004 to April 12, 2009. Therefore, there is no evidence of a compensatory purpose to awarding interest on attendant care provided to plaintiff during this time period. As there is no compensatory purpose to support an award of interest, the Full Commission concludes as a matter of law that plaintiff is not entitled to interest on attendant care benefits provided to her from August 23, 2004 to April 12, 2009.

Interest awards in this context are governed by N.C. Gen. Stat. § 97-86.2. The statute unambiguously states:

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer *shall pay interest on the final award or unpaid portion thereof* from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

N.C. Gen. Stat. § 97-86.2 (2011) (emphasis added).

It is well established that the word "shall" is generally imperative or mandatory. Thus, the statutory language of N.C. Gen. Stat. § 97-86.2 confers no "degree of discretion" on the Commission in determining an interest

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

award given the presence of the circumstances delineated in the relevant statutory language.

Chandler, ___ N.C. App. at ___, 720 S.E.2d at 750 (citations and quotation marks omitted). This Court has held that the statutory mandate applies to attendant care services provided by family members who have not been paid during an appeal. *Id.* Of course, “[w]here a literal reading of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975) (citation and quotation marks omitted).

The purposes of awarding interest are: “(a) To compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement.” *Chandler*, ___ N.C. App. at ___, 720 S.E.2d at 750 (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)) (brackets omitted).

Defendants and the Commission misunderstand the role these statutory purposes have played in our decisions. Defendants, citing *Childress v. Trion, Inc.*, 125 N.C. App. 588, 481 S.E.2d 697 (1997), and *Sprinkle v. Lilly Industries, Inc.*, 193 N.C. App. 694, 668 S.E.2d 378 (2008), argue that plaintiff is not entitled to interest because she suffered no prejudice from the appeal, such as out-of-pocket expenses, and that awarding interest would only serve an improper punitive purpose.

In *Childress*, we confronted the question of whether medical expenses are covered by § 97-86.2, or whether interest may only be paid on compensation due to a worker. *Childress*, 125 N.C. App. at 590, 481 S.E.2d at 698. We held that medical expenses were included in the interest calculation, despite the fact that “it was the medical providers who provided the treatment and who waited for the resolution of this matter to receive their funds, not the plaintiff.” *Id.* at 591, 481 S.E.2d at 699. Indeed, we stated that “any award of medical compensation for the plaintiff’s benefit is covered by G.S. 97-86.2.” *Id.*

Defendants point to our reasoning in *Childress* as implying that absent out-of-pocket expenses or other prejudice, an interest award only serves as a windfall to plaintiffs. Although we did highlight the myriad difficulties that plaintiffs face, including out-of-pocket expenses while awaiting resolution of their claim, we also noted other rationales for awarding interest, including “to prevent unjust

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

enrichment to a defendant for the use value of the money” and “to promote settlement.” *Id.* at 591-92.

Both of these legitimate legislative purposes are advanced by the award of interest to a worker, even where the worker has not shown out-of-pocket expenses during the appeal. An award of interest prevents a windfall to defendants who continue to benefit from the use value of the money that they owe plaintiffs by using or investing the funds during the pendency of an appeal. Without an award of interest, “carriers, through frivolous appeals, could temporarily deprive injured employees of awards while retaining the earnings thereon.” *Suggs v. Kelley Springfield Tire Co.*, 71 N.C. App. 428, 431, 322 S.E.2d 441, 443 (1984).⁵ Delay may further be incentivized by the fact that “he who pays \$1.00 tomorrow to discharge a debt of \$1.00 due and payable today, pays less than he owes.” *Lea Co. v. North Carolina Bd. Of Transp.*, 317 N.C. 254, 260, 345 S.E.2d 355, 358 (1986) (citation and quotation marks omitted). These incentives are lessened by a requirement that defendants pay interest on unpaid medical expenses, even where the plaintiff has not paid anything out of pocket. By removing such incentives, the legislature is not punishing defendants, but promoting settlement by depriving defendants of the financial advantage of delay if the worker is actually entitled to an award. *See Childress*, 125 N.C. App. at 591, 481 S.E.2d at 699.

Our opinion in *Sprinkle* concerned “only whether the calculation of interest on an unpaid award should include *amounts of the award which were reimbursed to the third-party health insurer.*” *Sprinkle*, 193 N.C. App. at 699, 668 S.E.2d at 381 (emphasis in original). We were presented with a situation where the provider and the plaintiff had both been compensated. *Id.* at 698-99. Only the plaintiff’s third-party insurer had yet to receive its part of the award for having covered the plaintiff’s expenses. *Id.* at 699. We held that “the language ‘final award or unpaid portion thereof,’ N.C. Gen. Stat. § 97-86.2, must not include amounts of medical compensation for which plaintiff was indemnified by his health insurer and which were reimbursable to the third-party health insurer.” *Id.* at 701, 668 S.E.2d at 383.

This Court reasoned that to award a plaintiff interest after he has already been compensated by a third-party insurer is to provide a windfall and therefore serves only to punish defendants for appealing, contrary to the statutory purposes. *Id.* We observed that the med-

5. This reasoning explains a purpose of the statute, in response to defendants’ argument as to proper purpose, but it is not required that the plaintiff show that in her particular case the defendant actually profited from use of the funds.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

ical provider had been paid by the plaintiff's major medical insurance, thus "interest awards on amounts reimbursed to a third-party health insurer are not for plaintiff's benefit." *Id.* at 696, 701, 668 S.E.2d at 379-80, 382.

Here, by contrast, the attendant care provider had not been compensated at all during the appeal. Rather, like the providers in *Childress*, Misty Boylan "provided the treatment and . . . waited for the resolution of this matter to receive [her] funds[.]" *Childress*, 125 N.C. App. at 591, 481 S.E.2d at 699. In both *Sprinkle* and *Childress*, the statutory purposes of awarding interest were used as interpretive guides to determine what is included in the "final award or unpaid portion" from which interest is calculated. In neither case did we require plaintiffs to show prejudice to receive interest on otherwise compensable unpaid medical expenses.

The statute "confers no degree of discretion on the Commission in determining an interest award given the presence of the circumstances delineated in the relevant statutory language." *Chandler*, ___ N.C. App. at ___, 720 S.E.2d at 750 (citations and quotation marks omitted). There is no dispute that plaintiff was awarded attendant care, that defendants appealed and that this Court affirmed the Commission's award. Therefore, § 97-86.2 applies. There is no evidence that plaintiff has been compensated or indemnified by a third party insurer in a manner that would make this case comparable to *Sprinkle*. Thus, here, unlike in *Sprinkle*, the award is for the plaintiff's benefit and the plain language of § 97-86.2 requires an award of interest. Further, doing so does not run contrary to the purposes of the statute.⁶

We hold that the Commission erred in concluding that plaintiff was not entitled to interest on the 9 December 2008 award of attendant care benefits from 23 August 2004 to 12 April 2009. Accordingly, we reverse the Commission's 2011 Opinion and Award in part and remand for the Commission to make conclusions of law and an award consistent with this opinion.

6. Even assuming such a finding was supported by evidence, the Commission's finding that plaintiff suffered no additional loss, out-of-pocket expense, or other disadvantage is immaterial as the Commission committed an error of law by requiring plaintiff to show such prejudice from defendants' appeal. Therefore, we do not address plaintiff's challenges to the Commission's findings.

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

V. Conclusion

In summary, we affirm all of the findings and conclusions made by the Industrial Commission as to plaintiff's entitlement to attendant care, the amount and compensation rate thereof, as well as to modifications to her wheelchair ramps. We reverse the Commission's conclusion that plaintiff is not entitled to interest on the amount of her attendant care services between 23 August 2004 and 12 April 2009 and remand to the Commission to determine the proper amount of interest to which plaintiff is entitled under N.C. Gen. Stat. § 97-86.2.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge HUNTER, Jr., Robert N. concurs.

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

BEASLEY, Judge concurring in part and dissenting in part.

I respectfully dissent from the majority's opinion affirming the increase in pay for attendant care and reversing the Commission's denial of interest on Plaintiff's award. I would reverse the increase in pay for attendant care.

This Court employs

a flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence, including but not limited to the following: a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury.

Shackleton v. S. Flooring & Acoustical Co., ___ N.C. App. ___, ___, 712 S.E.2d 289, 301 (2011)(footnotes omitted). *Chandler v. Atlantic Scrap & Processing*, ___ N.C. App. ___, ___, 720 S.E.2d 745, 752 (2011), *disc. review allowed*, ___ N.C. ___, 731 S.E.2d 141 (2012), cited by the majority, is easily distinguishable because the Commission was presented with testimony about the rate paid to an unskilled attendant. *Levens v. Guilford County Schools*, 152 N.C. App. 390, 396-97, 567 S.E.2d 767, 771-72 (2002), is also distinguish-

BOYLAN v. VERIZON WIRELESS

[224 N.C. App. 436 (2012)]

able. In *Levens*, the medical case manager testified that a home health attendant usually was paid anywhere between \$8.50 to \$10/hour, though the home health agencies usually charged an insurance company more for their employees' services (up to \$15). *Id. Palmer v. Jackson*, 161 N.C. App. 642, 590 S.E.2d 275 (2003), cited by Plaintiff, is distinguishable as well. In *Palmer*, a doctor from Mexico testified as to the reasonable rate of compensation for the comatose claimant in his rural home in Mexico, accounting for the claimant's condition, the condition of his home, and the distance the attendant would have to travel. *Id.* at 647, 590 S.E.2d at 278.

The majority concludes that the Commission did not err in awarding \$10/hour for attendant care. I believe the Commission erred because there is no evidence supporting an increase in the hourly rate from \$8/hour to \$10/hour. The only evidence regarding the pay for an attendant is Ms. Weiss' testimony that a certified nursing assistant, a skilled attendant, would be paid \$20.28/hour. Finding of Fact #32, without any support, states that "[f]or these ongoing services, a reasonable rate of compensation for Ms. Misty Boylan is \$10.00 per hour, an increase from the 2008 amount by \$2.00 per hour." Rp 52. The majority analogizes this case to *Chandler*, but neglects to note that the testimony in *Chandler* was for an *unskilled* attendant's rate whereas the testimony in this case was about a *skilled* attendant's rate when it is undisputed that Misty Boylan is not a skilled attendant. Though Plaintiff points to other cases where this Court has upheld rates of \$10-\$11/hour, the standard for awarding attendant care is explicitly on a case-by-case, flexible basis. Thus, I believe the payment rate is also to be determined on a case-by-case, flexible basis. The rates awarded in another case cannot simply be cut and pasted into this case. Neither can the Commission simply decide that cutting the skilled attendant's pay rate in half is appropriate for an unskilled attendant's pay rate. Thus, I would reverse the increase in attendant pay as it is unsupported by the competent evidence before the Commission.

CODERRE v. FUTRELL

[224 N.C. App. 454 (2012)]

SHANE CODERRE AND NORTH AMERICAN LAND ACQUISITIONS, INC., PLAINTIFFS

v.

GILBERT E. FUTRELL AND WIFE NANCY G. FUTRELL, DALE FUTRELL AND WIFE
GLENDA J. FUTRELL INDIVIDUALLY AND UNDER THE WILL OF PEARL THAYER
FUTRELL AND J. DALE FUTRELL, DEFENDANTS

No. COA12-517

Filed 18 December 2012

1. Pleadings—amended complaint—no standing—original complaint invalid—no relation back

The trial court did not err in a breach of contract and attorney fees case by dismissing plaintiff's amended complaint. Since plaintiff lacked standing to file the initial complaint, it was a nullity. Without standing to bring the initial complaint, there was no valid complaint to which the amended complaint could relate back.

2. Contracts—breach of contract—bankruptcy filing—statute of limitations not tolled—statute of limitations expired

The trial court did not err in a breach of contract and attorney fees case by dismissing plaintiff's amended complaint. Plaintiff's bankruptcy filing did not toll the statute of limitations on its breach of contract claim and plaintiff failed to file the claim prior to the expiration of the statute of limitations.

Appeal by plaintiffs from order entered 11 December 2011 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 26 September 2012.

William T. Batchelor, II, Attorney at Law, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey and Leonard, L.L.P., by Katherine J. Clayton, for defendant-appellees.

CALABRIA, Judge.

Shane Coderre (“Coderre”) and North American Land Acquisitions, Inc. (“NALA”)(collectively “plaintiffs”) appeal the trial court’s order dismissing plaintiffs’ claims against Gilbert E. Futrell, Nancy G. Futrell, Dale Futrell, Glenda J. Futrell, individually and under the will of Pearl Thayer Futrell, and J. Dale Futrell (collectively “defendants”). We affirm.

CODERRE v. FUTRELL

[224 N.C. App. 454 (2012)]

I. Background

On 18 August 2005, NALA, a North Carolina corporation, executed a purchase agreement (“the purchase agreement”) with defendants for the acquisition of 200 acres of land located in Montgomery County, North Carolina (“the property”). NALA paid \$1 million towards the \$7 million purchase price and financed the remainder of the purchase by executing a promissory note secured by a deed of trust in favor of defendants in the amount of \$6 million.

According to the purchase agreement, defendants would release 60 acres of the property from the deed of trust so long as NALA paid defendants \$2 million by 25 August 2006. When NALA had not made this payment by 16 August 2006, defendants modified the purchase agreement and deferred the date for NALA’s \$2 million payment to 25 August 2007. However, NALA failed to pay by the deferred date stated in the modification.

In February 2008, Thomas Simpson, as President of NALA, sought and secured financing for \$2 million from Cambridge Holdings Group. On 1 April 2008, NALA attempted to tender the \$2 million to defendants. However, since NALA was in default for failing to make required monthly payments of principle and interest, defendants refused to accept the \$2 million payment. Defendants directed the trustee of the deed of trust to initiate foreclosure proceedings.

The foreclosure sale was held at the courthouse door of the Montgomery County Courthouse on 2 July 2008. Defendants successfully bid on the property. There were no upset bids. Prior to the recording of the foreclosure deed, NALA and defendants entered into a new agreement (“the 30-day agreement”). Specifically, defendants agreed to postpone recordation of the deed if NALA paid all principal and interest in arrears under the note within 30 days. Upon payment, defendants agreed to assign NALA their successful foreclosure bid on the property. On 12 August 2008, one day before the 30-day agreement was scheduled to expire, NALA voluntarily filed a petition for relief under Chapter 11 of the United States Bankruptcy Code.

The United States Bankruptcy Court for the Eastern District of North Carolina (“the Bankruptcy Court”) allowed NALA to assume the 30-day agreement and cure its default under the agreement by 15 November 2008. Although this deadline was later extended until 18 January 2009, NALA was still unable to assume the 30-day agreement at that time. As a result, NALA filed a motion for its case to be con-

CODERRE v. FUTRELL

[224 N.C. App. 454 (2012)]

verted to a Chapter 7 bankruptcy. The Bankruptcy Court granted NALA's motion on 5 February 2009.

On 11 February 2011, while NALA's bankruptcy case was still pending, Coderre, one of NALA's shareholders, filed an action against defendants for breach of contract and attorney's fees in New Hanover County Superior Court ("the initial complaint"). On 7 June 2011, NALA was released from bankruptcy. On 13 June 2011, defendants filed a motion to dismiss the initial complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) alleging that Coderre did not have standing because he was not a party to the purchase agreement executed on 18 August 2005. That same day, Coderre filed an amended complaint adding NALA as an additional plaintiff ("the amended complaint"). On 22 July 2011, defendants filed another motion to dismiss under Rule 12(b)(6), alleging the amended complaint was barred by the statute of limitations. Defendants also asserted the defenses of judicial estoppel and *res judicata*. On 11 December 2011, the trial court granted defendants' motion to dismiss with prejudice. Plaintiffs appeal.

II. Standard of Review

"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, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

III. Initial Complaint

[1] Plaintiffs argue that the trial court erred in dismissing the amended complaint because, under N.C. Gen. Stat. § 1A-1, Rule 15(c), the amended complaint related back to the time Coderre filed the initial complaint. We disagree.

Rule 15(c) provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transac-

CODERRE v. FUTRELL

[224 N.C. App. 454 (2012)]

tions and occurrences, to be proved pursuant to the amended pleading.” N.C. Gen. Stat. § 1A-1, Rule 15(c) (2011). Plaintiffs contend that, under this Court’s holding in *Baldwin v. Wilkie*, 179 N.C. App. 567, 635 S.E.2d 431 (2006), Rule 15(c) allows a plaintiff to add an additional party plaintiff to an already filed action and have the new plaintiff’s claims relate back to the original filing. However, since we have determined that Coderre had no standing to file the initial complaint, we do not address plaintiffs’ Rule 15(c) argument.

“Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter.” *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (internal quotations and citation omitted). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Id.* (internal quotations and citations omitted).

In the instant case, nothing in the record indicates that Coderre had standing to file the initial complaint. The initial complaint named Coderre as a plaintiff in his individual capacity, but it did not include NALA or ever suggest that Coderre brought the action in a representative capacity on behalf of NALA. The purchase agreement, which was attached to and formed the basis of the initial complaint, was not executed by Coderre in his individual capacity. Furthermore, the complaint does not allege that Coderre was an intended third party beneficiary of the purchase agreement.

At the 5 December 2011 hearing on defendants’ motion to dismiss, plaintiffs’ counsel essentially conceded that Coderre lacked standing to file the initial complaint. Counsel informed the trial court that “[Coderre] had no independent interest. His only interest was I had to get a complaint filed, I couldn’t file it for NALA because we were in bankruptcy.” Thus, it is clear that Coderre lacked a “stake in an otherwise justiciable controversy so as to properly seek adjudication” of the initial complaint. *Woodring*, 180 N.C. App. at 366, 637 S.E.2d at 274. Accordingly, the trial court had no jurisdiction over Coderre’s initial complaint.

“A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Since Coderre lacked standing to file the initial complaint, it was a nullity. Without standing to bring the initial complaint, there was no valid complaint to which the amended complaint could relate back. As a

CODERRE v. FUTRELL

[224 N.C. App. 454 (2012)]

result, the initial complaint could not be used to defeat defendants' statute of limitations defense to the amended complaint. This argument is overruled.

IV. Amended Complaint

[2] Plaintiffs argue the trial court erred in dismissing the amended complaint because 11 U.S.C. § 108 of the Bankruptcy Code tolled the statute of limitations while NALA was in bankruptcy. We disagree.

Plaintiffs contend that this Court has interpreted 11 U.S.C. § 108 as tolling the statute of limitations while a debtor is in bankruptcy. Specifically, plaintiffs cite the following passage from *Person Earth Movers, Inc. v. Buckland*: “[t]he statute of limitations for a state law claim . . . expires at the end of the limitations period described by the appropriate state law, and is extended only by that amount of time the debtor is in bankruptcy.” 136 N.C. App. 658, 660, 525 S.E.2d 239, 240 (2000). However, the portion of 11 U.S.C. § 108 analyzed in *Person* is subsection (c). This subsection only applies to “a claim against the debtor[.]” 11 U.S.C. § 108(c) (2011). It does not apply to claims by the debtor against third parties.

Instead, this case is governed by 11 U.S.C. § 108(a). This subsection states:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

11 U.S.C. § 108(a) (2011). Under this subsection, a trustee may commence a nonbankruptcy action before the later of either the expiration of the statute of limitations for such action or two years after the entry of the order for relief.

In the instant case, defendants' alleged breach of contract occurred on 1 April 2008. In North Carolina, the statute of limitations for breach of contract is three years. N.C. Gen. Stat. § 1-52(1) (2011). Thus, the statute of limitations expired on plaintiffs' claim on 1 April

CODERRE v. FUTRELL

[224 N.C. App. 454 (2012)]

2011. NALA filed its bankruptcy petition on 12 August 2008 and the order for relief was entered that same day. Since 1 April 2011 was later than two years after the order for relief was entered, it was the last date NALA's breach of contract claim could be brought under 11 U.S.C. § 108 (a).

NALA had the power of the trustee to bring the breach of contract action while its case was in Chapter 11 bankruptcy. *See* 11 U.S.C. § 1107 (2011) ("A debtor in possession shall have all the rights . . . and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter."). When NALA's case was converted to a Chapter 7 bankruptcy, the bankruptcy trustee still had the power to bring NALA's breach of contract action against defendants until 1 April 2011.

However, NALA did not initiate a breach of contract action against defendants until 13 June 2011. At that time, its claim was barred by the statute of limitations. Consequently, the trial court properly allowed defendants' motion to dismiss. *See Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986) ("A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred."). This argument is overruled.

V. Conclusion

Coderre lacked standing to file the initial complaint and therefore, it was a nullity. As a result, the amended complaint could not relate back to the time the initial complaint was filed. NALA's bankruptcy filing did not toll the statute of limitations on its breach of contract claim. Since the amended complaint was not filed until after the expiration of the statute of limitations, the trial court properly granted defendants' motion to dismiss. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and STEPHENS concur.

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

IN THE MATTER OF P.D.R., L.S.R., J.K.R., MINOR CHILDREN

No. COA10-1519-2

Filed 18 December 2012

**Termination of Parental Rights—role of guardian ad litem—
diminished capacity—incompetence—assistance—substitution**

The trial court erred in a termination of parental rights (TPR) proceeding by failing to determine whether respondent mother was incompetent or had diminished capacity and by failing to determine the role of respondent's appointed guardian *ad litem* (GAL). Rule 17(e) of the Rules of Civil Procedure, which addresses the duties of a GAL for an incompetent person, should apply if the parent is incompetent and the role of the GAL should be one of substitution. If, however, the parent has diminished capacity, N.C.G.S. § 7B-1101.1(e) should apply and the role of the GAL should be one of assistance. The trial court's TPR order was vacated and remanded.

Appeal by respondent from order entered 28 September 2010 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. This case was originally heard in the Court of Appeals 9 May 2011. Upon remand by order from the North Carolina Supreme Court filed 18 April 2012.

Kathleen Marie Arundell for petitioner-appellee.

Richard Croutharmel for respondent-appellant.

*Administrative Office of the Courts, by GAL Appellate Counsel
Deana K. Fleming, for guardian ad litem.*

GEER, Judge.

In this Court's prior opinion, *In re P.D.R., L.S.R., J.K.R.*, 212 N.C. App. 326, 713 S.E.2d 60 (2011), *rev'd*, 365 N.C. 533, 723 S.E.2d 335 (2012), we addressed the sole question before us: Whether the trial court erred in allowing respondent mother to waive counsel and represent herself at the hearing on the petition to terminate her parental rights to her three minor children. After concluding that the trial court did not conduct a sufficient inquiry regarding respondent mother's competence to waive counsel and represent herself in the termination of parental rights ("TPR") hearing, we vacated the TPR

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

order and remanded for further proceedings. *Id.* at 336-37, 713 S.E.2d at 67-68. The Supreme Court, however, reversed that opinion and remanded to this Court with instructions “to decide, after full briefing by the parties, whether the role of the [guardian ad litem for respondent mother] here is one of assistance or substitution.” *In re P.D.R., L.S.R., & J.K.R.*, 365 N.C. 533, 538, 723 S.E.2d 335, 338 (2012).

Respondent mother, petitioner Mecklenburg County Department of Social Services, Youth and Family Services (“YFS”), and the children’s guardian ad litem (“GAL”) all argue that the role of respondent mother’s GAL was one of substitution. Based upon our review of the pertinent statutory provisions and this Court’s prior opinions addressing this issue, we cannot agree with the parties that a parent’s GAL, appointed pursuant to N.C. Gen. Stat. § 7B-1101.1 (2011), necessarily, in all cases, plays a substitutive role.

The trial court, when appointing a GAL for a parent must, as part of that decision, determine whether the GAL should function in a substitutive capacity or play a role of assistance to the parent. Because it does not appear from the record that the trial court made that determination in this case, we vacate the TPR order and remand for further proceedings consistent with this opinion.

Facts

A full statement of the facts is set forth in this Court’s prior opinion. The following facts are pertinent to the issue on remand from the Supreme Court. YFS filed a petition dated 6 October 2008 alleging that respondent mother’s three children, then six months old, two years old, and ten years old, were neglected and dependent. In the Initial (7-Day) Order, filed 21 October 2008, the trial court appointed Evelyn Earnest to serve as respondent mother’s GAL.

On 29 January 2009, the trial court entered an Order for Mental Examination, requiring respondent mother to submit to a mental examination at the Behavioral Health Center at Carolinas Medical Center-Randolph (“CMC-Randolph”). The order found that respondent mother had exhibited extreme impulse control problems or paranoia during visitation with the children, that she would not communicate with her attorney and GAL, and that she had orally moved to have her attorney and GAL released. The court released both the attorney and the GAL in accordance with respondent mother’s request.

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

On 11 February 2009, the trial court entered an Order for Forensic Evaluation with respect to respondent mother and one of the fathers of the children. The court directed the evaluator to answer the following questions: “What is each parent’s current mental condition and are there any issues relating to [their] mental stability? Does each parent currently have the mental capacity to participate in, and assist her attorney with, child dependency proceedings?” The order provided that the evaluation was to be completed and delivered by 27 March 2009 so that the court could review the results at the 9 April 2009 hearing on YFS’ amended petition.

The trial court appointed Christian Hoel as respondent mother’s attorney and Mary Alice Dixon as respondent mother’s GAL. However, the record contains a note written by respondent mother sometime prior to 9 April 2009 purportedly firing her attorney. In addition, in a letter dated 17 March 2009, a psychologist from CMC-Randolph informed the trial court that respondent mother had made no contact with them, and, therefore, the ordered forensic evaluation had been terminated.

On 9 April 2009, respondent mother requested that the court discharge her attorney and GAL. The trial court allowed both Mr. Hoel and Ms. Dixon to withdraw on 10 July 2009, noting that respondent mother “has insisted on proceeding Pro Se.” However, in an order dated 30 July 2009, the trial court appointed Rhonda Wilson as respondent mother’s GAL.

The trial court entered an order adjudicating the children neglected and dependent on 20 August 2009 and an amended order on 2 September 2009. In the amended order, the trial court found:

The petition in this matter contains allegations of mental health issues and substance abuse. The mother has rejected two sets of capable, astute attorneys; each had more than sufficient ability to provide competent representation. The Court spent more than twenty minutes on July 10, 2009 discussing [respondent mother’s] ability to represent herself. Over and over again, she has reiterated that she wants to represent herself and will not cooperate with any court-appointed attorneys. We have been struggling with this process since October 4, 2008 and are three months from needing to achieve permanence should the children be adjudicated neglected or dependent. However, the Court has not been able to

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

convince the mother to work with her attorneys so as to move this case forward and put herself in a position to have her children returned. The mother has refused to sign a waiver of counsel. However, she has stated under oath that she does not wish to have her current counsel or any other counsel assist her and wishes to represent herself. The Court has attempted to balance the mother's possible need for a guardian ad litem with her guardian having to face an uncooperative and openly hostile client. The mother's hostility made it impossible for her attorney or GAL to represent her. There is no clear guidance in this situation. Therefore, this Court has decided that the polar star in this matter is the best interests of the children. The children need this matter to be resolved and to get to permanence as soon as possible. This will best be achieved at this time by allowing the mother's requests to have her court-appointed attorney and GAL released. If this matter is appealed and remanded on this issue, the Court requests specific step by step instructions on how to proceed.

The court further noted that "[t]he mother is either very distrusting of the system or has acute paranoia. Based on the mother's present position, the Court has grave doubts that she could get her children back as she is not doing what is in her own best interests." The court then concluded: "Despite the mother's objections to the assistance of a GAL, a Rule 17 GAL appointment is necessary to ensure procedural safeguards for the mother."

DSS filed a petition to terminate respondent's parental rights on 19 November 2009. In an order dated 19 November 2009, the trial court re-appointed Christian Hoel as respondent mother's attorney and Ms. Wilson as respondent mother's GAL for the TPR proceedings.

Respondent mother, however, filed a *pro se* motion on 23 February 2010 seeking modification of the visitation order. In that motion, she stated: "I had no knowledge of this system[.] [T]hat's why it took so long to get this far[.] [N]o one took time to help [me] understand[.] I did my own research." In an order entered 18 March 2010 denying respondent mother's motion, the court found that "[t]he mother's conduct and behavior in court today was disjointed and hostile." The court also found that "[h]er visitation rights will not be restored, if ever, until she complies with the prior order of the Court

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

that she be evaluated at the Behavioral Health Center, shares the evaluation with all parties, and demonstrates she can control her emotions and conduct in court.”

After hearings on 13 May and 18 June 2010, the trial court entered an order on 28 September 2010 terminating respondent mother’s parental rights. During the termination hearing, Ms. Wilson continued to serve as respondent mother’s GAL, although respondent mother’s court-appointed counsel, Mr. Hoel, was allowed to withdraw based on respondent mother’s request to represent herself. The TPR order found:

That Mr. Christian Hoel had been previously appointed to represent [respondent mother] in the underlying abuse/ neglect/ and dependency proceeding regarding the above referenced juveniles. On 13 May 2010, Mr. Hoel moved in open court to withdraw as court appointed counsel for [respondent mother]. Mr. Hoel informed the Court that [respondent mother] refused to communicate with him regarding the pending termination hearing; that she exhibits hostile behavior towards Mr. Hoel, and that she does not want Mr. Hoel to represent her.

The court further found that respondent mother, “[a]fter extensive questioning by the Court,” expressed “an unequivocal, informed and competent decision to waive her right to court appointed counsel.” The court noted, however, that respondent mother refused to sign the waiver of counsel form.

Respondent mother appealed to this Court, and this Court vacated the trial court’s order because the trial court had not adequately determined whether respondent mother was competent to waive counsel and to represent herself. 212 N.C. App. at 336-37, 713 S.E.2d at 67-68. In reaching this decision, because of the lack of guidance in the Juvenile Code, the Court relied upon statutes and precedents from the criminal context addressing the analogous issue of a criminal defendant’s competence to waive counsel and proceed pro se, including N.C. Gen. Stat. § 15A-1242 (2011). 212 N.C. App. at 329-34, 713 S.E.2d at 63-66.

The Supreme Court granted discretionary review and reversed. 365 N.C. at 538, 723 S.E.2d at 336, 338. The Court stated that the parties presented two issues on appeal: “(1) whether the role of a GAL

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

appointed for a parent in termination proceedings is one of assistance or substitution, and (2) whether the trial court erred by importing the requirements of N.C.G.S. § 15A-1242, a criminal statute, into TPR proceedings.” *Id.* at 536, 723 S.E.2d at 337. The Court concluded as to the second issue that N.C. Gen. Stat. § 15A-1242 does not apply outside the criminal context to parents seeking to waive counsel in TPR proceedings. 365 N.C. at 538, 723 S.E.2d at 338. The Court did not further address respondent mother’s competence to waive counsel and proceed pro se.

With respect to the first issue, the Court wrote:

[B]oth petitioner and respondent argue that the role of a GAL is one of substitution rather than assistance. They thus contend that the trial court was required to obtain approval of the GAL before permitting respondent to waive counsel. The parties disagree, however, whether the GAL consented to the waiver of counsel. Because both parties argued before the Court of Appeals that the decision to waive counsel fell to respondent, the Court of Appeals did not directly address the role of respondent’s GAL. We remand this matter for the Court of Appeals, after full briefing, to decide whether the GAL’s role here is one of assistance or substitution.

Id. at 536-37, 723 S.E.2d at 337-38. That question is now before this Court for decision.

Discussion

In their briefs filed on remand from our Supreme Court’s decision, all parties argue that the role of a parent’s GAL under N.C. Gen. Stat. § 7B-1101.1 is one of substitution rather than assistance. Respondent mother argues that the trial court therefore erred by allowing her to waive counsel and proceed pro se. For the following reasons, we do not agree with the parties’ construction of the statute or their analysis of this Court’s prior opinions on the issue of the role of a parent’s GAL.

N.C. Gen. Stat. § 7B-1101.1(c), which governs the appointment of a GAL for an adult parent in a TPR proceeding, provides:

On motion of any party or on the court’s own motion, the court may appoint a guardian ad litem for a parent

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

in accordance with G.S. 1A-1, Rule 17 if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

The statute's plain language thus provides that a court *may* appoint a GAL upon finding a "reasonable basis" for believing that the parent *either* (1) is incompetent, *or* (2) has diminished capacity and cannot adequately act in his or her own interest. *Id.* Any appointment of a GAL is required to be "in accordance with" Rule 17 of the Rules of Civil Procedure.

The statute goes on to provide in N.C. Gen. Stat. § 7B-1101.1(e) that

[g]uardians ad litem appointed under this section may engage in all of the following practices:

- (1) Helping the parent to enter consent orders, if appropriate.
- (2) Facilitating service of process on the parent.
- (3) Assuring that necessary pleadings are filed.
- (4) Assisting the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met.

This Court reasoned in *In re L.B.*, 187 N.C. App. 326, 329, 653 S.E.2d 240, 242 (2007), *aff'd per curiam*, 362 N.C. 507, 666 S.E.2d 751 (2008), that the duties enumerated in § 7B-1101.1(e) make "clear that the GAL's role is limited to one of assistance, not one of substitution."

However, at the time that *In re L.B.* was decided, N.C. Gen. Stat. § 7B-1101.1(c) did not specify that appointment of a GAL for a parent over the age of 18 must be in accordance with Rule 17. *See In re L.B.*, 187 N.C. App. at 330, 653 S.E.2d at 243 (in holding that GAL could not sign notice of appeal because role limited to assistance, noting that "[i]n its 2005 revisions to Chapter 7B, the General Assembly retained the requirement that the appointment of a GAL be in accordance with Rule 17 only when the parent is under the age of eighteen years"). N.C. Gen. Stat. § 7B-1101.1(c) was subsequently amended to include the reference to Rule 17.

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

Rule 17(b)(2) of the Rules of Civil Procedure addresses the appointment of a GAL for “incompetent persons” and provides that “[i]n actions . . . when any of the defendants are . . . *incompetent* persons, . . . they must defend . . . by guardian ad litem appointed as hereinafter provided . . .” N.C.R. Civ. P. 17(b) (emphasis added). Rule 17(e) describes the role of a GAL appointed under the rule, providing that,

[a]ny guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

Appointment of a GAL under Rule 17 for an incompetent person “will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination.” *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 48 (2005).

We are thus left with a seeming conflict between N.C. Gen. Stat. § 7B-1101.1(e), which contemplates a role of assistance, and Rule 17, incorporated in N.C. Gen. Stat. § 7B-1101.1(c), which provides for a role of substitution. While the parties urge that the reference to Rule 17 requires that we hold that all GALs assume a role of substitution in TPR cases, such a construction of the statute would, in effect, render N.C. Gen. Stat. § 7B-1101.1(e) meaningless. It is well established that “[a] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute’s provisions to be surplusage.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) (quoting *Jolly v. Wright*, 300 N.C. 83, 86, 265 S.E.2d 135, 139 (1980), overruled on other grounds by *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993)).

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

We believe that both N.C. Gen. Stat. § 7B-1101.1(e) and Rule 17(e) can be given effect by focusing on the two separate prongs of N.C. Gen. Stat. § 7B-1101.1(c), with one authorizing appointment of a GAL if the parent is incompetent, while the second authorizing appointment of a GAL if the parent has diminished capacity. The extent of the parent's disability logically informs the role a GAL needs to play for the parent in a TPR proceeding.

Our General Assembly has defined an “incompetent adult” as

an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2011). For incompetent persons, “[t]he essential purpose” of the appointment of a guardian “is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.” N.C. Gen. Stat. § 35A-1201(a)(3) (2011).

With respect to the “diminished capacity” prong, this Court has noted with respect to the identically-worded statute governing appointment of a GAL in abuse, neglect, and dependency proceedings:

The phrase “diminished capacity,” which appears in N.C.G.S. § 7B-602(c), is used primarily in the criminal law context and is defined as “[a]n impaired mental condition—short of insanity—that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime.” Black's Law Dictionary 220 (8th ed. 2004). However, our Court has also defined “diminished capacity” in the juvenile context as a “lack of ‘ability to perform mentally.’” *In re Reinhardt*, 121 N.C. App. 201, 204, 464 S.E.2d 698, 701 (1995) (quoting *Taber's Cyclopedic Medical Dictionary* 278 (16th ed. 1989)), *overruled on other grounds by In re Brake*, 347 N.C. 339, 493 S.E.2d 418 (1997).

In re M.H.B., 192 N.C. App. 258, 262, 664 S.E.2d 583, 585-86 (2008). In other words, a person with diminished capacity is not incompetent,

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

but may have some limitations that impair their ability to function.

Given these distinctive prongs, we believe that the role of the GAL should be determined based on whether the trial court determines that the parent is incompetent or whether the trial court determines that the parent has diminished capacity and cannot adequately act in his or her own interest. Rule 17(e), which addresses the duties of a GAL for an incompetent person, should apply if the parent is incompetent—the role of the GAL should be one of substitution. On the other hand, if the parent has diminished capacity, N.C. Gen. Stat. § 7B-1101.1(e) should apply and the role of the GAL should be one of assistance.

This holding is consistent with this Court's opinion in *In re A.S.Y.*, 208 N.C. App. 530, 703 S.E.2d 797 (2010). In *In re A.S.Y.*, this Court held that once a GAL was appointed for a parent, "the requirements of Rule 17 applied to the termination proceedings." *Id.* at 540, 703 S.E.2d at 803. The Court noted:

While N.C. Gen. Stat. § 7B-602(e) emphasizes that the primary role of the parent's GAL in a termination proceeding is to act as "a guardian of procedural due process for [the] parent, to assist in explaining and executing her rights," [*In re*] *Shepard*, 162 N.C. App. [215,] 227, 591 S.E.2d [1,] 9 [(2004),] this is not the sole role of the GAL. "[A] guardian ad litem is considered an officer of the court and as such has a duty to represent the party he is appointed to represent to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 17:20 (6th ed. 2003) (footnotes omitted). Thus, while in many cases the GAL may fulfill his or her duties in a termination proceeding by merely assisting the parent, at times it will be necessary for the GAL to take further action during the proceeding in order to represent the parent to the fullest extent feasible and to secure a judgment favorable to that parent.

Id. at 538-39, 703 S.E.2d at 802. In other words, the precise role of the GAL varies depending on the limitations of the parent.

As *In re A.S.Y.* holds, however, Rule 17 still controls in other respects. "Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed." *Id.* at 538, 703 S.E.2d at

IN RE P.D.R.

[224 N.C. App. 460 (2012)]

802. As a result, once a trial court determines, in its discretion, that a parent meets the requirements of N.C. Gen. Stat. § 7B-1101.1(c) and appoints the parent a GAL, “it [is] necessary for [the parent] to be represented by a GAL throughout the neglect and dependency and termination proceedings, as long as the conditions that necessitated the appointment of a GAL still exist[.]” *In re A.S.Y.*, 208 N.C. App. at 539, 703 S.E.2d at 802. Further, “once a parent has been appointed a GAL according to Rule 17, the presence and participation of the GAL is necessary in order for the trial court to ‘proceed to final judgment, order or decree against any party so represented. . . .’” *Id.* at 540, 703 S.E.2d at 803 (quoting N.C.R. Civ. P. 17(e)).

Accordingly, the trial court acting under N.C. Gen. Stat. § 7B-1101.1(c), must conduct a hearing in accordance with the procedures required under Rule 17 in order to determine whether there is a reasonable basis for believing that a parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. If the court chooses to exercise its discretion to appoint a GAL under N.C. Gen. Stat. § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the GAL should play, whether one of substitution or assistance.

In this case, the trial court appointed the GAL without benefit of the above analysis. There are indications in the record that the trial court was concerned about the competency of respondent mother, but because of respondent mother’s lack of cooperation, there was no resolution of that issue. No mental health or forensic evaluation occurred. There are other indications in the record suggestive that the trial court believed that respondent mother suffered only a diminished capacity that could be adequately addressed through the assistance of a GAL. We cannot, however, resolve this issue on appeal.

We, therefore, vacate the TPR order and remand for a determination, in accordance with the above opinion, regarding respondent mother’s need for a GAL and the proper role of that GAL. In the event that the trial court determines that respondent mother suffered only diminished capacity, then she was free to make her own decision whether to proceed pro se. Based on the Supreme Court’s reversal of this Court’s prior opinion, no further issue would remain regarding whether respondent mother was competent to waive counsel, and the trial court’s TPR order could be reinstated. In the event, however, that the trial court determines that the GAL should have had a sub-

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

stitutive role, then the court would be required to conduct a new TPR hearing during which the GAL would act on behalf of respondent mother, making the decisions necessary to seek a result favorable to respondent mother.

Vacated and remanded.

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

GROVER FRANKLIN MINOR AND CAROLEEN W. MINOR, PLAINTIFFS

v.

SANDRA ANN MINOR, DEFENDANT

No. COA12-693

Filed 18 December 2012

Adverse Possession—jury instruction—harmless error—insufficient evidence as to hostility and duration

The trial court did not err in a real property case by denying defendant's request for an instruction on acquiring title to less than the entire tract. Any error in failing to so instruct the jury was harmless in light of the insufficiency of the evidence as to the hostility and duration of defendant's possession.

Judge Elmore dissenting.

Appeal by Defendant from judgment entered 30 August 2011 and order entered 23 September 2011 by Judge Jan H. Samet in Guilford County District Court. Heard in the Court of Appeals 14 November 2012.

Forman Rossabi Black, P.A., by T. Keith Black and Gavin J. Reardon, for Plaintiffs-Appellees.

Tuggle Duggins & Meschan, P.A., by Denis E. Jacobson and Jeffrey S. Southerland, for Defendant-Appellant.

BEASLEY, Judge.

Sandra Ann Minor (Defendant) appeals from judgment entered pursuant to a jury verdict declaring Grover and Caroleen Minor (collectively, Plaintiffs) to be the lawful owners of the property located at

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

7949 Valley Falls Road (the property). Defendant also appeals from an order denying her motions for judgment notwithstanding the verdict and a new trial. For the reasons stated below, we affirm.

Defendant is Plaintiffs' ex-daughter-in-law. Grover Minor (Grover) and his father bought the property as part of a larger tract of land in 1971. They subdivided the land in 1972, making Plaintiffs the record owners of the disputed property. Grover and his son, Tyson Minor (Tyson), built a log cabin on the land in mid-1970s. Tyson and Defendant married in 1980. Ty and Defendant began living in the cabin between 1984 and 1986. Defendant testified that she thought the cabin was her husband's property. Defendant believed she owned the land based on what Grover had said to her about inheriting the property if Tyson died. She did not ask permission to live there or make improvements. Around Christmas of 1985, she testified to telling the family that the property was hers and Tyson's property. On cross-examination when she was asked whether she lived at the cabin with her husband's permission, she answered that they lived together and she let him live there too. She claimed to be the owner of the property, having assumed her name was on the deed.

Grover testified that he gave Tyson permission to live in the cabin. Grover stated that Defendant had permission to live there since she was Tyson's wife. Grover pledged the property as collateral on a deed of trust for a loan so that Tyson and Defendant could make improvements to the property. Tyson and Defendant made the payments on the loan, but Grover signed the promissory note.

Tyson paid a leasehold tax in exchange for living on the property, and Plaintiffs paid the real estate taxes, according to Grover's and Tyson's testimonies. Plaintiffs' exhibit¹ shows that leasehold taxes, rather than real property taxes, were paid on the property from 1985 to 2006. The exhibit also includes a 1988 check for the amount due signed by Defendant. Defendant admitted that she wrote the check. She thought she was paying the taxes she and Tyson owed on the property.

There was never a doubt in Tyson's mind that his father owned the property. Tyson never heard Defendant say she owned the property. Tyson testified that Defendant did not like Caroleen Minor making statements in public that Defendant and Tyson lived on her and Grover's property because it made it seem like they did not own it.

1. The exhibit is denominated "Trial Exhibit 'D-1'" since Plaintiffs took the posture of the defendants in the case below.

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

Tyson told Grover about several of the improvements they were going to make on the property. He did not explicitly ask for permission, but he would let Grover know their plans and Grover did not stop them. He took it as permission to make the improvements. If Grover had said no, he would not have been able to make those improvements.

Defendant and Tyson lived together on the property continuously from 1984 until they separated around 2001. At that time, Tyson moved off of the property. After the separation, Grover testified that he allowed Defendant to continue living there since she was still legally their daughter-in-law and asked her to leave in 2008 when she and Tyson began the divorce process.

Plaintiffs filed a complaint in Guilford County District Court on 27 January 2010. Plaintiffs obtained a judgment for summary ejectment in small claims court on 16 March 2010. Defendant appealed to district court on 25 March 2010 and filed a counterclaim to quiet title by way of adverse possession on 23 April 2010. The issue of adverse possession came on for jury trial on 18 July 2011. Defendant took the posture of the plaintiff during trial.

Defendant requested an instruction that Defendant could acquire title to less than the entire tract of land. The trial court denied the request.

On 20 July 2011, the jury returned a verdict in favor of Plaintiffs, finding that Defendant's possession of the property was not actual, open and notorious under known and visible boundaries, and uninterrupted for twenty years. The jury found that Defendant's possession of the property was exclusive and hostile to Plaintiffs, but the verdict sheet does not indicate when this exclusive and hostile possession began.² Defendant filed motions for judgment notwith-

2. The dissent argues that our review exceeds the issues presented since the jury found that Defendant's possession was hostile. As noted above, we cannot tell during what time period the jury found her possession to be hostile. Her possession was certainly hostile after 2008 when Grover asked her to leave. Regardless of whether the jury found Defendant's possession to be hostile earlier than 2008, the jury nevertheless found against Defendant on the statutory period, supporting our ultimate conclusion that Defendant has failed to show that the jury was misled or that the verdict was affected. It is unnecessary to reverse and remand the case for a new trial when the evidence shows that the verdict in the first trial should nonetheless be upheld.

In further response to the dissent, the other improvements built in the 1980s and shown on "Exhibit E" fail to create visible boundaries that satisfy the twenty-year period. The dog fence that would enclose the portion Defendant claims was not constructed until 1994, meaning the statute of limitations would not run until 2014. The

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

standing the verdict and a new trial on 29 July 2011, both of which were denied 23 September 2011. Defendant now appeals.

Defendant argues that the trial court erred in denying her request for an instruction on acquiring title to less than the entire tract. We disagree. Defendant has failed to show that the jury was misled or that the verdict was affected by the trial court's failure to give the instruction. Any error in failing to so instruct the jury is harmless in light of the insufficiency of the evidence as to the hostility and duration of Defendant's possession.

A specific jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury."

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)). "The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002).

"In North Carolina, to acquire title to land by adverse possession, the claimant must 'show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period . . . under known and visible lines and boundaries.'" *Rushing v. Aldridge*, ___ N.C. App. ___, ___, 713 S.E.2d 566, 571 (2011)(quoting *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (2001)). The evidence in this case demonstrates that Plaintiff's possession was permissive and failed to satisfy the prescriptive period.

"A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). North Carolina presumes permissive use, and the presumption is stronger when the parties are related. *Amos*

barbed wire fence that was installed in 1984 merely traces along the property line and fails to separate the portion that Defendant claims from the remainder of the tract. As such, Defendant's requested jury instruction would not have affected the verdict since she failed to show visible boundaries as to a lesser portion of the property for a twenty-year period.

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

v. Bateman, 68 N.C. App. 46, 50, 314 S.E.2d 129, 131 (1984) (“Mere use, standing alone, is presumed to be permissive, particularly use by members of a family living as neighbors as in this case.” (internal citation omitted)). In cases of adverse possession by a tenant as against the landlord, the lease must end before the use becomes adverse to the landlord. See *Pitman v. Hunt*, 197 N.C. 574, 576, 150 S.E. 13, 14 (1929). The statutory period to acquire title by adverse possession without color of title is twenty years. N.C. Gen. Stat. § 1-40 (2011).

A New York case speaks to the unique facts presented here. The New York Appellate Division, in considering whether the occupant of a co-operative apartment was likely to prevail on the merits of her adverse possession claim such that the court should issue an injunction, held as follows:

While plaintiff and Malone, whose spouses were siblings, may not be related to each other in any conventional sense, any presumption of hostility to which plaintiff is entitled by reason of the fact that her occupancy was open, continuous and uninterrupted for at least 10 years is rebutted by the fact that she was the prior owner’s daughter-in-law, and that her occupancy of the apartment from 1984 to 1995 [the time period corresponding to her marriage] was apparently with his permission. Moreover, even if such an in-law relationship is not by itself sufficient to rebut the presumption of hostility, taking possession of property by reason of cohabiting with a spouse is not a taking under a claim of right, also a necessary element of adverse possession. It does not avail plaintiff that she may have believed that her husband owned the apartment.

Sugarman v. Malone, 816 N.Y.S.2d 453, 454 (N.Y. App. Div. 2006) (internal citations omitted).³

Here, Defendant’s possession is presumed permissive, and she failed to rebut that presumption and demonstrate that her possession was hostile for twenty years. Defendant lived on the property with Plaintiffs’ permission and merely paid a leasehold interest on the property. Defendant’s lease on the property and permissive use ended only in 2008 when Plaintiffs sued for summary ejection; thus, any

3. New York law differs from North Carolina law in that New York presumes hostile use if all other elements of adverse possession have been met. *Sinicropi v. Town of Indian Lake*, 538 N.Y.S.2d 380, 381 (N.Y. App. Div. 1989).

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

hostile use of the property began only in 2008, well short of the statutory period of twenty years. Further, Tyson gave unequivocal testimony that he never thought he owned the property. “Cohabiting with a spouse is not a taking under a claim of right,” as noted by the *Sugarman* court. *Id.* Her right to be on the property was derivative of Tyson’s; she could have no more right to the cabin by adverse possession than he did. If Defendant and Tyson had not divorced, Defendant could not sue to quiet title as against Plaintiffs where Tyson did not have the state of mind to claim the property as his own. Defendant has failed to demonstrate to this Court that the verdict was affected or that the jury was misled when the evidence tends to show that she did not possess the property under a claim of right for twenty years.

In Defendant’s “Issues Presented,” she lists the issue of whether the trial court erred in denying her motion for judgment notwithstanding the verdict. Given our decision above, we need not consider it.⁴

For the reasons stated above, we affirm the trial court’s decisions and the jury’s verdict.

Affirmed.

Judge STROUD concurs in result only.

Judge ELMORE dissents.

ELMORE, Judge dissenting.

I respectfully disagree with the decision of the majority to affirm the trial court’s judgment entered in Guilford County District Court on 30 August 2011, declaring that defendant had no lawful interest in the property subject to this dispute and dismissing her appeal of summary ejection. I agree with defendant that the trial court erred in failing to instruct the jury that they could divide the property at issue in the event that they determined defendant adversely possessed some lesser portion of the property. As a result, I would we reverse and remand for a new trial.

I believe that the majority’s analysis stretches far beyond what we have been asked to review on appeal. On appeal, defendant contends

4. We would also deem the issue abandoned per N.C. R. App. P. 28(a) since Defendant presented no argument on this issue, instead choosing to argue for a new trial throughout her brief.

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

only that the trial court erred in failing to instruct the jury that they could divide the property 1) in its initial instruction to the jury and 2) after the jury sent a written question to the trial court, inquiring if it could divide the property. Defendant submitted a written request for specific instructions “for the purpose of allowing the jury to determine if she possessed something less than the entire 23-acre parcel in the event that that portion of the property was actually possessed.” The trial court denied the request. Thus, our review is strictly limited to whether the evidence supported such an instruction.

When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court’s failure to give the instruction is reversible error.

Ellison v. Gambill Oil Co., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citations omitted), *aff’d per curiam and disc. review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009).

I conclude that defendant’s request was supported by the evidence presented at trial. Our Supreme Court has established that

[o]ne may assert title to land embraced within the bounds of another’s deed by showing adverse possession of the portion claimed for twenty years under known and visible lines and boundaries, but his claim is limited to **the area actually possessed**, and the burden is upon the claimant to establish his title to the land in that manner.

Wallin v. Rice, 232 N.C. 371, 373, 61 S.E.2d 82, 83 (1950) (citation omitted) (emphasis added).

Here, at trial, defendant offered “Exhibit E,” a diagram of the property, into evidence. From this exhibit she testified to her use of the property. She explained that she made the following improvements, all of which were without plaintiffs’ permission: 1) a “media dog fence” installed “around 1994” which was visible and marked by flags, 2) a barbed wire fence installed in 1984, which “traces along the property line” 3) two “wrought-iron gates” installed “around the early part” of her possession of the property, which were installed “to protect the drive to the house” 4) a barn, and the foundations for two

MINOR v. MINOR

[224 N.C. App. 471 (2012)]

other barns, built in the early 90s, 5) a “stone bridge” built in the early 90s, and 6) an arbor built in the late 80s to “park a car, or either, you know, to entertain, if you want” Defendant also testified that when she moved into the cabin on the property, she installed indoor plumbing, heat, water, and electricity, all without plaintiffs’ assistance or permission.

I conclude that this evidence is sufficient to allow a reasonable inference by the jury that defendant actually possessed at least some portion of the property, smaller than the entire 23-acre parcel; and further, that those portions actually possessed were marked by visible boundaries. *See Locklear v. Savage*, 159 N.C. 236, 238, 74 S.E. 347, 348 (1912) (“The possession must . . . be shown by known and visible boundaries.”).

As such, I conclude that the trial court erred in denying defendant’s request for specific instructions regarding portions of the property that were actually possessed. Further, I disagree with the majority that the defendant was not prejudiced by this error.

The majority reasons that any error in failing to so instruct the jury was harmless in light of the insufficiency of the evidence as to hostility. Yet, it appears that the majority has ignored the fact that the issue of hostility was decided by the jury in defendant’s favor. On the verdict sheet, the jury was asked: “Was this actual possession exclusive and hostile to the Defendants, Grover & Caroleen Minor?” To which the jury answered, “Yes.” As such, I believe the majority’s lengthy analysis, regarding hostility and labeling defendant’s possession permissive, is inappropriate and beyond the scope of our review on appeal.

While I agree with the majority that the evidence presented at trial would tend to suggest that defendant has failed to satisfy the element of hostility, the jury obviously disagreed. “Weighing evidence is not a task assigned to the Court—either trial or appellate.” *Southern R. Co. v. Woltz*, 264 N.C. 58, 61, 140 S.E.2d 738, 740 (1965). Determining the weight of the evidence is “a jury function.” *Id.* Likewise, on remand for a new trial, a new jury very well might determine, as the majority suggests, that defendant’s possession was permissive. But again, I must stress the importance of keeping that determination squarely within the hands of the jury.

SMITH v. DENROSS CONTR’G, U.S., INC.

[224 N.C. App. 479 (2012)]

JAMES ARTHUR SMITH, EMPLOYEE, PLAINTIFF

v.

DENROSS CONTRACTING, U.S., INC., EMPLOYER, NONINSURED, AND DENNIS BARRETT INDIVIDUALLY, AND THE NEW YORK STATE INSURANCE FUND, CARRIER; AND KAPSTONE KRAFT PAPER, EMPLOYER, SENTRY INSURANCE, CARRIER, DEFENDANTS

No. COA12-169

Filed 18 December 2012

1. Workers’ Compensation—jurisdiction—insurance company—separate from the State of New York—no sovereign immunity

The Industrial Commission did not err in a workers’ compensation case by concluding that New York State Insurance Fund (NYSIF) was subject to the jurisdiction of the Commission. NYSIF acted as an insurance company separate from the State of New York and was not entitled to sovereign immunity in North Carolina courts.

2. Workers’ Compensation—insurance coverage—compensable injuries—estoppel from denial of coverage

The Industrial Commission did not err in a workers’ compensation case by concluding that plaintiff’s injury was subject to coverage by the insurance policy between New York State Insurance Fund (NYSIF) and employer DenRoss. NYSIF was estopped from denying coverage of plaintiff’s compensable injuries because its representations to DenRoss were sufficient for DenRoss to believe it had coverage from NYSIF for employees working outside of State.

3. Workers’ Compensation—insurance coverage—actions of insurance carrier—quasi-estoppel applicable

The Industrial Commission’s unchallenged findings of fact in a workers’ compensation case supported its conclusion that New York State Insurance Fund’s (NYSIF) actions were sufficient to induce defendant employer DenRoss into believing NYSIF insured DenRoss employees working outside of New York State and that NYSIF’s conduct gave rise to the application of the doctrine of quasi-estoppel.

4. Workers’ Compensation—late payment penalty—response to notice of claim timely

The Industrial Commission erred in a workers’ compensation case by assessing a late payment penalty against New York State Insurance Fund (NYSIF) pursuant to N.C.G.S. § 97-18(j). NYSIF

responded to the notice of the claim of a compensable injury within thirty days of notice from the Commission, thus complying with the requirements of N.C.G.S. § 97-18(j).

5. Workers' Compensation—unreasonable defense of claim—attorney fees

The Industrial Commission erred in a workers' compensation case by concluding that New York State Insurance Fund (NYSIF) unreasonably defended this claim and awarding attorney fees pursuant to N.C.G.S. § 97-88.1 where NYSIF's denial of plaintiff's claim was not unreasonable.

Appeal by defendant The New York State Insurance Fund from Opinion and Award entered 12 October 2011 and amended 22 November 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 August 2012.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Michael G. Soto and M. Duane Jones, for defendant-appellant The New York State Insurance Fund.

Wallace and Graham, P.A., by Whitney V. Wallace, for plaintiff-appellee.

Cranfill Sumner & Hartzog, LLP, by Ashley Baker White and Holland B. Ferguson, for defendants Kraft Paper and Sentry Insurance.

BRYANT, Judge.

Where the New York State Insurance Fund accepted premium payments calculated by the Fund to provide workers' compensation liability insurance to employees of DenRoss Contracting, U.S., Inc., working in North Carolina with knowledge that DenRoss maintained only clerical staff in New York State, the Fund is estopped to deny coverage for plaintiff's compensable injuries on the basis of quasi-estoppel. Where the record indicates that the New York State Insurance Fund filed a denial of plaintiff's claim within thirty-days of notice of claim from the Commission, we reverse the Commission's sanction for late filing. Where the New York State Insurance Fund asserted a valid basis for contesting plaintiff's claim, we reverse the Commission's award for asserting an unreasonable defense.

In 2004, DenRoss Contracting, U.S., Inc., (DenRoss) contracted with the New York State Insurance Fund (NYSIF) to provide workers'

SMITH v. DENROSS CONTR'G, U.S., INC.

[224 N.C. App. 479 (2012)]

compensation coverage for its employees. NYSIF's New York Insurance Fund Workers' Compensation and Employers' Liability Policy specifically excluded from insurance liability coverage "bodily injury occurring outside the State of ." DenRoss was audited annually in person by a NYSIF auditor, and the policy was automatically renewed after the audit and the premiums were paid.

Prior to 2010, DenRoss worked at jobsites throughout the and providing maintenance service for paper mill machines. In September 2009, DenRoss entered into a contract with defendant Kapstone Kraft Paper (Kapstone) to clean and paint a paper machine located at Kapstone's plant in Roanoke Rapids, North Carolina. To perform the work, DenRoss hired twenty-four employees, including plaintiff James Smith.

On 3 October 2009, plaintiff was working at the Roanoke Rapids jobsite on a catwalk suspended twenty feet above the plant floor; the catwalk gave way; and plaintiff fell. Plaintiff suffered injuries including a heel fracture, a hip contusion, broken ribs, and a right knee injury. All parties have stipulated that plaintiff's injuries are compensable.

On 7 October 2009, plaintiff filed a Form 18 and later two amended forms giving notice of the accident to his employer and the claim of the employee with the North Carolina Industrial Commission. DenRoss filed a Form 61, Denial of Workers' Compensation Claim.

On its Form 61 denial of plaintiff's workers' compensation claim, DenRoss stated that it should not be held responsible for payment: its insurance carrier, NYSIF, had coverage of the claim; and Kapstone was the principal contractor and statutory employer.

Kapstone filed a Form 33R also denying liability for plaintiff's injuries. Kapstone listed defendant Sentry Insurance as its insurance carrier but contended that plaintiff was either an independent contractor or the employee of an independent contractor at the time of his compensable injury.

On 20 November 2009, Deputy Commissioner Adrian Phillips issued an order to compel DenRoss as follows:

1. . . . [E]ither begin making [workers' compensation] payments immediately or notify the Commission of a denial no later than Friday, November 20, 2009[.]

. . .

3. If [DenRoss] is in compliance with N.C.G.S. [197-93 and insurance is available, it is ORDERED that [DenRoss] must submit this compensable claim to its insurance carrier for payment immediately and ensure that all benefits to which Employee-Plaintiff is entitled under the Act are paid”

The order was not appealed, and no notification of a denial was provided the Industrial Commission.

On 3 May 2010, the case came on for hearing before Deputy Commissioner Phillips. In an Opinion and Award filed 15 March 2011, Deputy Commissioner Phillips ordered NYSIF to pay plaintiff temporary total disability compensation. NYSIF was also ordered to pay plaintiff’s medical expenses incurred for the treatment of his injury by accident and attendant care expenses payable to Evelyn Troutman, plaintiff’s mother. Commissioner Phillips further concluded that the denial of plaintiff’s indemnity benefits was unreasonable and untimely; therefore, defendants were subject to a 10% penalty for outstanding benefits, medical treatment, and attendant care services.

Defendants appealed to the Full Commission (the Commission).

On 12 October 2011, the Commission filed an Opinion and Award setting forth the following issues: Whether NYSIF was subject to the jurisdiction of the Commission under the North Carolina Workers’ Compensation Act; and whether NYSIF provided workers’ compensation insurance for DenRoss in North Carolina. The Commission concluded that all parties were properly before it and were subject to and bound by the provisions of the North Carolina Workers’ Compensation Act; and that the Commission had jurisdiction over the parties. The Commission further concluded that DenRoss was covered by NYSIF at the time of plaintiff’s injury and ordered NYSIF to pay plaintiff temporary total disability compensation at the rate of \$747.04 per week from 3 October 2009 until plaintiff returns to suitable employment; to pay current and future medical expenses and medical treatment provided for plaintiff’s injury by accident; and to pay Evelyn Troutman for attendant care services at a rate of \$11.00 per hour for nine hours a day for the period from 4 October 2009 to 26 December 2009.

The Commission also concluded that “[p]ayment of these indemnity benefits[, medical benefits and attendant care services] has been unreasonably and untimely denied, therefore; [sic] Defendants are

SMITH v. DENROSS CONTR’G, U.S., INC.

[224 N.C. App. 479 (2012)]

subject to a penalty of 10% [of the outstanding indemnity benefits, medical benefits, and attendant care services]. . . . N.C. GEN. STAT. § 97-18(j).” Based on the conclusion that defendants unreasonably defended plaintiff’s claim, the Commission ordered NYSIF to pay plaintiff’s counsel 25% of all accrued and past due benefits owed to plaintiff, not to be deducted from the sums due plaintiff, as well as 25% of all future indemnity benefits paid to plaintiff to be deducted from compensation owed plaintiff. NYSIF appealed to this Court.

On 22 November 2011, the Commission filed an amended Opinion and Award vacating a 24 May 2011 order entered by Deputy Commissioner Phillips after the Commission’s 15 March 2011 Opinion and Award had been filed awarding attorney fees to plaintiff’s counsel: the matter had been addressed in the Opinion and Award of the Commission. NYSIF appeals to this Court from the amended Opinion and Award of the Commission.

On appeal, NYSIF raises the following five issues: whether the Commission erred in (I) concluding that NYSIF was subject to the jurisdiction of the Commission; (II) concluding that plaintiff’s injury was subject to coverage by the insurance policy between NYSIF and DenRoss; (III) concluding that NYSIF’s actions were sufficient to induce DenRoss into believing it had coverage with NYSIF; (IV) awarding a late payment penalty against NYSIF; and (V) concluding NYSIF unreasonably defended this claim.

Standard of Review

“The standard of appellate review of decisions of the Industrial Commission consists of a determination of whether the Full Commission’s findings of fact are supported by competent evidence, and whether its conclusions of law are supported by those findings.” *Harrison v. Tobacco Transp. Inc.*, 139 N.C. App. 561, 565, 533 S.E.2d 871, 874 (2000) (citation omitted). “[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal. Only the Commission’s conclusions of law are reviewed *de novo*.” *Chaisson v. Red Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (citations, and quotations omitted).

SMITH v. DENROSS CONTR'G, U.S., INC.

[224 N.C. App. 479 (2012)]

I

[1] NYSIF argues that the Commission erred in concluding that NYSIF was subject to the jurisdiction of the Commission. NYSIF argues that it was established by statute to provide workers' compensation insurance within New York State. NYSIF contends that as a statutory creation and, thus, an agency of the State of New York, it is entitled to sovereign immunity in North Carolina courts. We hold that it is not.

“Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity.” *Evans v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (citation and quotations omitted). We first consider whether NYSIF has waived its immunity.

NYSIF is the creation of New York Workers' Compensation Law, section 76. N.Y. Workers' Comp. Law § 76 (2011) (“There is hereby continued in the department of labor a fund known as ‘the state insurance fund’, for the purpose of insuring employers against liability for personal injuries or death sustained by their employees . . . if such liability is incident to an employment carried on in [New York State] . . .”). “The Fund acts . . . as workmen’s compensation insurer of the State of (and other employers) in the coverage of employees.” *Commissioners of State Insurance Fund v. Low*, 3 N.Y.2d 590, 595, 148 N.E.2d 136, 138 (1958).

[W]hile it is not a separate corporation and while it is an agency of the State in one sense, is nevertheless treated by the statutes as a separate insurance business . . . and that, especially in litigations, it is considered to be an entity separate from the State itself.

Id. (noting that pursuant to N.Y. Workers' Compensation Law § 82, the Fund is not represented by the State Attorney-General; it is treated “much like a private insurance company” required to be examined by the State Superintendent of Insurance, per § 99; the Fund is not subject to New York State’s budgetary laws, per § 81; and per § 93, the Fund may bring suits for unpaid premiums in its own name); *see also*, *In the Matter of the Claim of Carney v. Newburgh Park Motors*, 84 A.D.2d 599, 444 N.Y.S.2d 220 (1981) (holding that where NYSIF contested its liability for workers' compensation benefits almost five years after accepting liability, NYSIF was operating as an entity separate from the State); *e.g.*, *Alvarez v. Frederick Snare Corp.*, 50 A.D.2d 643, 374 N.Y.S.2d 438 (1975) (where a New York Corporation employee was killed working in Guatemala, the question of whether NYSIF should be held liable was “clearly a justiciable

SMITH v. DENROSS CONTR’G, U.S., INC.

[224 N.C. App. 479 (2012)]

issue before [the New York State court] . . .”).

The Commission found that plaintiff sustained compensable injuries while working for DenRoss, a New York State Corporation which contracted with NYSIF for workers’ compensation liability coverage. DenRoss paid premiums to NYSIF to maintain workers’ compensation insurance, and upon request, NYSIF provided a certificate of insurance to Kapstone as evidence that it provided workers’ compensation liability coverage to DenRoss. We hold that NYSIF acted as an insurance company separate from the State of New York. And, in accordance with the interpretation of New York State statutes by the New York Court of Appeals, we affirm the Commission’s conclusion that NYSIF waived its sovereign immunity from suit to determine whether it is liable for plaintiff’s compensable injuries. *See Commissioners of State Insurance Fund*, 3 N.Y.2d at 595, 148 N.E.2d at 138.

II

[2] NYSIF argues that the Commission erred in concluding that plaintiff’s injury was subject to coverage by the insurance policy between NYSIF and DenRoss. Specifically, NYSIF contends that the insurance policy issued by NYSIF for DenRoss specifically excludes workers’ compensation coverage for bodily injury occurring outside of New York State.

We acknowledge that the NYSIF Workers’ Compensation and Employers’ Liability Policy, made a part of the record on appeal, states under heading “Part two—Employers’ Liability Insurance” subpart “C. Exclusions” that “[t]his insurance does not cover . . . 7. bodily injury occurring outside the state of New York” excepting where such coverage is “afforded by endorsement to this policy[.]” But, we also note that the Commission did not conclude NYSIF was liable for plaintiff’s injuries because of the terms of NYSIF’s insurance policy. Rather, the Commission concluded that NYSIF was estopped from denying coverage of plaintiff’s compensable injuries because its representations to DenRoss were sufficient for DenRoss to believe it had coverage from NYSIF for employees working outside of State.

We therefore address the merits of NYSIF’s argument that it is not estopped from denying plaintiff’s workers’ compensation coverage in issue *III*.

III

[3] NYSIF argues that the Commission erred in concluding that NYSIF’s actions were sufficient to induce DenRoss into believing NYSIF insured DenRoss employees working outside of New York State. NYSIF contends that (A) NYSIF’s acceptance of premiums from DenRoss did not bind NYSIF beyond the terms of the workers’ compensation policy and (B) DenRoss was not misled or induced to believe its out-of-state workers were covered by NYSIF. We affirm the Commission’s conclusion.

In its 22 November 2011 opinion and award, the Commission concluded that “[b]ased upon a preponderance of the evidence . . . NYSIF is estopped from denying workers’ compensation insurance coverage for Plaintiff’s compensable injury by accident.” (Citations omitted).

Our Supreme Court has held that “[t]he law of estoppel applies in compensation proceedings as in all other cases[.]” *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 665, 75 S.E.2d 777, 781 (1953), and “[t]hat liability for [workers’] compensation may be based on estoppel is well established.” *Aldridge v. Foil Motor Co.*, 262 N.C. 248, 251, 136 S.E.2d 591, 594 (1964) (citation and quotations omitted).

“ ‘Estoppel’ is not a single coherent doctrine, but a complex body of interrelated rules, including estoppel by record, estoppel by deed, collateral estoppel, equitable estoppel, promissory estoppel, and judicial estoppel.” *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004) (citation omitted). Our Supreme Court has recognized a “branch of equitable estoppel known as ‘quasi-estoppel’ or ‘estoppel by benefit.’ ” *Id.* at 18, 591 S.E.2d at 881 (citations omitted).

Under 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. . . . In comparison to equitable estoppel, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation.

Id. at 18, 591 S.E.2d at 881-82 (citations omitted).

A.

NYSIF argues that its acceptance of DenRoss’s insurance premiums failed to bind NYSIF in covering plaintiff, apart from the insurance contract. In support of its contention, NYSIF directs this Court’s

SMITH v. DENROSS CONTR’G, U.S., INC.

[224 N.C. App. 479 (2012)]

attention to the deposition testimony of the NYSIF auditor who prepared DenRoss’s annual audit. NYSIF argues that because the audit disclosed DenRoss was withholding New York State payroll taxes on behalf of its employees, NYSIF had no knowledge that DenRoss’s employees were working outside of New York State and, thus, NYSIF cannot be estopped from asserting that plaintiff’s compensable injuries, which occurred on a North Carolina jobsite, are excluded from liability coverage under NYSIF’s workers’ compensation policy. We disagree.

In presenting its argument, NYSIF has directed the attention of this Court to deposition testimony of the NYSIF auditor but, at least as to this argument, has failed to contest any of the Commission’s findings of fact, save one: “The Full Commission finds that NYSIF’s representations to Denross [sic] regarding its workers’ compensation policy were sufficient for Denross [sic] to reasonably believe that it had coverage from NYSIF for employees working outside the state of New York.”

“[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal.” *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156 (citations and quotations omitted). Therefore, we review the Commission’s findings of fact and seek to determine whether those findings support a conclusion that NYSIF’s conduct gives rise to the application of the doctrine of quasi-estoppel as it applies to the party to be estopped, NYSIF. We hold that it does.

[T]he essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent positions. . . . [Q]uasi-estoppel requires mutuality of parties; the doctrine may not be asserted by or against a “stranger” to the transaction that gave rise to the estoppel. . . . [Q]uasi-estoppel does not require detrimental reliance per se by anyone. Instead, quasi-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.

Whitacre P’ship, 358 N.C. at 18-19, 591 S.E.2d at 882 (citations and quotations omitted); see also, *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991) (holding that the plaintiff was estopped to deny the validity of the agreement to sell real property, despite a conclusion

that the property description was indefinite, where the plaintiff paid property taxes and made the agreed upon payments for nearly eight years); *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982) (holding the defendant county and its insurance carrier were estopped from denying workers' compensation coverage to an injured plaintiff where the county and its insurance carrier respectively paid and received the compensation premiums for the plaintiff despite an unresolved dispute as to whether the plaintiff was working for the county or the town at the time of his injury).

In summary, the Commission found that DenRoss and NYSIF began their current contract for workers' compensation liability insurance coverage in 2004 and that NYSIF automatically renewed DenRoss's coverage "after the audit and the premium payments were received"; that NYSIF audited DenRoss annually and, pertinently, performed an audit for the "Denross/Kapstone" project; that NYSIF was aware that DenRoss's only employees in New York State were clerical staff and DenRoss worked throughout the United States; and that NYSIF accepted payment of DenRoss's insurance premiums calculated to cover DenRoss employees hired to work on the Kapstone project.

The Commission also made the following unchallenged findings of fact:

28. [An NYSIF] [u]nderwriter . . . wrote on one of Denross' NYSIF Quote Calculation forms, "Broker-Bonnie assured has only clerical in New York. I did advise if there were any subs or Canadian employees working in the US, they will be picked up. They have not had any contracts in New York for quite sometime."

To hold that NYSIF can now deny plaintiff workers' compensation liability insurance coverage after accepting payment of premiums calculated to provide him with insurance while he worked on the Kapstone project would violate the principles of equity. Therefore, we overrule NYSIF's argument that its acceptance of DenRoss's insurance premiums failed to bind NYSIF in covering plaintiff apart from the insurance contract.

B.

Next, NYSIF argues that DenRoss was not misled or induced to believe its out-of-state workers were covered by NYSIF's insurance policy.

SMITH v. DENROSS CONTR’G, U.S., INC.

[224 N.C. App. 479 (2012)]

We note that “quasi-estoppel does not require detrimental reliance *per se* by anyone. Instead, quasi-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.” *Whitacre P’ship*, 358 N.C. at 19, 591 S.E.2d at 882 (citations and quotations omitted). Accordingly, we need not consider whether DenRoss was misled or induced to believe its out-of-state workers were covered by NYSIF’s insurance policy.

Because the Commission’s findings of fact support the imposition of the equitable remedy quasi-estoppel, we uphold the Commission’s conclusion that “NYSIF is estopped from denying workers’ compensation insurance coverage for Plaintiff’s compensable injury by accident.” Accordingly, NYSIF’s argument is overruled.

IV

[4] Next, NYSIF argues that the Commission erred in awarding a late payment penalty pursuant to N.C. Gen. Stat. § 97-18(j). We agree.

Pursuant to North Carolina General Statutes, section 97-18(j), entitled “Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties,”

[w]hen an employee files a claim for compensation with the Commission, the Commission may order reasonable sanctions against an employer or insurer which does not, *within 30 days following notice from the Commission of the filing of a claim*, or within such reasonable additional time as the Commission may allow, do one of the following:

...

(2) Notify the Commission and the employee that it denies the employee’s right to compensation

....

(3) Initiate payments without prejudice and without liability

N.C. Gen. Stat. § 97-18(j) (2011) (emphasis added).

The Commission found that plaintiff filed a Form 18, notice of accident to employer and claim of employee, on 7 October 2009. The

record indicates that a denial of plaintiff’s workers’ compensation claim was filed with the Commission on 11 December 2009.

NYSIF notes that the record on appeal evidences the first notice from the *Commission* to any defendant (in this case DenRoss) indicating a claim of injury had been filed was dated 14 November 2009, within thirty days of 11 December 2009. We see nothing in the record to indicate a notice from the Commission to any defendant prior to 14 November 2009. Therefore, it appears that NYSIF responded to the notice of the claim of a compensable injury within thirty days of notice from the Commission, thus complying with the requirements of N.C.G.S. § 97-18(j). Accordingly, we reverse the Commission’s award of sanctions for late payment pursuant to N.C.G.S. § 97-18(j).

V

[5] Lastly, NYSIF argues that the Commission erred in concluding that NYSIF unreasonably defended this claim and awarded attorney’s fees pursuant to N.C. Gen. Stat. § 97-88.1. We agree.

Pursuant to General Statutes, section 97-88.1, “[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.” N.C. Gen. Stat. § 97-88.1 (2011). “The purpose of this section is to prevent stubborn, unfounded litigiousness, which is inharmonious with the primary purpose of the Workers Compensation Act to provide compensation to injured employees.” *Chaisson*, 195 N.C. App. at 484, 673 S.E.2d at 164 (citation omitted). “The reviewing court must look to the evidence introduced at the hearing in order to determine whether a hearing has been defended without reasonable ground. The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.” *Id.* (citations and quotations omitted).

At the hearing before the Commission, NYSIF introduced evidence and the Commission found that the New York State Insurance Fund Workers’ Compensation and Employers’ Liability Policy specifically excepted from liability coverage “bodily injury occurring outside the state of New York.” Further, the certificate of insurance, provided by NYSIF to Kapstone stated, that the insurance policy applied “with respect to all operations in the state of New York”

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Given the extraterritorial exclusion provisions of NYSIF's New York Insurance Fund Workers' Compensation and Employers' Liability Policy, we cannot say that NYSIF's denial of plaintiff's claim was unreasonable. This is further supported by the fact that we affirm the Commission's award of coverage based on principles of estoppel after determining the nonexistence of coverage under the policy. Accordingly, we reverse the Commission's award pursuant to G.S. § 97-88.1.

Affirmed in part; reversed and remanded in part.

Judges STEPHENS and THIGPEN concur.

RUFUS STARK AND BETTY STARK, PETITIONERS

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF LAND RESOURCES, HARRISON CONSTRUCTION, DIVISION OF APAC ATLANTIC, INC., AND THE NORTH CAROLINA MINING COMMISSION, RESPONDENTS

No. COA12-449

Filed 18 December 2012

1. Witnesses—expert—not licensed

The fact that a witness (Straw) at an administrative hearing concerning a mining dispute was neither a licensed engineer nor a licensed geologist did not render his expert testimony either “illegal” or inadmissible. In light of Straw's demonstrated expertise in the study of ground vibration and its effect on structures, his expert testimony was properly admitted.

2. Administrative Law—contested case hearing—mining permit—misrepresentation—not relevant

Evidence regarding alleged misrepresentations by defendant Harrison Construction to petitioners and a county manager during a prior mining permit action was not relevant to the Division of Land Resources' (DLR's) consideration of the permit denial criteria in this case and was properly excluded.

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

3. Administrative Law—mining permit—findings—supported by evidence—not arbitrary

A Division of Land Resources (DLR) decision to issue a permit for the expansion of a quarry was supported by substantial, competent evidence and was not arbitrary or capricious. DLR found none of the seven statutory criteria for denial, found that any adverse effects would be mitigated by defendant Harrison Construction, and was required by statute to issue the permit.

4. Appeal and Error—preservation of issues—brief—incorporation of arguments by reference—dismissed

Petitioners' attempt to "incorporate by reference" a multitude of arguments and challenges to findings was dismissed. The Court of Appeals' scope of review is limited to those issues for which argument and authority are presented within the appellate brief.

Appeal by petitioners from order entered 28 September 2011 by Judge James U. Downs in Clay County Superior Court. Heard in the Court of Appeals 27 September 2012.

Stark Law Group, PLLC, by Thomas H. Stark, for petitioner appellants.

Attorney General Roy Cooper, by Assistant Attorneys General Sueanna P. Sumpter, Rufus Allen, and Special Deputy Attorney General Kathryn Jones Cooper, for the North Carolina Department of Environment and Natural Resources, Division of Land Resources, and the North Carolina Mining Commission respondent appellees.

Roberts & Stevens, PA, by William Clarke; and Deborah Murphey, for Harrison Construction, Division of APAC Atlantic, Inc., respondent appellee.

McCULLOUGH, Judge.

Rufus Stark and Betty Stark ("petitioners") appeal from an order of the trial court affirming the Final Agency Decision of the North Carolina Mining Commission (the "Mining Commission"). We affirm.

I. Background

Respondent Harrison Construction, Division of APAC Atlantic, Inc. ("Harrison"), holds Mining Permit No. 22-06, authorizing opera-

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

tion of a crushed stone quarry known as the Hayesville Quarry in Clay County, North Carolina. The Hayesville Quarry is located in the vicinity of Shewbird Mountain. Harrison's permit was issued by respondent North Carolina Department of Environment and Natural Resources ("DENR"), Division of Land Resources ("DLR"), in 1989 and renewed by DLR in 1999. On 5 January 2007, Harrison applied for a major modification to its permit, seeking to add 37 acres to its previously permitted acreage and, within the proposed permit boundary, to increase the area disturbed by its mining operations by 22.1 acres.

Upon receipt of Harrison's application for modification, DLR routed the application to multiple state and federal agencies for review and comment, including the Asheville Regional Office of DENR's Divisions of Air Quality and Water Quality, the North Carolina Wildlife Resources Commission, the United States Fish and Wildlife Service, DENR's Division of Parks and Recreation, the State Historic Preservation Office's Division of Historical Resources, and DLR's North Carolina Geological Survey Section, as specified in N.C. Gen. Stat. § 74-50(b3) (2011). Upon receipt of written comments from those agencies, any concerns expressed were investigated by DLR and, where appropriate, additional information was requested from Harrison.

On 17 January 2007, Harrison sent notice of its application for modification to adjoining landowners of record. On 14 March 2007, James Simons, Director of DLR ("Simons"), determined that significant public interest concerning Harrison's permit modification application warranted a public hearing in the matter. Petitioners attended the public hearing conducted on 2 April 2007 and both submitted written comments and made an oral presentation at the public hearing. Petitioners subsequently forwarded additional written comments to DLR following the hearing.

Petitioners reside on a 32-acre tract of land located on the south face of Shewbird Mountain. Their property adjoins that of Harrison, with a common property line of approximately 1500 feet. Petitioners' home is approximately 300 feet from that line.

At the public hearing, petitioners described cracks in the foundation of their home and the worsening of cracks in the tile floor of their home. They also indicated a window in their home had been displaced in its frame and they had replaced four large windows whose vacuum seal had been "compromised." Petitioners also stated the following concerns in their written comments expressing opposition to

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

modification of the permit: the operation would have an adverse impact on water supply wells in the area and decrease the flow and quality of surface waters; it would destroy plants and animal habitats in the area of the proposed expansion; it would present a physical hazard to petitioners' home; it would have an adverse impact on publicly owned parks and recreation areas, as Shewbird Mountain is visible from various points in the area; and blasting would threaten the stability of rock outcroppings above their home. Prior to the 2 April 2007 public hearing concerning the subject permit modification application, petitioners had not made any complaints to DLR about Harrison's mining operation.

After hearing and considering the concerns of petitioners and various other attendees at the public hearing, on 27 April 2007, DLR sent Harrison a letter in which it requested the applicant submit additional information and studies. Specifically, Harrison was asked, *inter alia*, 1) to address screening of the mining operation from public view; 2) to obtain a groundwater study evaluating possible impacts of the proposed quarry expansion on water supply wells on the north, east, and south sides of Shewbird Mountain; and 3) to obtain a blasting study to determine if expansion of the quarry could occur as proposed with blasting levels remaining below the permit limits at the closest occupied dwelling and without mobilizing existing old debris slides on the east side of the mountain. In response to DLR's 27 April 2007 request for additional information, Harrison submitted a letter addressing the information requested along with a groundwater evaluation completed by Geological Resources, Inc. and a blasting evaluation completed by GeoSonics Inc. ("GeoSonics").

In determining whether to approve the proposed permit modification, Simons considered the application and all relevant materials in light of the denial criteria set forth under N.C. Gen. Stat. § 74-51(d) (2011). Following that review, on 18 January 2008, DLR approved the requested modification to Harrison's mining permit.

On 21 February 2008, petitioners initiated a contested case in the North Carolina Office of Administrative Hearings ("OAH") to challenge DLR's 18 January 2008 decision to approve Harrison's permit modification. A hearing was held before an Administrative Law Judge ("ALJ") on 12-14 October 2009. At the contested case hearing, petitioners presented evidence to the effect that as of January 2008, their home had sustained some cracks in the foundation and in the tile floor. The cracks in the tile floor were present when petitioners moved into the home in 2001 but had lengthened recently. Petitioner

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Rufus Stark painted the foundation of the home in 2001 and did not notice any cracks at that time.

Petitioners also presented the testimony of two expert witnesses: Stephen Blevins (“Blevins”), who testified as an expert in the fields of blasting, geology, and professional engineering regarding soils and materials; and Bernard Feinberg (“Feinberg”), who testified as an expert in the fields of structural engineering and blasting. Blevins was retained by petitioners to review the GeoSonics blasting evaluation and comment upon it. Feinberg was retained by petitioners to visit their home and observe various defects at the residence. In addition, the ALJ heard testimony by Simons as to DLR’s review of each of the statutory denial criteria set forth under N.C. Gen. Stat. § 74-51(d), as well as testimony by Jeffrey Straw (“Straw”), who testified as an expert in the field of ground vibration and acoustics analysis and its effect on structures; Straw also had prepared the GeoSonics blasting evaluation. On 28 January 2010, the ALJ entered a decision affirming DLR’s decision to approve the permit modification.

The matter was then heard before the Mining Commission on 15 June 2010. Prior to the hearing, the parties were allowed to submit exceptions to the ALJ’s decision and written arguments for consideration. At the hearing, the parties were also allowed to present oral arguments. Following deliberations, the Mining Commission voted to adopt the decision of the ALJ. The Final Agency Decision was signed on 8 July 2010 and served upon the parties.

On 6 August 2010, petitioners commenced an action in superior court seeking judicial review of the Mining Commission’s Final Agency Decision. The matter was heard by the trial court on 28 December 2010, and on 28 September 2011, the trial court entered an order affirming the Mining Commission’s Final Agency Decision in its entirety. Petitioners now appeal from the trial court’s order affirming the Mining Commission’s Final Agency Decision.

II. Standards of Review

Pursuant to N.C. Gen. Stat. § 74-61 (2011):

An applicant, permittee, or affected person may contest a decision of [DENR] to deny, suspend, modify, or revoke a permit or a reclamation plan . . . by filing a petition for a contested case under G.S. 150B-23 within 30 days after [DENR] makes the decision. Article 4 of

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Chapter 150B of the General Statutes governs judicial review of a decision of the Commission.

Id. N.C. Gen. Stat. § 150B-51(b) (2011) provides:

The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (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, capricious, or an abuse of discretion.

Id. “On judicial review of an administrative agency’s final decision, the substantive nature of each [asserted error] dictates the standard of review.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004); *see also* N.C. Gen. Stat. § 150B-51(c); *Utilities Comm. v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981) (“The nature of the contended error dictates the applicable scope of review.”). “[E]rrors of law are reviewed *de novo*, while the whole record test is applied to allegations that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious.” *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 491, 574 S.E.2d 120, 126 (2002).

“*De novo* review requires a court to consider the question anew, as if the agency has not addressed it.” *Blalock v. N.C. Dep’t of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001).

The whole record test requires the trial court to examine all of the evidence before the agency in order to determine whether the decision has a rational basis in

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

the evidence. If the trial court concludes there is substantial competent evidence in the record to support the findings, the agency decision must stand. The trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency.

Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 31-32, 594 S.E.2d 832, 837 (2004) (citations omitted). “Rather, a court must examine all the record evidence—that which detracts from the agency’s findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency’s decision.” *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (internal quotation marks and citations omitted). “Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.” *Id.* (internal quotation marks and citations omitted).

III. Admission of Expert Testimony

[1] In their first argument on appeal, petitioners argue that the superior court erred in rejecting their arguments challenging the admissibility of Straw’s expert testimony. Petitioners also presented arguments challenging the admissibility of the GeoSonics blasting evaluation prepared by Straw. However, it appears from the record that the GeoSonics blasting evaluation was both introduced and admitted at the hearing as a joint exhibit of the parties without objection by petitioners. Thus, any error in admitting the GeoSonics blasting evaluation was invited error, about which petitioners cannot now complain on appeal. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (“A party may not complain of an action which he induced.”). Thus, we will review petitioners’ argument only as it pertains to Straw’s expert testimony presented at the hearing. The appropriate standard of review for evidentiary issues on appeal from a final agency decision is *de novo*. *Sack*, 155 N.C. App. at 493, 574 S.E.2d at 127.

At the contested case hearing, Straw testified that he was asked by Harrison to visit the Hayesville Quarry and prepare a blasting evaluation to determine the effects of ground vibration and air blast on structures and on the stability of slopes in the area. Straw testified that he visited the Hayesville Quarry on 10 September 2007, during which time he toured the entire operation, viewed the areas where the operator had blasted, traveled to the site where Harrison proposed to blast, toured the neighboring community, and visited peti-

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

tioners' residence. Straw testified he was provided with seismograph recording information for the period January 2005 through 21 June 2007, wave form recordings, velocity levels and air overpressure information, and individual blast logs.

Based upon the individual blast logs produced by Harrison's independent blasting contractor, Straw developed a table that detailed generally the blasting procedures used by Harrison at the Hayesville Quarry. Straw also input the data provided into a spreadsheet for use in conjunction with a program developed from regression evaluation formulas of the United States Bureau of Mines designed to evaluate ground vibration levels generated by blasting. Straw then completed a regression analysis using this software. The regression analysis produced a range within which ground vibration was expected to fall. After completing the regression analysis, Straw concluded that the blasting limits established in the permit modification approved by DLR for the Hayesville Quarry were sufficient to prevent damage to the nearest structure adjacent to it.

Straw further testified that he evaluated offsite slope stability as related to ground vibration levels. Straw testified that he reviewed technical literature addressing this issue, which indicated that ground vibration levels of between one and four inches per second would be required to cause movement of loose slope areas. Straw testified he also looked for evidence of past slide activity on the quarry property and on petitioners' property, but his observations of petitioners' property and on his drive around the mountain did not indicate any active unstable areas. Based upon his research and site visit, and comparing the projections made with the levels necessary to cause slope slides, Straw concluded that the ground vibration would be considerably less than that required to cause a slide to occur.

Petitioners argue on appeal that Straw's expert testimony was inadmissible because practice in his field of expertise requires either an engineering license or a license to practice geology. Accordingly, petitioners contend Straw's testimony was "illegal" and his credentials were therefore inadequate, requiring exclusion of his testimony.

"The trial court has broad discretion in the determination and admission of expert testimony." *State v. East*, 345 N.C. 535, 550, 481 S.E.2d 652, 662 (1997). "The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer." *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. 201, 230, 331 S.E.2d 124, 144 (1985); *see also Maloney v.*

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Hospital Systems, 45 N.C. App. 172, 179, 262 S.E.2d 680, 684 (1980) (noting “the trial court’s decision concerning whether or not a witness has qualified as an expert is ordinarily within the court’s sound discretion”). “A finding by the trial court that the witness is qualified will not be reversed unless there was no competent evidence to support it or the court abused its discretion.” *State v. Love*, 100 N.C. App. 226, 232, 395 S.E.2d 429, 433 (1990).

The admissibility of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence, which provides:

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[.]

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2011). In *Maloney v. Hospital Systems*, 45 N.C. App. 172, 262 S.E.2d 680 (1980), this Court “accept [ed] the principle that the giving of expert testimony should not be limited to those witnesses who are licensed in some particular field of endeavor, nor limited by whether such witnesses employ their skills professionally or commercially[.]” *Id.* at 178, 262 S.E.2d at 684. Subsequently, our Supreme Court noted:

“ ‘It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession.’ *State v. Evangelista*, 319 N.C. 152, 164, 353 S.E.2d 375, 384 (1987). ‘It is enough that the expert witness “because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.” ’ *Id.* at 164, 353 S.E.2d at 384 (quoting *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978)).”

East, 345 N.C. at 550, 481 S.E.2d at 662 (quoting *State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d 631, 640-41 (1995)). Other cases from both this Court and our Supreme Court have continued to reiterate that “[t]o qualify as an expert, one need not be a specialist or have a license from an examining board or be engaged in any particular profession. As long as study, experience, or both makes the witness better qualified than the jury to draw appropriate inferences from the facts, he may be qualified as an expert.” *Love*, 100 N.C. App. at 232, 395 S.E.2d at 433; see also *Williams v. CSX Transp., Inc.*, 176 N.C.

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

App. 330, 340, 626 S.E.2d 716, 725 (2006) (“Expert testimony is not ‘limited to those witnesses who are licensed in some particular field of endeavor, nor limited by whether such witnesses employ their skills professionally or commercially.’” (quoting *Maloney*, 45 N.C. App. at 178, 262 S.E.2d at 684)).

Prior to giving the challenged testimony, Straw testified that he held a Bachelor of Science Degree in environmental science and that he has completed professional training and course work in the areas of vibration and acoustics, airport noise modeling, and explosives. Straw testified that he was currently serving as vice president and area manager of the Florida Office for GeoSonics, and he had worked for GeoSonics and its predecessor company for 31 years. Straw testified that GeoSonics operates to determine the effects on structures from blasting activities in the construction and mining industries, to complete traffic vibration studies, and to evaluate the effects of implosion upon structures. Straw stated that in working for GeoSonics, he had monitored ground vibration and air overpressure produced by blasting activities at quarries, completed noise evaluations for quarries, completed preconstruction or preblast inspections for mining operations, and performed projections of future blasts based upon existing data. Straw testified that he, like the other individuals employed by GeoSonics, is an “applied seismologist” who studies either manmade or natural ground vibration and air overpressure levels caused by blasting activities and other sources. Specifically, Straw stated that he takes measurements and relates the information collected to determine the effects of those parameters upon adjacent structures. Straw further stated that he maintained responsibilities for GeoSonics’ Raleigh, North Carolina, office and that he had previously testified in North Carolina as an expert on the effects of ground vibration caused by blasting.

Given these credentials, we discern no abuse of discretion by the ALJ in admitting Straw’s expert testimony. We are not persuaded by petitioners’ argument that Straw, in preparing the report for Harrison and in testifying as to his conclusions in the report, was illegally engaged in the practice of engineering or geology. Numerous statutes regulate the practice of various professions in this State. *See, e.g.*, N.C. Gen. Stat. Ch. 87 (Contractors), Ch. 88B (Cosmetic Art), Ch. 89C (Engineering and Land Surveying), Ch. 89E (Geologists), Ch. 90 (Medicine and Allied Occupations), Ch. 90B (Social Workers). The overarching purpose of these statutes is to protect the public from incompetent persons purporting to practice a given profession. *See,*

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

e.g., *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 586, 704 S.E.2d 486, 492 (2010) (“The purpose of the licensing statutes is to protect consumers from incompetent contractors.”); *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 510-11 (1968) (“The purpose of Article 1 of Chapter 87 of the General Statutes, which prohibits any contractor who has not passed an examination and secured a license as therein provided from undertaking to construct a building costing \$20,000.00 or more, is to protect the public from incompetent builders.”); *McArver v. Gerukos*, 265 N.C. 413, 416, 144 S.E.2d 277, 280 (1965) (purpose of statute requiring licensure of real estate brokers and real estate salesmen is to “protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salesmen”). The fact that a professional is or is not “practicing a given profession” does not hinder his ability to testify as an expert in most instances. Indeed, the Legislature has undertaken to specify when testimony by a licensed professional is required. *See, e.g.*, N.C. Gen. Stat. § 8C-1, Rule 702(b) (licensed physician required to testify as to the appropriate standard of health care in medical malpractice actions).

Rather, our Courts have upheld a trial court’s or administrative law judge’s decision to qualify an expert on a particular subject, despite that the expert is not “licensed” pursuant to statute. In *Kenney v. Medlin Construction & Realty*, 68 N.C. App. 339, 315 S.E.2d 311 (1984), this Court found no abuse of discretion in the trial court’s determination that a contractor

who had been involved in building more than 200 residences, including eight to twelve in plaintiff’s subdivision, was an expert, better qualified than the jury to form an opinion as to the quality of workmanship and damage resulting from the construction of plaintiff’s house. *That [the contractor] was not a licensed contractor does not render his opinion testimony inadmissible.*

Id. at 342-43, 315 S.E.2d at 314 (emphasis added); *see also Rutherford v. Air Conditioning Co.*, 38 N.C. App. 630, 641-42, 248 S.E.2d 887, 895 (1978) (upholding expert opinion testimony by electrical engineering professor). In *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995), our Supreme Court likewise held that “[n]urses are qualified to render expert opinions as to the cause of a physical injury even though they are not licensed to diagnose illnesses or prescribe treatment, and

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

there is no basis for any preference of licensed physicians for such medical testimony.” *Id.* at 294, 457 S.E.2d at 858.

Accordingly, we agree with this Court’s reasoning in *Maloney*, 45 N.C. App. 172, 262 S.E.2d 680:

The common law . . . does not require that the expert witness on a medical subject shall be a person *duly licensed to practice medicine* Except as an indirect stimulus to obtain a license, such a rule is ill-advised, first, because the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses, and, secondly, because some of the most capable investigators have probably not needed or cared to obtain a license to practice medicine.

Id. at 178, 262 S.E.2d at 683-84 (ellipses in original) (citation omitted). In accordance with this rationale, the law in this state does not require a testifying scientific expert to be a person duly licensed to practice in a particular field. Indeed, petitioners’ own expert, Blevins, a licensed professional engineer in North Carolina, testified that he was unaware of any requirement that a blasting analysis be performed by, certified by, or completed under the direction of a licensed engineer.

We conclude likewise and hold that the fact that Straw was neither a licensed engineer nor a licensed geologist did not render his expert testimony either “illegal” or inadmissible, and, in light of Straw’s demonstrated expertise in the study of ground vibration and its effect on structures, Straw’s expert testimony was properly admitted. Petitioners’ argument on this issue, therefore, is without merit. Although petitioners also attempt to argue that Straw’s testimony must be excluded on the basis that his methodology was unreliable, this argument is not properly before this Court and was abandoned by petitioners, as they did not present such an argument to the court below and appear to have actually conceded this issue at the contested case hearing.

IV. Exclusion of Evidence

[2] In their second argument on appeal, petitioners argue the trial court erred in rejecting their arguments regarding certain evidentiary rulings made by the ALJ. Evidentiary issues are reviewed *de novo* on appeal from a final agency decision. *Sack*, 155 N.C. App. at 493, 574 S.E.2d at 127-28.

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

First, petitioners contend they should have been allowed to present evidence of alleged communications between representatives of Harrison and the county manager in 1989 and between representatives of Harrison and petitioners in 1999. Petitioners assert that in both instances, representatives of Harrison made assurances that the mining operation would not expand beyond the limits established in prior permitting proceedings. Petitioners argue such evidence was relevant to DLR's consideration of the permitting denial criteria set forth under N.C. Gen. Stat. § 74-51(d).

However, none of the seven denial criteria address the existence, enforcement, or consideration of private agreements between a permittee and adjacent landowners or other private individuals concerning the permittee's plans for expansion of its mining operation. To the extent petitioners contend such assurances or misrepresentations violate N.C. Gen. Stat. § 74-64(b) (2011), thereby implicating denial criterion seven, their arguments are misguided. Denial criterion seven allows DLR to deny a permit modification if the applicant has not been in substantial compliance with the Mining Act or any rules adopted thereunder, and such noncompliance resulted in, *inter alia*, “[c]onviction of a misdemeanor under G.S. 74-64.” N.C. Gen. Stat. § 74-51(d)(7)(c). N.C. Gen. Stat. § 74-64(b) imposes a criminal penalty upon “any operator who engages in mining in willful violation of the provisions of [the Mining Act] or of any rules promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this Article or willfully gives false information in any application or report required by this Article[.] *Id.* (emphasis added). Harrison's alleged misrepresentations to petitioners and to the county manager are not equivalent to a misrepresentation to DLR in its actions to seek, modify, or renew its permit under the Mining Act. Moreover, denial criterion seven requires a “[c]onviction” under this statute. Petitioners' evidence does not demonstrate a criminal violation of the Mining Act, nor a conviction therefor. Accordingly, petitioners' evidence regarding these alleged misrepresentations by Harrison representatives was not relevant to DLR's consideration of the denial criteria and was properly excluded.

[3] Second, petitioners argue they should have been allowed to introduce evidence concerning Harrison's history of Mining Act violations, which petitioners argue likewise implicates review criterion seven.

However, petitioners have not demonstrated that the list of violations they sought to introduce into evidence are pertinent to review

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

criterion seven. In order for review criterion seven to be implicated, the evidence must show:

That the applicant or any parent, subsidiary, or other affiliate of the applicant or parent has not been in substantial compliance with this Article, rules adopted under this Article, or other laws or rules of this State for the protection of the environment or has not corrected all violations that the applicant or any parent, subsidiary, or other affiliate of the applicant or parent may have committed under this Article or rules adopted under this Article and that resulted in [revocation of a permit; forfeiture of part or all of a bond or other security; or monetary fines, conviction of a misdemeanor, or any other court ordered action under N.C. Gen. Stat. § 74-64].

N.C. Gen. Stat. § 74-51(d)(7). The evidence offered by petitioners does not demonstrate a lack of “substantial compliance” over the lifetime of Harrison’s mining operation, nor does the evidence show that Harrison failed to correct any of the violations alleged. Notably, the record demonstrates Harrison’s mining operation has not suffered any of the penalties specified in review criterion seven as a result of petitioners’ alleged violations. We also note that certain evidence of Harrison’s violations, including sedimentation in a nearby lake and a complaint regarding Harrison’s blasting was received into the record and considered by the ALJ. Thus, we conclude petitioners’ argument is without merit.

Third, petitioners argue they were not allowed to present seismograph readings recorded at their residence following DLR’s approval of Harrison’s permit modification in January 2008. However, we conclude such evidence was properly excluded, as it neither was relevant to a review of the correctness of DLR’s decision to approve the permit modification nor demonstrated a violation of the blasting limits established in the permit. In addition, the evidence was cumulative of other evidence presented by petitioners.

Here, Harrison placed a seismograph on petitioners’ property for the purpose of recording and monitoring the vibration levels resulting from its mining operations. Petitioner Rufus Stark testified at the hearing that the seismograph produced a reading after every blast. All readings recorded by the seismograph prior to DLR’s approval of Harrison’s permit modification were admitted into evidence.

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

However, those readings taken after DLR's approval of Harrison's permit modification were excluded on the basis that such evidence was not relevant to a review of the propriety of DLR's decision to approve the permit modification. We agree.

Petitioners initiated the contested case hearing below pursuant to N.C. Gen. Stat. § 74-61, which allows an "affected person" to contest DLR's decision to "deny, suspend, modify, or revoke a permit[.]" *Id.* We fail to see how evidence that came into existence after DLR had made its contested decision is relevant to a review of the propriety of DLR's actions in approving the permit modification.

In support of their argument that such evidence was properly admissible at the contested case hearing, petitioners rely on this Court's opinion in *Robinson v. DHHS*, ___ N.C. App. ___, 715 S.E.2d 569 (2011). In *Robinson*, the petitioner, Robinson, a mentally and physically disabled man, was denied the level of Medicaid coverage requested by his case manager by the respondent Department of Health and Human Services ("DHHS"). *Id.* at ___, 715 S.E.2d at 569-70. Accordingly, Robinson appealed the agency's decision to the OAH and a contested case hearing was held. *Id.* at ___, 715 S.E.2d at 570. At the hearing, Robinson presented testimony by his treating physician and an evaluating psychologist, both of whom supported the level of Medicaid coverage requested in Robinson's case plan. *Id.* However, such evidence had not been presented to or considered by the agency before making its initial decision to modify and reduce Robinson's services. *Id.*

On appeal, this Court held that the administrative law judge could properly admit Robinson's evidence, having found "no . . . regulation in the Medicaid context which would prohibit the ALJ from considering additional evidence regarding a petitioner's medical needs." *Id.* at ___, 715 S.E.2d at 572. Indeed, the Court in *Robinson* recognized that the General Assembly had recently enacted a provision expressly allowing for the consideration of additional evidence in contested Medicaid cases, although we note that this provision did not apply in the *Robinson* decision. *Id.* at ___ n.3, 715 S.E.2d at 572 n.3. In addition, this Court supported its decision in *Robinson* with the policy rationale that, in contested Medicaid cases, disallowing a petitioner to present additional evidence at a contested case hearing would "deny Medicaid recipients meaningful input at any stage of the process[.]" *Id.* at ___, 715 S.E.2d at 572 (internal quotation marks omitted). This Court reasoned:

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Prior to its initial decision, the agency only requests documents from a Medicaid recipient's case manager. Therefore, any failure to submit the relevant medical evidence necessary to support the case plan would be on the part of the case manager, who is also an agent of the State. Thus, if a recipient is barred from presenting additional evidence to the ALJ during a contested hearing, there is no way to remedy any deficiencies in the presentation of his case plan and to have a meaningful opportunity to be heard.

Id.

We conclude the *Robinson* decision is readily distinguishable on its facts, and its holding is therefore inapplicable to the facts of the present case. *Robinson* was decided in the context of contested Medicaid cases in which a petitioner is afforded no input during the process until initiating a contested case hearing. Here, however, prior to DLR's decision to approve Harrison's permit modification under the Mining Act, petitioners had ample opportunity to participate, and did in fact participate, in DLR's permitting review process. Petitioners attended the public hearing in this matter at which they presented their concerns regarding the damage to their home resulting from Harrison's blasting at the Hayesville Quarry, and petitioners likewise presented written comments concerning the same to DLR following the public hearing. In addition, petitioners had the opportunity to present evidence addressing the correctness of DLR's decision to issue the permit modification based on circumstances existing before or at the time of the agency decision. Petitioners therefore had a meaningful opportunity to participate in the agency's decision-making process and to present evidence on their own behalf prior to the agency's determination to approve the permit modification. Thus, petitioners' reliance on *Robinson* in support of their argument in the present case is misplaced.

Petitioners also rely on this Court's decision in *Clark Stone Co. v. N.C. Dep't of Env't & Natural Res.*, 164 N.C. App. 24, 594 S.E.2d 832 (2004), in support of their argument that post-permit evidence is admissible in a contested case hearing under the Mining Act. Again, however, petitioners' reliance on the decision in *Clark Stone* is misguided, as the decision in *Clark Stone* is distinguishable on its facts. In *Clark Stone*, DENR had issued a mining permit to the petitioner, Clark Stone Co., to conduct mining operations on land in Avery County, North Carolina. *Id.* at 27, 594 S.E.2d at 834. However, follow-

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

ing the issuance of the permit, DENR became aware that the mining operation was within visual and audible range of the Appalachian Trail. *Id.* After learning of the mining operation's proximity to the Appalachian Trail, DENR initiated an investigation into the matter. *Id.* As a result of its post-permit investigation, DENR decided to revoke the petitioner's permit on the grounds that the mining operation had a significantly adverse effect on the Appalachian Trail in violation of the Mining Act. *Id.* at 29-30, 594 S.E.2d at 836. Accordingly, Clark Stone Co. filed a petition for a contested case hearing to review DENR's decision. *Id.* at 26, 594 S.E.2d at 834.

We first note that no issue concerning the reception of post-permit evidence was raised on appeal in *Clark Stone*, and therefore, the opinion contains no holding directly on point. In addition, to the extent petitioners rely on *Clark Stone* because post-permit evidence was received at the contested case hearing in that case, the decision being reviewed in *Clark Stone* was markedly different from the decision being reviewed in the present case. The issue in *Clark Stone* was whether DENR improperly revoked the mining permit at issue. The revocation necessarily was based on evidence discovered after the initial issuance of the permit, during DENR's post-permit investigation, and was therefore relevant to review of the agency decision at issue. Such is not the case here. Here, the issue concerns the correctness of the issuance of the permit in the first instance. Thus, unlike *Clark Stone*, evidence collected after the permit modification was issued is not relevant to a review of the agency's decision.

Further, the record indicates petitioners' excluded evidence was cumulative of other evidence admitted at the contested case hearing. Petitioners' evidence concerning the seismograph readings in the present case appear to have been introduced to rebut and/or discredit Straw's projections concerning the range of expected ground vibration levels. Specifically, based on his regression analysis, Straw concluded that for 95% of blasts with an explosives weight of 327 pounds, ground vibration would be less than .303 inches per second. Petitioners' seismograph readings, taken after DLR's approval of Harrison's permit modification, tended to show occasions where Straw's projections had been exceeded. Nonetheless, Blevins testified that on two occasions, prior to the issuance of the permit modification, he found Straw's predictions had been exceeded. Thus, the seismograph readings showing more occurrences of what Blevins had already testified to were merely cumulative and would not have significantly strengthened petitioners' contentions.

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Finally, petitioners have presented no argument that the seismograph readings demonstrate the blasting limits established in the permit modification approved by DLR, which petitioners have not challenged on appeal, were exceeded by Harrison, thereby demonstrating a violation of the Mining Act. We note that the provisions of the Mining Act in no way “restrict or impair the right of any private or public person . . . to bring any legal or equitable action for redress against nuisances or hazards.” N.C. Gen. Stat. § 74-66 (2011). Although petitioners’ post-permit seismographic evidence is not relevant to a review of the correctness of the agency decision at issue in the present case, such evidence may be more appropriately introduced in a private action for relief. Thus, we hold petitioners’ proffered evidence was properly excluded from the contested case hearing.

V. Review of Agency Decision

[3] Finally, petitioners argue that “unrebutted” evidence presented at the hearing establishes that Harrison’s application for modification should have been denied based on multiple review criteria. Accordingly, petitioners contend the agency’s decision is unsupported by substantial evidence in the record and is arbitrary and capricious. We review petitioners’ final argument challenging the agency’s decision under the whole record test. N.C. Gen. Stat. § 150B-51(c).

Pursuant to the terms of the Mining Act, “[a]n operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in G.S. 74-52.” N.C. Gen. Stat. § 74-50(a) (2011). Under N.C. Gen. Stat. § 74-52 (2011), the terms and conditions of a permit may be modified “only where the Department determines that the permit as modified would meet all requirements of G.S. 74-50 and [G.S.] 74-51.” *Id.* § 74-52(c) (alteration in original).

Upon review of a permit application or application for permit modification, DLR considers the seven denial criteria enumerated under N.C. Gen. Stat. § 74-51(d):

- (d) The Department may deny the permit upon finding:
 - (1) That any requirement of this Article or any rule promulgated hereunder will be violated by the proposed operation;

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

- (2) That the operation will have unduly adverse effects on potable groundwater supplies, wildlife, or fresh water, estuarine, or marine fisheries;
- (3) That the operation will violate standards of air quality, surface water quality, or groundwater quality that have been promulgated by the Department;
- (4) That the operation will constitute a direct and substantial physical hazard to public health and safety or to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property, excluding matters relating to use of a public road;
- (5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;
- (6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or
- (7) That the applicant or any parent, subsidiary, or other affiliate of the applicant or parent has not been in substantial compliance with this Article, rules adopted under this Article, or other laws or rules of this State for the protection of the environment or has not corrected all violations that the applicant or any parent, subsidiary, or other affiliate of the applicant or parent may have committed under this Article or rules adopted under this Article and that resulted in:
 - a. Revocation of a permit,
 - b. Forfeiture of part or all of a bond or other security,
 - c. Conviction of a misdemeanor under G.S. 74-64,
 - d. Any other court order issued under G.S. 74-64, or
 - e. Final assessment of a civil penalty under G.S. 74-64.

Id. Notably, N.C. Gen. Stat. § 74-51(e) provides: “In the absence of any finding set out in subsection (d) of this section, or if adverse effects

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

are mitigated by the applicant as determined necessary by the Department, a permit *shall* be granted.” *Id.* (emphasis added).

Petitioners premise their arguments on a construction of the statute that where “unrebutted evidence” implicates any of the seven denial criteria, such evidence “require[s] denial of a permit.” Petitioners’ construction of the statute is entirely inconsistent with its literal language. Rather, the statute plainly states that DLR “may” deny a permit upon a finding that any of the seven criteria are met. However, DLR is required to issue the permit if it makes no finding that any of the seven criteria are implicated or if DLR finds that any such implicated criteria can and will be mitigated by the applicant. Here, DLR found none of the seven criteria are implicated, and that, to the extent any of the criteria are implicated, any adverse effects will be mitigated by Harrison as required under the terms of the permit modification.

Nonetheless, petitioners argue their evidence unequivocally indicates that criteria one, two, four, five, six, and seven were violated, and therefore, the permit modification should not have been granted.

Regarding criterion one, petitioners argue removing the mountain top and destabilizing mountain slopes violate the Mining Act’s stated purposes. The Mining Act provides that its purposes are to provide:

- (1) That the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration.
- (2) That from June 11, 1971, no mining shall be carried on in the State unless plans for such mining include reasonable provisions for protection of the surrounding environment and for reclamation of the area of land affected by mining.

N.C. Gen. Stat. § 74-48 (2011). Petitioners have not shown that an adequate reclamation plan is not in place to restore the land in compliance with the Act, and there is no evidence in the record indicating that an adequate reclamation plan was not considered by DLR. Thus, petitioners’ argument as to this criterion is without merit.

Regarding criterion two, petitioners argue the lay testimony of petitioner Rufus Stark established that there is decreased wildlife in the area as a result of Harrison’s mining operation. However, petitioners ignore that both the U.S. Fish and Wildlife Service and the

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

N.C. Wildlife Resources Commission had no objections to the permit modification based upon any threats to wildlife. Specifically, the U.S. Fish and Wildlife Service informed DLR of its opinion that the proposed permit modification would not have any adverse effect on federally listed species. The only concerns raised by the U.S. Fish and Wildlife Service, as well as the N.C. Wildlife Resources Commission, addressed the parameters of the reclamation plan. The record evidence shows these concerns were addressed through revisions to the reclamation plan. Thus, petitioners' argument as to this criterion is without merit.

Regarding criterion four, petitioners argue that their expert, Feinberg, provided the only competent evidence concerning the damaging effects of Harrison's blasting to their home and that Feinberg's testimony established that Harrison's blasting is causing structural damage to their home. Specifically, Feinberg testified that he had visited petitioners' home and had observed various defects at the residence. Feinberg testified that, in his opinion, cracks he observed in the tile floor of petitioners' home were "due to movement" and that it was "possible that [the cracks were] caused by the effects of blasting." Feinberg also testified that he observed separation of the windows on petitioners' home and opined that such separation was "caused by blasting damage" because he "couldn't explain the separation in any other way." Feinberg stated that he felt "very strongly" that the cracks in the tile floor had been caused by Harrison's blasting and that other cracks observed around the home could have been "aggravated" by the blasting. However, Feinberg later testified that it was "possible" that the damage observed could have been the result of causes other than blasting. Moreover, Feinberg testified that none of the damage he observed at petitioners' residence currently posed a threat to the structural integrity of the home. Notably, criterion four requires evidence of a "direct and substantial physical hazard" to the home. Further, petitioners' other expert, Blevins, as well as Straw, testified that the blasting limits established in the permit modification were conservative limits consistent with the standards adopted by the U.S. Bureau of Mines and are generally considered to be protective of adjacent structures. Simons testified that DLR included the most stringent limits within the permit modification so as to protect the nearest structure, petitioners' home, from damage. Furthermore, the record shows DLR incorporated certain operating conditions into the permit modification to minimize any potential structural damage that might result from blasting. In light of the evidence as a whole, petitioners' argument as to this criterion must fail.

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

Regarding criterion five, petitioners argue Simons' testimony established that Harrison's mining operation diminished the scenic value of the public parks in the area. However, there is no evidence in the record demonstrating that the "purposes" of these public parks or their use and enjoyment are affected by Harrison's blasting. In addition, the record evidence indicates that Harrison proposed, and DLR accepted Harrison's proposal as sufficient, to establish a tree line in order to minimize any scenic effects resulting from the mining operation. Further, the record discloses there is no audible noise resulting from the blasting that can be heard at the public parks in question. These facts are readily distinguishable from those in *Clark Stone*, on which petitioners' rely, where the purpose of the Appalachian Trail, the public park area at issue in that case, was to provide a pristine wilderness experience and the mining operation at issue was within both visual and audible proximity to the Trail. *Clark Stone*, 164 N.C. App. at 27, 32-33, 594 S.E.2d at 834, 837-38. Thus, petitioners' argument as to this criterion is without merit.

Regarding criterion six, petitioners argue Simons' testimony likewise established that the groundwater flow will be affected by Harrison's blasting activities and that no examination of the effect on groundwater resulting from Harrison's mining operation was presented by Harrison or DLR at the contested case hearing. To the contrary, however, DLR incorporated operating conditions into the permit modification requiring efforts by Harrison to mitigate any groundwater concerns, consistent with the Mining Act. In addition, a groundwater evaluation provided by Geological Resources, Inc. indicated no significant adverse impact on groundwater resulting from Harrison's mining operation. Thus, petitioners' argument as to this criterion is without merit. Petitioners' remaining argument as to criterion seven is likewise without merit, as the record clearly discloses no prior mining violations by Harrison that resulted in any of the measures detailed under that criterion.

Accordingly, based on our review of the entire record in this case, we conclude the agency's decision was supported by substantial, competent evidence and was not arbitrary or capricious. Rather, as the ALJ properly concluded:

A preponderance of the evidence presented in this matter indicates that [DLR]'s decision to issue the subject permit modification was made after due consideration of the statutory factors set forth in N.C. Gen. Stat. § 74-51 and was correct and proper. The

STARK v. N.C. DEP'T OF ENV'T & NATURAL RES.

[224 N.C. App. 491 (2012)]

respondent did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule in approving [Harrison]'s application for modification of the mining permit.

Thus, we affirm the trial court's order affirming the agency's decision upholding DLR's decision to approve Harrison's permit modification.

[4] Finally, we note that, although petitioners attempt to "incorporate by reference" a multitude of arguments and challenges to findings of fact made in their petition for judicial review below, we dismiss any such arguments. Our scope of review on appeal is limited only to those issues for which argument and authority are presented within the appellate brief. N.C. R. App. P. 28(a) (2012); see *Fortner v. J.K. Holding Co.*, 319 N.C. 640, 641-42, 357 S.E.2d 167, 167-68 (1987); *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 615-16, 659 S.E.2d 442, 453 (2008).

VI. Conclusion

We hold Straw's expert testimony was properly admissible in the present case, as Rule 702 does not require a testifying scientific expert to hold a license to practice a given profession in order for his expert testimony to be admissible. In light of Straw's demonstrated expertise in the study of ground vibration and its effect on structures, Straw's expert testimony was properly admitted under Rule 702 at the contested case hearing. In addition, we hold petitioners' excluded evidence concerning Harrison's alleged misrepresentations and Mining Act violations, as well as the seismograph readings taken after DLR approved Harrison's permit modification, were not relevant to a review of the propriety of the agency's decision and were properly excluded. We further hold that the record demonstrates that the agency's decision was supported by substantial, competent evidence and was not arbitrary or capricious. Accordingly, we affirm the trial court's order affirming the Final Agency Decision of the Mining Commission in the present case.

Affirmed.

Judges HUNTER, JR. (Robert N.) and ERVIN concur.

STATE v. CANTY

[224 N.C. App. 514 (2012)]

STATE OF NORTH CAROLINA

v.

NATHANIEL CANTY

No. COA12-804

Filed 18 December 2012

1. Appeal and Error—preservation of issues—no motion to suppress filed—constitutional issue not raised at trial

Defendant's argument that the trial court committed plain error in a possession of a firearm by a convicted felon and carrying a concealed handgun case by admitting evidence resulting from a traffic stop was dismissed as defendant did not file a motion to suppress nor did he argue his Fourth Amendment claim to the trial court.

2. Constitutional Law—effective assistance of counsel—search and seizure—no reasonable suspicion to initiate traffic stop

Defendant received ineffective assistance of counsel in a possession of a firearm by a convicted felon and carrying a concealed handgun case because his attorney did not file a motion to suppress evidence seized as a result of a traffic stop. Based on the totality of the circumstances, the officers lacked reasonable suspicion to initiate the traffic stop and a motion to suppress would likely have succeeded.

Appeal by Defendant from judgment entered 22 February 2012 by Judge Phyllis M. Gorham in Sampson County Superior Court. Heard in the Court of Appeals 14 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Stuart M. Saunders, for the State.

Reece & Reece, by Michael J. Reece, for Defendant.

BEASLEY, Judge.

Nathaniel Canty (Defendant) appeals from his convictions of possession of a firearm by a convicted felon and carrying a concealed handgun. For the following reasons, we order a new trial.

Defendant was indicted for possession of a firearm by a convicted felon and carrying a concealed weapon on 16 May 2011. 15 April

STATE v. CANTY

[224 N.C. App. 514 (2012)]

2011, Corporals Bass and Pope of the Sampson County Sheriff's Office were stationed along I-40 in Sampson County. Corporal Bass testified that he saw a green minivan slow from approximately 73 miles per hour (mph) to 65 mph. Corporal Pope's and Corporal Bass's official reports stated that the vehicle was going 65 mph before it slowed down. The speed limit in that portion of I-40 was 70 mph. Corporal Pope's attention was drawn to the vehicle because he noted that it slowed down even though it was not exceeding the posted speed limit. Corporal Pope described the reduction in speed as "dramatic" since the front of the vehicle dipped from the reduction in speed. Both officers testified that the two occupants of the vehicle stared straight ahead and appeared nervous.

Corporal Bass pulled the patrol car from its location and began to follow the vehicle. At one point, Corporal Bass pulled the patrol car alongside of the vehicle and observed that the occupants would not make eye contact. Corporals Bass and Pope then observed that the vehicle had slowed to 59 mph. While following the vehicle, the officers testified that the vehicle crossed the solid white fog line separating the driving lane from the shoulder. Corporal Bass switched on the patrol car's lights only after the vehicle "completely crossed—went across the fog line." Based on the reduction in speed and crossing the fog line, Corporal Bass initiated a traffic stop for "unsafe movement." Corporal Pope approached the passenger side of the vehicle after the driver pulled over. Gina Canty (Ms. Canty), Defendant's ex-wife, was the driver, and Defendant was the passenger. Ms. Canty was instructed to sit in the patrol vehicle with Corporal Bass whereupon he wrote a warning for unsafe movement.

During that time, Corporal Pope talked with Defendant. Corporal Pope asked Defendant about his travel plans and his destination. Corporal Pope became suspicious based on Defendant's lack of eye contact, evasive answers, and nervous demeanor. Corporal Pope could see a strong pulse in Defendant's stomach and neck. In Corporal Pope's experience, the driver, rather than a passenger, is nervous during a traffic stop. There was no odor of marijuana or alcohol in the vehicle or on Defendant.

After writing the warning, Corporal Bass returned Ms. Canty's information and license and told her to "have a nice day." Corporal Pope then asked Ms. Canty for permission to search the vehicle. Ms. Canty consented to the search of the vehicle which revealed a revolver and a rifle in a suitcase. Corporal Bass testified that the suit-

STATE v. CANTY

[224 N.C. App. 514 (2012)]

case was behind the passenger seat.¹ Upon finding the weapons, Corporal Bass handcuffed Ms. Canty and Defendant. He read them their *Miranda* rights and questioned them about the weapons. Ms. Canty began crying and said she did not know anything about the weapons. According to Corporal Pope, Defendant agreed to speak to him about the weapons. Corporal Pope did not ask Ms. Canty about the suitcase. Defendant said that he was taking the guns back to Philadelphia for his “old lady” who needed protection and that he had more guns in Philadelphia. Corporal Bass then placed Defendant under arrest for carrying a concealed weapon and possession of a firearm by a convicted felon.

Sergeant Stroud testified regarding the operation of the camera and microphone system in the patrol car. For the patrol car used by Corporals Bass and Pope, the camera system automatically records when the lights and siren are used or if the officers manually turn on either the camera system or the microphone. The camera system automatically records 45 seconds of video, but no audio, before the system is engaged. An “M” appears on the screen indicating that the audio is muted. The recording from this traffic stop, State’s Exhibit 8, was admitted into evidence and played for the jury. Sergeant Stroud explained that the “M” on the recording indicated that the microphone system was muted and that the “L” on the recording indicated that either Corporal Bass or Corporal Pope had activated the lights and siren. Defendant’s counsel noted, without asking a question to Sergeant Stroud, that he never saw the vehicle touch the white fog line.

[1] Defendant argues that the trial court committed plain error in admitting evidence resulting from the traffic stop. Defendant, however, did not file a motion to suppress nor did he argue his Fourth Amendment claim to the trial court. Constitutional arguments not made at trial are generally not preserved on appeal. *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001). We therefore dismiss Defendant’s constitutional argument.

[2] Defendant also argues that he received ineffective assistance of counsel because his attorney did not file a motion to suppress this evidence. We agree.

It is well established that ineffective assistance of counsel claims “brought on direct review will be decided on the merits when the cold record reveals that

1. State’s Exhibit 8, a recording of the traffic stop and search, shows Corporal Bass removing the suitcase from the driver’s side of the vehicle.

STATE v. CANTY

[224 N.C. App. 514 (2012)]

no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.”

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)) (citation omitted). This Court has declined to consider a claim of ineffective assistance of counsel where it was argued that counsel was deficient in failing to file a timely written motion to suppress. *State v. Johnson*, 203 N.C. App. 718, 721-23, 693 S.E.2d 145, 146-47 (2010). In *Johnson*, no evidentiary hearing was held, and there was a clear conflict in the testimony regarding whether the crack pipe was in plain view. *Id.* at 722, 693 S.E.2d at 147. In this case, there is a very detailed transcript and a DVD of the traffic stop. The “cold record” in this case is sufficient to review Defendant’s ineffective assistance of counsel claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)(citations and internal quotation marks omitted). “Where the strategy of trial counsel is ‘well within the range of professionally reasonable judgments,’ the action of counsel is not constitutionally ineffective.” *State v. Campbell*, 142 N.C. App. 145, 152, 541 S.E.2d 803, 807 (2001)(quoting *Strickland v. Washington*, 466 U.S. 668, 699, 80 L. Ed. 2d 674 (1984)). We have held that failure to file a motion to suppress is not ineffective assistance of counsel where the search or stop that led to the discovery of the evidence was lawful. *State v. Jones*, ___ N.C. App. ___, ___, 725 S.E.2d 910, 914 (2012); *State v. Brown*, ___ N.C. App. ___, ___, 713 S.E.2d 246, 249 (2011). Our review thus turns to whether the stop that led to the discovery of the challenged evidence was lawful.

STATE v. CANTY

[224 N.C. App. 514 (2012)]

A passenger has standing under the Fourth Amendment to challenge the constitutionality of a traffic stop. *Brendlin v. California*, 551 U.S. 249, 251, 168 L. Ed. 2d 132 (2007). Neither this Court nor our Supreme Court has explicitly held that a passenger has standing to contest the stop of the vehicle. The closest case is *State v. Mackey*, 209 N.C. App. 116, 124-25, 708 S.E.2d 719, 724-25 (2011), where this Court cited *Brendlin* but did not ultimately hold that a passenger has standing to contest the traffic stop. That case turned on whether the defendant had standing to contest a search of the vehicle. *Id.* at 124-25, 708 S.E.2d at 724-25. Here, Defendant challenges the *stop* that led to the search, not the search itself. In accordance with the United States Supreme Court, we hold that Defendant has standing to contest the stop of the vehicle in which he was a passenger.

In *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008), our Supreme Court held that reasonable suspicion is the standard for all traffic stops. A traffic stop is a seizure for the purposes of the Fourth Amendment. *Id.* at 414, 665 S.E.2d at 439. “A court must consider ‘the totality of the circumstances—the whole picture’ in determining whether a reasonable suspicion to make an investigatory stop exists.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)(quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L.Ed.2d 621, 629 (1981)). “The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)). “The only requirement is a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’” *Id.* at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). Even the absence of a “verifiable traffic code violation,” the driver’s conduct may give rise to reasonable suspicion to initiate a traffic stop. *See State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989).

Our courts have decided numerous cases regarding the factual circumstances giving rise to reasonable suspicion to initiate a traffic stop. *See, e.g., State v. Otto*, ___ N.C. ___, ___, 726 S.E.2d 824, 828 (2012)(“weaving ‘constantly and continuously’ over the course of three-quarters of a mile” around 11 p.m. is sufficient); *State v. Peele*, 196 N.C. App. 668, 674, 675 S.E.2d 682, 687 (2009)(holding one instance of weaving in one’s own lane coupled with an anonymous tip does not constitute reasonable suspicion, as a single instance of weaving is “conduct falling within the broad range of what can be

STATE v. CANTY

[224 N.C. App. 514 (2012)]

described as normal driving behavior” (citations and internal quotation marks omitted)); *State v. Fields*, 195 N.C. App. 740, 746, 673 S.E.2d 765, 69 (2009)(holding that weaving in one’s own lane standing alone does not provide reasonable suspicion to stop a motorist for driving under the influence of alcohol); *Jones*, 96 N.C. App. at 395, 386 S.E.2d at 221 (weaving and driving twenty mph below speed limit is enough for reasonable suspicion).

“Nervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists.” *State v. McClendon*, 350 N.C. 630, 638-639, 517 S.E.2d 128, 134 (1999). Nervousness has been considered a factor in prolonging the seizure *after* the traffic stop has been initiated, but nervousness has not been held to be a factor in *initiating* the stop. *See id.*; *State v. Fisher*, ___ N.C. App. ___, ___, 725 S.E.2d 40, 44-45 (2012)(noting nervousness as a proper factor after traffic stop has been made); *State v. Hodges*, 195 N.C. App. 390, 398-99, 672 S.E.2d 724, 730 (2009)(believing package in vehicle contained narcotics, giving false name of passenger, and nervousness were sufficient for reasonable suspicion to prolong stop); *State v. Myles*, 188 N.C. App. 42, 50, 654 S.E.2d 752, 758 (2008)(nervousness alone is not enough for reasonable suspicion). “Ordinary nervousness” does not amount to reasonable suspicion. *See McClendon*, 350 N.C. at 639, 517 S.E.2d at 134.

Refusal to make eye contact has also been considered in determining whether there was reasonable suspicion to prolong the traffic stop but has not been considered in the context of initiating the traffic stop. *See, e.g., McClendon*, 350 N.C. at 637, 517 S.E.2d at 133; *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 (2007).

Here, the State argues that Ms. Canty’s alleged crossing of the fog line, Ms. Canty’s and Defendant’s alleged nervousness and failure to make eye contact with the officers as they drove by and drove alongside the patrol car, and the vehicle’s slowed speed for reasonable suspicion were legitimate grounds for the traffic stop. Based on the totality of the circumstances, these factors fall short of reasonable suspicion.

First, the State’s evidence shows that there was no traffic violation. State’s Exhibit 8 shows that the vehicle did not cross the fog line

STATE v. CANTY

[224 N.C. App. 514 (2012)]

in the forty-five second interval before Corporal Bass engaged the lights and siren. Corporal Bass testified that he only turned on the blue lights and siren *after* he saw the vehicle cross the fog line.

Second, even in the absence of a “verifiable traffic code violation,” the officer’s beliefs about Defendant and Ms. Canty’s conduct amounts to nothing more than an “unparticularized suspicion or hunch.” Nervousness, slowing down, and not making eye contact is nothing unusual when passing law enforcement stationed on the side of the highway. We find it hard to believe that these officers could tell Ms. Canty and Defendant were “nervous” as they passed by the officers on the highway and as the officers momentarily rode alongside them. A vehicle’s slowed speed has been a factor in initiating a traffic stop, but the weight of this factor is minimal since the officers’ reports state that the vehicle was going 65 mph and slowed to 59 mph, which is hardly significant in comparison to *Jones* where we held that driving twenty mph below the speed limit in addition to weaving amounted to reasonable suspicion. *Jones*, 96 N.C. App. at 395, 386 S.E.2d at 221. Slowed speed also tends to be a factor in reasonable suspicion for impaired driving. *See State v. Aubin*, 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990); *Jones*, 96 N.C. App. at 395, 386 S.E.2d at 221. Impaired driving, however, was not the offense for which the officers testified that they pulled over Ms. Canty. Even if the nose of the car dipping from the sudden reduction in speed demonstrates a significant change in speed, it is the only factor on which this stop is premised. The reduction in speed standing alone could be explained a number of different ways, including normal apprehension many people feel when approaching a law enforcement officer. Nervousness, failure to make eye contact with law enforcement, and a relatively small reduction in speed is “conduct falling within the broad range of what can be described as normal driving behavior.” *Peele*, 196 N.C. App. at 674, 675 S.E.2d 687 (citations and internal quotation marks omitted). Based on the totality of the circumstances, these officers lacked reasonable suspicion to initiate the traffic stop that resulted in the search and seizure of the weapons in this case.

Since we have found that the search of the vehicle was illegal, a motion to suppress would likely succeed, distinguishing this case from *Jones*, ___ N.C. App. at ___, 725 S.E.2d at 914, and *Brown*, ___ N.C. App. at ___, 713 S.E.2d at 249. We cannot discern a strategic advantage by *not* filing a motion to suppress the incriminating evidence. Defense counsel apparently realized that the search was illegal but chose not to file a motion to suppress, saying, “First of all,

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

I never saw the vehicle touch the line but I'm going to move on." Without the traffic stop, there would have been no search. Without the search, no weapons would have been found. Without the weapons, Defendant could not have been convicted of carrying a concealed weapon or possession of a firearm by a convicted felon. We hold that defense counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the outcome would have been different had defense counsel filed a motion to suppress. As such, Defendant has demonstrated that he received ineffective assistance of counsel and is entitled to a new trial.

For the above reasons, we order a new trial.

New Trial.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA

v.

HENRY TYRONE RANDOLPH

No. COA12-688

Filed 18 December 2012

1. Evidence—defendant's oral and written statements—admissible—no plain error

Defendant was not entitled to a new trial in a second-degree sexual offense case because evidence "of and about" a written instrument prepared by a police investigator was not improperly admitted at trial. Defendant's oral statements made to the investigator were admissible, and assuming but in no way deciding that it was error for the trial court to allow the State to characterize the written instrument as defendant's "statement," a different result would not have been reached at trial absent such characterization.

2. Sexual Offenses—jury instructions—use of defendant's comments—within trial court's discretion

The trial court did not err in a second-degree sexual offense case by failing to give a limiting instruction during the jury charge

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

regarding the State's use of defendant's Miranda-inadmissible comments on cross-examination. This argument was subject to plain error review as defendant did not object to the jury instruction at trial and the instruction on the State's use of the evidence in question that the trial court elected to give was within its discretion.

3. Sexual Offenses—sufficient evidence—sexual act

The trial court did not err by denying defendant's motion to dismiss a second-degree sexual offense charge because the State presented insufficient evidence of a requisite "sexual act" on the part of defendant.

4. Evidence—second-degree sexual offense—testimony—other crimes—invited error—not prejudicial

The trial court did not commit plain error in a second-degree sexual offense case by admitting via testimony evidence regarding other crimes. The admission of some of the evidence was invited error and the introduction of the remaining evidence was not so prejudicial as to have tilted the scales and caused the jury to reach its verdict.

5. Evidence—second-degree sexual offense—opinion evidence—narrative of investigation

The trial court did not err in a second-degree sexual offense case by admitting the State's opinion evidence that defendant had in fact sexually abused the victim. The police investigator's testimony was merely a narrative of his investigation and was not being offered as expert or lay testimony probative on the issue of defendant's guilt.

Appeal by defendant from judgment entered 13 October 2011 by Judge Jack W. Jenkins in Wayne County Superior Court. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

Henry Tyrone Randolph (“Defendant”) appeals from judgment entered after a jury convicted him of second-degree sexual offense. Defendant contends he is entitled to a new trial because the trial court erred in: (1) admitting evidence concerning a writing the State inaccurately characterized as Defendant’s “statement”; (2) failing to provide the jury with a limiting instruction concerning the proper use of the substantive portions of this “statement” the State used to cross-examine Defendant; (3) denying Defendant’s motion to dismiss the charge against him in light of the State’s failure to put on sufficient evidence of a requisite “sexual act”; (4) instructing the jury on a theory of “sexual act” not supported by the evidence; (5) admitting certain past “bad acts” evidence; and (6) admitting improper opinion evidence. We find no prejudicial error.

I. Factual and Procedural History

On 1 November 2010, the Wayne County Grand Jury indicted Defendant for one count of first-degree forcible sexual offense, one count of taking indecent liberties with a minor, and one count of lewd and lascivious act with a minor. Defendant pled not guilty to all three counts, and the charges came on for trial at the 10 October 2011 Special Criminal Session of Wayne County Superior Court.

The State’s evidence tended to show the following. In the mid-1990s, Defendant met Robin Sheffield (“Sheffield”) and Dionne Vann (“Vann”). Both women were Defendant’s contemporaries and recent mothers. Sheffield’s daughter was named Tanya and Vann’s daughter was named Barbara.¹ Defendant formed friendships with both women and their children. Defendant’s friendship with Sheffield included a long off-and-on sexual relationship.

For a decade or more, Defendant, Sheffield, Vann, and their two daughters were close friends. Defendant often baby sat Barbara and Tanya when they were very young. He spent time and money on the girls, and counseled them as a surrogate father as they grew older. Both girls occasionally spent the night at Defendant’s home. With Sheffield’s consent, Tanya spent almost every weekend at Defendant’s house. Sheffield testified Defendant had a paternal relationship with Tanya, and that she thought he was the type of person that “every parent would want in their child’s life.” Barbara testified Defendant was a friend of her mother, and that she viewed him as a father figure. At least one of the girls referred to Defendant as “Uncle Ty.”

1. Pseudonyms are used to protect the minors’ identities.

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

In 2010 Barbara, then age 16, accused Defendant of sexually abusing her. She testified that on 4 September 2010 she played basketball with Defendant, went to Defendant's house, and laid down on Defendant's bed. Barbara testified that Defendant then laid down next to her, touched her above her clothes around her vaginal area, pulled her underwear down, "put two fingers inside of [her]" against her will, got next to her, and "started licking all over [her] and stuff." After the incident, Barbara sent Defendant a text message on 17 September 2010 from her job which read: "Sorry to tell you I have to tell my mom what happened because ever since that night I've been irritated and I got a discharge. I got to go to the doctor. [sic]" Defendant responded by texting "Do What?" and "Call me?". When Barbara did not respond, Defendant went to Barbara's workplace, asked Barbara about her text, and then left. Barbara then called Vann from work, was taken to the Goldsboro police station, and gave a statement to police in which she accused Defendant of having touched her inappropriately.

Sheffield testified that after she learned of Barbara's allegations, she asked her daughter Tanya if Defendant had ever touched her inappropriately. Tanya initially said that Defendant had not touched her. She later recanted and told Sheffield that she had been touched by Defendant on two separate occasions, the first on 8 May 2010 when he touched her on her breast and vaginal area while she was sleeping on a couch in Defendant's house, and a second time on 10 September 2010 when she woke up naked with vaginal bleeding after falling asleep at Defendant's house.

Goldsboro police arrested Defendant on 18 September 2010 and incarcerated Defendant in the county jail later that day. At some point, Defendant requested to speak with Investigator Doug Bethea. Defendant remained in jail during the next two days until the morning of 20 September 2010. That morning, Investigator Bethea went to the jail, retrieved Defendant, and brought him to the police station for interrogation. There, Investigator Bethea showed Defendant a written waiver of rights form. Defendant wrote on the rights form that he did not understand he had been charged with criminal offenses, and that an attorney had "not yet" been appointed to represent him. Defendant did sign a pre-printed *Miranda* waiver.

Following this exchange, Investigator Bethea started questioning Defendant in the interrogation room at 8:57 a.m. After several minutes of interrogation, Investigator Bethea began writing on a piece of

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

paper and then asked Defendant to sign the written instrument. However, Defendant said he was afraid Investigator Bethea had “change[d] things” and “turned what he said inside out,” and refused to sign. At 9:21 a.m., Defendant said he was tired of answering questions and “clearly indicated to [Investigator Bethea] . . . he . . . didn’t want to answer any more questions.” However, Investigator Bethea “kept asking [Defendant] questions” and “kept telling [Defendant] ‘[i]f you got something that you need to tell me, you need to tell me.’” Defendant responded to Investigator Bethea’s further interrogation by repeatedly examining his arrest warrants, nervously worrying about prison time, and orally responding to Investigator Bethea’s questions. Investigator Bethea hand wrote more notes as the interrogation progressed. At about 11:00 a.m., Investigator Bethea once again asked Defendant to sign the writing he had produced. Defendant refused to “sign” the writing, but did initial various places on the writing “just for [Investigator Bethea’s] satisfaction.”

Before trial, Defendant filed a motion seeking to suppress any and all evidence of post-arrest comments he allegedly made to Investigator Bethea on the morning of 20 September 2010, including the writing prepared by Investigator Bethea. Defendant renewed his motion at the start of trial, but the court deferred ruling at that time. The motion was heard near the end of the State’s case-in-chief, in anticipation of the State calling Investigator Bethea to testify.

At that hearing, Defendant argued the evidence was inadmissible because it was obtained in violation of his *Miranda* rights. He further argued that there was no evidence of any “statement” he made, signed, or adopted. During the motion to suppress hearing, the trial court observed that Investigator Bethea “[n]ever represented that he was trying to capture [Defendant’s comments] word for word,” that the written instrument unlikely “capture[d] everything that was said in the course of” the interrogation, and that the court was “having trouble with [the State’s argument] that the statement is somehow a verbatim transcript.” The trial court found that Defendant “did not sign any statement that ultimately was written out. Whatever statements were written out were not . . . in his handwriting. He did put some initials on [Investigator Bethea’s notes] but they were sporadic and it doesn’t seem to be any sort of rhyme or reason to them; they’re just sort of sporadic here and there.” The trial court also found that Defendant’s “no” answer on the rights form “suggest[s] that [Defendant] did not understand that he had been charged with criminal offenses.”

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

At the end of the hearing, the trial court orally granted Defendant's motion to suppress in part.² The court suppressed the State's evidence regarding comments Defendant made to Investigator Bethea after 9:21 a.m., including the written instrument prepared by Investigator Bethea, on the grounds that:

[t]he defendant did give an indication that he was tired of answering questions at or about 9:21, and thereafter additional statements were taken, which, in the Court's opinion, should not have been, and those statements should not be used against the defendant because they would violate the defendant's constitutional rights.

However, the trial court ruled that the State's evidence regarding comments Defendant made between 8:57 a.m. and 9:21 a.m. were admissible.

Investigator Bethea testified immediately after the trial court's ruling. He was the last witness called by the State. At the close of the State's evidence, the trial court dismissed the first-degree sexual offense charge for insufficient evidence but determined there was sufficient evidence of the lesser included offense of second-degree sexual offense to proceed on that charge.

Defendant testified at trial, repeatedly denied he ever inappropriately touched Barbara or Tanya, and suggested both girls were fabricating stories because he was ending or had ended his sexual relationship with Tanya's mother Sheffield. On cross-examination and without objection, the prosecutor marked the writing Investigator Bethea made during the 20 September 2010 interrogation as State's Exhibit 11, characterized the writing as "[D]efendant's statement," questioned Defendant about his "statement," and had Defendant read his "statement" to the jury twice.

The jury found Defendant guilty of second-degree sexual offense involving Barbara, but not guilty of the two counts related to the alleged touching of Tanya. On 13 October 2011, the trial court sentenced Defendant to 83 months minimum imprisonment, and subjected Defendant to lifetime sex offender registration and satellite-

2. Because the only two witnesses to testify at the hearing (Investigator Bethea and arresting Officer Chris Irby) presented uncontroverted testimony, the trial court was not required to enter a written order in the matter. See *State v. Braswell*, ___ N.C. App. ___, ___, 729 S.E.2d 697, 700 (2012) ("Pursuant to N.C. Gen. Stat. § 15A-977(f) (2011), the 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." (citations and quotation marks omitted)).

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

based monitoring orders. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

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

III. Analysis

Defendant raises six issues on appeal, which we address in turn.

A. Improper Use and Characterization of Defendant's "Statement"

[1] Defendant first argues that he is entitled to a new trial because evidence "of and about" a written instrument prepared by Investigator Bethea was improperly admitted at trial. We disagree.

As noted above, Defendant brought a Motion to Suppress before trial, seeking to exclude "any and all" evidence regarding statements he made to Investigator Bethea on the morning of 20 September 2010. Defendant moved to suppress on both *Miranda* grounds and on the basis that the written instrument prepared by Investigator Bethea was "not the statement of the defendant." At trial, the court granted Defendant's motion in part, on constitutional grounds, and suppressed all evidence concerning statements made by Defendant *after* 9:21 a.m., including the written instrument. The trial court did not suppress evidence related to oral statements made by Defendant prior to 9:21 a.m.

Defendant raises two arguments with respect to evidence of his purported "statement" being introduced at trial. First, Defendant contends that the substance of Investigator Bethea's testimony regarding Defendant's comments made prior to 9:21 a.m., which the trial court deemed admissible, should have been excluded under the rationale of *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967). Second, Defendant objects to the use and introduction of the written instrument prepared by Investigator Bethea during his cross-examination.

1. Direct Examination of Investigator Bethea

With respect to Defendant's argument regarding the substance of Investigator Bethea's testimony, the State contends we should review for plain error, because "[t]he Motion to Suppress the introduction of Defendant's statement was not enough to preserve [the] objection . . .

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

once the evidence was introduced without objection.” The State argues “Defendant was required to object to testimony regarding the statement,” and failed to do so. We disagree with the State that Defendant has failed to preserve his argument.

The North Carolina Rules of Evidence provide that a Defendant seeking to preserve an issue for appeal “need not renew an objection” once the trial court has “made a definitive ruling on the record.” N.C. R. Evid. 103(a)(2). However, our Supreme Court has recognized that “[t]here is a direct conflict between this evidentiary rule and [the North Carolina Rules of Appellate Procedure], which this Court has consistently interpreted to provide that a trial court’s evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.” *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). Because the North Carolina Constitution vests in our Supreme Court “the exclusive authority to make rules of procedure and practice for the Appellate Division,” any conflict must be resolved in favor of the Appellate Rules and the case law interpreting them. *Id.* (quoting N.C. Const. art. IV, § 13, cl. 2).

Nevertheless, even under our precedent requiring renewal of an objection at trial, Defendant has preserved this argument for appeal. Defendant filed a written pre-trial motion to suppress evidence in which he moved to suppress “any and all” evidence of “statements made by the defendant.” Defendant renewed this motion at the start of trial, but agreed at the request of the trial court to defer hearing on the matter until the issue arose. Defendant renewed his objection to the evidence when the trial court convened a voir dire of Investigator Bethea at trial, and once again stated the basis for his objection. At the conclusion of voir dire, the trial court ruled on Defendant’s Motion to Suppress. The State then immediately called Investigator Bethea to testify before the jury, where testimony which formed part of the basis of Defendant’s Motion to Suppress was elicited. Although Defendant did not object again during Investigator Bethea’s testimony, he did object in anticipation of this challenged testimony. Thus under these facts, where Defendant filed a proper pre-trial motion to suppress on which ruling was deferred until trial, we hold Defendant has preserved this issue for appeal where his objection at trial prompted the court to hold a hearing addressing the merits of the pre-trial motion. Therefore, we review for prejudicial error. Under a prejudicial error analysis, “[t]his Court considers whether there was a reasonable possibility that, had the error in question not been com-

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

mitted, a different result would have been reached at trial.” *State v. Stanley*, ___ N.C. App. ___, ___, 713 S.E.2d 196, 199 (2011).

Immediately following the court’s ruling on Defendant’s motion to suppress, the State called Investigator Bethea. Defendant objects on appeal to the following portion of Investigator Bethea’s testimony:

Q. What did you do when you got to the police department?

A. I took him in, had him have a seat in the interview room number 1. I asked him did he want anything to drink and did you need any snacks. I told him where the bathrooms were. Once we got in there, I read him his Fifth and Sixth amendment rights.

Q. What did you do after that?

A. Well, once I—we went over the form, he decided—he made the decision to talk to me. And—

Q. What did he say?

A. We discussed what he—what he had said in the first part of our interview.

Q. And what did he say in the first part of your interview?

A. He stated that she had told him she had a discharge from her vaginal area.

Q. Who is “she”?

A. [Barbara]. He arrived at work to talk to her about it and asked her what was the deal. She didn’t know where it had come from. Stated that on Friday she, being [Barbara], was over at his house. She took a shower and came and laid on the bed beside him. He said, “Beside me.” She had on shorts, panties, sports bra, and a T-shirt. He said, I laid my arm across her body while she was on the phone. I asked her was she going to get off the phone. I turned the other way, away from her.

Q. Did the defendant say anything at all about how he came to know that the defendant—that—did the defendant say how he knew that [Barbara] had on panties and a sports bra under her shorts and T-shirt?

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

A. We had been in conversation, and all he did was just come out and I, you know—I was asking questions and he would answer. And these—this is all he said. He didn't say anything else.

Q. Okay. What did you do when you concluded taking the defendant's statement?

A. Are you talking about at that point in time or—

Q. At the end of your interview. A. At the end of our interview? I escorted him back to the jail.

Defendant asserts this testimony should have been excluded under the rationale of *Walker*, 269 N.C. 135, 152 S.E.2d 133.

In *Walker*, our Supreme Court held:

If a statement purporting to be a confession is given by accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to accused, and is not signed by accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or per se, the confession of accused; and it is not admissible in evidence as the written confession of accused.

269 N.C. at 139, 152 S.E.2d at 137 (quotation marks and citations omitted). Thus, *Walker* stands for the proposition that the State may not introduce evidence of a written confession unless that written statement bears certain indicia of voluntariness and accuracy. However, so long as oral statements are not obtained in violation of the constitutional protections against self-incrimination or due process, a "defendant's own statement is admissible when offered against him at trial as an exception to the hearsay rule." *State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 815 (2005) (citing N.C. R. Evid. 801(d)).

Here, Investigator Bethea merely testified as what Defendant told him prior to 9:21 a.m. on 20 September 2010. The trial court held that statements made by Defendant prior to 9:21 a.m. were not constitutionally inadmissible, and Defendant does not argue differently on appeal. As explained below, the State was permitted to use the constitutionally suppressed evidence on *cross-examination* of Defendant

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

to impeach his testimony. During the State's case-in-chief however, no written manifestation of Defendant's comments prior to 9:21 a.m. was introduced or read to the jury. Therefore, *Walker* does not bar Investigator Bethea's testimony regarding Defendant's oral statements made prior to 9:21 a.m., and Defendant's argument is overruled.

We also disagree with Defendant that the two isolated references to his "statement," made during Investigator Bethea's testimony constituted prejudicial error when viewed in light of the later testimony elicited from Defendant discussed below.

2. Cross Examination of Defendant

Defendant next argues that under the holding of *Walker*, it was improper for the State, during cross-examination, to introduce and characterize the written instrument prepared by Investigator Bethea as Defendant's "statement."

On direct examination, defense counsel elicited testimony from Defendant regarding his interaction with Investigator Bethea, including both a denial that he had given any "statement," as well as testimony specifically addressing, and denying, several of the inculpatory portions of the written instrument. Accordingly, Defendant may not argue on appeal that introduction of the substance of the written instrument on cross-examination to impeach Defendant constituted error. *See State v. Jones*, ___ N.C. App. ___, ___, 711 S.E.2d 791, 796 (2011) (observing that a defendant may not request a new trial on the basis of error he causes or joins in causing). Defendant could have avoided any discussion of the written instrument entirely by simply declining to testify. Therefore, Defendant is limited only to arguing that the prosecution's characterization of the written instrument as "Defendant's statement" was improper.

Assuming but in no way deciding that it was error for the trial court to allow the State to characterize the written instrument as Defendant's "statement," we cannot conclude that "a different result would have been reached at trial" absent such characterization. *Stanley*, ___ N.C. App. at ___, 713 S.E.2d at 199. Defendant has not demonstrated that the State's characterization of the written instrument as "Defendant's statement" caused the jury to accept it as such. To the contrary, the record reveals Defendant took the stand, denied that he had acquiesced to any "statement," and denied specific admissions contained in the purported "statement." The State subsequently attempted to impeach Defendant's testimony. This ultimately presented the jury

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

with the question of whether Defendant was credible in his denial. Defendant has not met his burden of demonstrating prejudice.

B. Failure to Provide a Limiting Instruction

[2] Defendant next argues that the trial court erred by failing to give a limiting instruction during the jury charge regarding the State's use of Defendant's *Miranda* inadmissible comments on cross-examination. Specifically, Defendant contends the trial court failed to instruct the jury that this evidence "was admissible for only one limited purpose, that it could not be considered as substantive evidence of guilt, and that it could only be considered as non-substantive impeachment evidence." We disagree.

Preliminarily, we note that Defendant did not object to the jury instruction at trial; therefore this argument is subject to plain error review. *See State v. Oakman*, 191 N.C. App. 796, 798, 663 S.E.2d 453, 456 (2008) ("A defendant who does not object to jury instructions at trial will be subject to a plain error standard of review on appeal."). "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." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). However, "even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977))(alteration in original).

The court charged the jury on the State's use of the evidence in question using the language of N.C.P.I.–Crim. 105.21, entitled "False, Contradictory, or Conflicting Statements of Defendant":

The State contends and the defendant denies that the defendant made false, contradictory, or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience, seeking to divert suspicion or to exculpate the concern, and you should consider that evidence along with all the other believable evidence in this case. However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence standing alone

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

is not sufficient to establish guilt.

This instruction explained to the jury that: (1) the State and Defendant disputed whether Defendant made prior inconsistent statements to Investigator Bethea, (2) if the jury believed that Defendant made such statements, that they could consider them as evidence of an effort by Defendant to “divert suspicion,” and (3) standing alone, any prior inconsistent statement of Defendant was insufficient to establish guilt.

It is speculative as to whether the jury took this charge to mean it could consider Defendant’s prior comments to Investigator Bethea as substantive evidence of guilt. Defendant on appeal does not direct us to the alternate language the trial court should have used. To the extent Defendant argues that the charge given did not properly instruct the jury as to the limited purpose for which the evidence could be considered, we note that a “trial court [does] not err in . . . fail[ing] to restrict the purpose of the cross-examination for impeachment only” when “counsel [does] not request such an instruction.” *Gillespie v. Draughn*, 54 N.C. App. 413, 416, 283 S.E.2d 548, 551 (1981).

In general, the choice of jury instructions is a “matter within the trial court’s discretion and will not be overturned absent a showing of abuse of discretion.” *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (2002). The instruction the trial court elected to give was within its discretion. We hold the court’s decision was not in error, much less plain error.

C. Insufficient Evidence of “Sexual Act”/Instructing on Theory Unsupported by Evidence

[3] Defendant next asserts that the trial court erred by denying his motion to dismiss the second-degree sexual offense charge because the State presented insufficient evidence of a requisite “sexual act” on the part of Defendant. Defendant’s argument is without merit.

We review a trial court’s denial of a motion to dismiss *de novo*. *State v. Chillo*, 208 N.C. App. 541, 545, 705 S.E.2d 394, 397 (2010). When a defendant makes a motion to dismiss, the trial court must determine whether there is “substantial evidence” of (1) the essential elements of the offense charged, and (2) the defendant’s being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” and is a question of law for the trial court. *State v.*

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

Smith, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). In evaluating a defendant's motion, the trial court must view the evidence in the light most favorable to the State and give the State "the benefit of all reasonable inferences" to be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

Defendant was convicted of second-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.5(a)(1) (2011), an essential element of which is "engage[ment] in a sexual act with another person." N.C. Gen. Stat. § 14-27.1(4) (2011) defines "sexual act" as including "cunnilingus" or "the penetration . . . by any object into the genital . . . opening of another person's body." Cunnilingus is "the slightest touching by the lips or tongue of another to any part of [a] woman's genitalia." *State v. Ludlum*, 303 N.C. 666, 674, 281 S.E.2d 159, 163 (1981).

Here, Defendant argues that there was insufficient evidence of both cunnilingus and penetration. However, the record reflects sufficient evidence of both acts, particularly when providing the State the "benefit of all reasonable inferences."

Barbara testified as follows:

Q. What happened then?

A. He had grabbed my shorts and tried to pull them down. I had one side of them and he kept trying to pull my shorts down. And he got them down. He put two fingers inside of me. And I grabbed his hand, tried to move but he wouldn't.

Q. Did you have on underpants at that time?

A. Yes, ma'am.

Q. Did he pull those down, too?

A. Yes, ma'am.

Barbara then testified that Defendant said he "wanted to please [her] like a woman should be pleased," "got between [her] legs" and "started licking all over [her] and stuff," and this went on for about five minutes. Barbara also stated that Defendant immediately expressed remorse over what he had done. She also explained that she "was having [vaginal] discharge from [Defendant]." The State introduced, without objection from Defendant, a lengthy and detailed statement Barbara made to police which was consistent with the account of the events she gave at trial. We disagree with Defendant

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

that the evidence presented, viewed in totality and taken in the light most favorable to the State, warranted dismissal of the charge against him. Defendant's motion to dismiss was properly denied.

Accordingly, Defendant's argument that the trial court erred by "instruct[ing] the jury on a theory of 'sexual act' not supported by the evidence," is also without merit.

D. Admission of "Other Crimes" Evidence

[4] Defendant additionally argues that the trial court erred in admitting via testimony four pieces of "other crimes" evidence which were inadmissible under N.C. R. Evid. 401–404 and 802. Specifically, Defendant contends admission of the following was improper: (1) Barbara's testimony that a woman named Cathy Smith had told her that Smith had "walked in on [Defendant] molesting another fourteen-year-old girl," (2) testimony from Vann to the same effect, (3) Tanya's repeated testimony that Defendant had threatened to kill her mother and grandmother, and (4) testimony from Defendant the State eliciting on cross-examination that he had "just got out of jail."

Defendant did not object to any of this testimony at trial, and thus bears the burden of demonstrating plain error. *See State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012). This Court does not analyze errors cumulatively to determine whether plain error is present. *State v. Bellamy*, 172 N.C. App. 649, 662, 617 S.E.2d 81, 90 (2005).

With regard to Barbara and Vann's testimony about Defendant's alleged molestation of another girl, we note that Defendant elicited this testimony on cross-examination of the State's witnesses, and made no motion to strike this testimony. This Court has recognized that "[s]tatements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *See State v. Carter*, ___ N.C. App. ___, ___, 707 S.E.2d 700, 707–08 (2011) (quotation marks and citation omitted). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001). Accordingly, Defendant's argument insofar as it pertains to these statements is overruled.

Moreover, we cannot say that introduction of the remaining two pieces of evidence, that Defendant had threatened to kill Tanya's mother and grandmother, and that he had "just got out of jail," although likely not helpful to Defendant's case, were so prejudicial as

STATE v. RANDOLPH

[224 N.C. App. 521 (2012)]

to have “‘tilted the scales’ and caused the jury to reach its verdict.” *State v. Duke*, 360 N.C. 110, 138-39, 623 S.E.2d 11, 29-30 (2005). Defendant’s argument to the contrary is overruled.

E. Inadmissible Opinion Evidence

[5] Defendant lastly argues that the trial court erred in “admitt[ing] the State’s inadmissible opinion evidence [that] Defendant had in fact sexually abused [Barbara].” This argument is without merit.

At trial, Investigator Bethea testified for the State that on 20 September 2010 he “thought [he] had enough [evidence] at that point in time” to arrest Defendant for sex crimes and that on that on the same day both Vann and Sheffield told him that “a sexual assault had occurred over a period of time.” Vann also testified for the State that another woman named Ann Herring told her after September 2010 that “she knew that [Defendant] had did this because of the questions that [Defendant] had asked her” and that “[D]efendant had done what he was accused of.” Defendant argues this testimony was impermissible opinion evidence that should have been excluded.

However, an officer may give testimony regarding his perception and experience conducting a sexual assault investigation. *See, e.g., State v. O’Hanlon*, 153 N.C. App. 546, 562–63, 570 S.E.2d 751, 761–62 (2002). Upon review of the record, it is clear that Investigator Bethea was merely providing a narrative of his investigation. His testimony was not being offered as expert or lay testimony probative on the issue of Defendant’s guilt. Vann’s hearsay testimony recounting a third party’s assertion that “she knew that [Defendant] had did this because of the questions that [Defendant] had asked her” does not, standing alone, amount to plain error. This is especially true in light of the context in which it was elicited—as a response to a question about how the investigation began. Defendant’s argument to the contrary is overruled.

IV. Conclusion

For the foregoing reasons, we find

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

Judges HUNTER, Robert C. and CALABRIA concur.

TOWN OF SANDY CREEK v. COAST CONTR’G, INC.

[224 N.C. App. 537 (2012)]

THE TOWN OF SANDY CREEK, PLAINTIFF

v.

EAST COAST CONTRACTING, INC., MICHAEL D. HOBBS, ENGINEERING SERVICES,
PA, CHARLES DAVID DICKENSON, TODD S. STEELE AND RLI INSURANCE
COMPANY, DEFENDANTS

And

EAST COAST CONTRACTING, INC., Third-Party Plaintiff

v.

THE CITY OF NORTHWEST, Third-Party Defendant

No. COA12-561

Filed 18 December 2012

Immunity—governmental immunity—proprietary function

The trial court did not err in a breach of contract, negligence, and indemnity and contribution case by denying third-party defendant town’s motion to dismiss the negligence claim based on governmental immunity. Defendant town was involved in a proprietary function while handling its business relationship with third-party plaintiff and thus was not entitled to immunity.

Appeal by third-party defendant from order filed 13 February 2012 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 11 October 2012.

Smith Parsons, by Steven L. Smith and Matthew E. Orso, for third-party plaintiff appellee.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Justin K. Humphries and Clay Allen Collier, for third-party defendant appellant.

McCULLOUGH, Judge.

The City of Northwest (“Northwest”), appeals from the trial court’s denial of its motion to dismiss East Coast Contracting, Inc.’s (“ECC”) third-party complaint. For the following reasons, we affirm the denial of Northwest’s motion on the limited basis of governmental immunity.

I. Background

This case began 9 September 2010 when The Town of Sandy Creek (“Sandy Creek”) filed suit against ECC, Engineering Services,

TOWN OF SANDY CREEK v. COAST CONTR’G, INC.

[224 N.C. App. 537 (2012)]

PA (“ES”), and individuals seeking recovery for damages to Sandy Creek roads allegedly caused by ECC while ECC was constructing a sewer system for Northwest. Sandy Creek’s complaint alleged that Sandy Creek and Northwest discussed plans for a sanitary sewer system for their respective municipalities prior to November 2007. Thereafter, Northwest contracted with ES and ECC to design and construct the sewer system. Sandy Creek, who alleges to be a third-party beneficiary to the contracts, further alleged that they incurred damages as a result of the sewer system and that the “damages were caused by deficiencies and defects in the design, drawings, engineering, supervision, specifications, final plans, planning, coordination and workmanship provided by ES” and that ECC’s “work deviated from the standard of care such that they breached their duties to [Sandy Creek].”

With Sandy Creek’s original suit pending, ECC filed a third-party complaint against Northwest on 12 November 2010 alleging breach of contract, negligence, and indemnity and contribution. Northwest then filed a Rule 12(b)(6) motion to dismiss on 14 February 2011. Northwest’s motion came on for hearing at the 9 December 2011 Civil Session of Brunswick County Superior Court, the Honorable Ola M. Lewis presiding. The trial court filed an order on 13 February 2012 denying Northwest’s motion to dismiss.

Northwest now appeals the order upon the trial court’s Rule 54(b) certification and the stay of ECC’s third-party claims.

II. Analysis

On appeal, Northwest contends that the trial court erred by denying its motion to dismiss ECC’s third-party claims. “[A] motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint.” *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). On appeal, “[t]his 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, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). “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*, 297 N.C. at 185, 254 S.E.2d at 615.

TOWN OF SANDY CREEK v. COAST CONTR'G, INC.

[224 N.C. App. 537 (2012)]

Appealability

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). An order denying a motion to dismiss is therefore an interlocutory order and not generally immediately appealable.

However,

immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a “substantial right.”

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted). “‘[T]his Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.’” *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000) (quoting *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted)).

In the present case, ECC asserted claims for breach of contract, negligence, and indemnity and contribution against Northwest. Upon Northwest’s Rule 12(b)(6) motion to dismiss ECC’s claims, the trial court refused to dismiss the case. Yet, by the same order denying dismissal, the trial court certified the issue of immunity for appeal, stating “[i]nasmuch as the question of whether the Third-Party Complaint is barred by governmental immunity affects substantial rights of Northwest so as to present no just reason for delay, . . . this matter is certified pursuant to N.C.R.C.P. Rule 54(b) for immediate appeal.” Thus, to the extent it is alleged that governmental immunity bars ECC’s negligence claim, we review the interlocutory order denying dismissal.

TOWN OF SANDY CREEK v. COAST CONTR'G, INC.

[224 N.C. App. 537 (2012)]

Despite conceding that ECC's breach of contract claim is not barred by governmental immunity, Northwest requests that we review the entire case in order to prevent piecemeal litigation. We decline Northwest's request. Where there is no substantial right at stake as a result of the trial court's denial of Northwest's motion to dismiss ECC's breach of contract claim and where the trial court only certified the issue of governmental immunity for appeal, we limit our scope of review as we have done in previous cases. *See, e.g., Clayton v. Branson*, 153 N.C. App. 488, 570 S.E.2d 253 (2002); *Dempsey v. Halford*, 183 N.C. App. 637, 645 S.E.2d 201 (2007). Thus, the sole issue on appeal is whether the trial court erred in denying Northwest's motion to dismiss ECC's negligence claim because Northwest is entitled to governmental immunity.

Governmental Immunity

"In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999).

In this case, Northwest first argues that it is entitled to governmental immunity because ECC failed to plead statutory authorization to sue the city and failed to plead waiver of immunity. Thus, citing *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 451 S.E.2d 650 (1995), Northwest concludes that failure to allege waiver is a failure to plead a tort against a North Carolina municipality and the claims should be dismissed. This argument is misplaced.

Waiver of governmental immunity need only be pled where a municipal corporation is acting in a governmental capacity. Where a municipal corporation is acting in a proprietary manner, it is not entitled to governmental immunity and waiver need not be pled. *See McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525 ("[I]f the governmental entity was acting in a government function, there can be no recovery unless the county waives its governmental immunity; but if the operations were proprietary rather than governmental, the county is not protected."). Therefore, "[i]n deciding whether a governmental entity may claim immunity from suit, we must first determine whether the nature of the complained-of act is proprietary or governmental." *Stephenson v. Town of Garner*, 136 N.C. App. 444, 454, 524 S.E.2d 608, 615 (2000) (citing *Rich v. City of Goldsboro*, 282 N.C. 383, 385, 192 S.E.2d 824, 826 (1972)).

TOWN OF SANDY CREEK v. COAST CONTR’G, INC.

[224 N.C. App. 537 (2012)]

“Our courts have long noted that drawing the line between municipal operations which are proprietary and subject to tort liability versus operations which are governmental and immune from such liability is a difficult task.” *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 751, 407 S.E.2d 567, 568 (1991). Nevertheless, it is a task we must undertake.

“Historically, government functions are those activities performed by the government which are not ordinarily performed by private corporations.” *McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525.

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

Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942). We have provided various tests for determining into which category a particular activity falls, but have consistently recognized one guiding principle: “[G]enerally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and ‘private’ when any corporation, individual, or group of individuals could do the same thing.” *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952).

Evans v. Housing Auth. of City of Raleigh, 359 N.C. 50, 54, 602 S.E.2d 668, 671 (2004). Furthermore, “activities that can be performed by either private persons or government agencies may be shielded, depending on the nature of the activity. . . . For example, children may be educated by either public schools or private schools, but public schools are still granted governmental immunity.” *McIver*, 134 N.C. App. at 587, 518 S.E.2d at 526 (citation omitted). In the instant case, we are dealing with the construction of a sewer system.

Northwest contends that the construction of a sewer system is a governmental function and therefore it is entitled to governmental immunity. In support of its position, Northwest relies on *McCombs v. City of Asheboro*, where the plaintiff’s intestate crawled into a ditch

TOWN OF SANDY CREEK v. COAST CONTR'G, INC.

[224 N.C. App. 537 (2012)]

excavated for the laying of a sewer line and was killed when the ditch partially collapsed on top of him. 6 N.C. App. 234, 235, 170 S.E.2d 169, 170 (1969). In *McCombs*, we addressed the issue of governmental immunity and noted “that the courts are sharply divided as to whether the construction of a sewerage system constitutes a governmental function or a proprietary function.” *Id.* at 240, 170 S.E.2d at 173. Yet, we ultimately held “the construction of a sewerage system is a governmental function . . .” *Id.*

However, *McCombs* was decided over 40 years ago and in the opinion we acknowledged that “[t]he line between powers classed as governmental and those classified as proprietary is none too sharply drawn and seems to be subject to a change in position as society changes and progresses and the concepts of the functions of government are modified.” *Id.* at 238, 170 S.E.2d at 172. Thus, we do not find *McCombs* dispositive.

Although not binding on this Court, we find *City of Gastonia v. Balfour Beatty Constr. Corp.*, 222 F. Supp. 2d 771 (W.D.N.C. 2002), instructive in this case. In *Balfour*, the court considered whether the construction of a water treatment facility was a governmental or proprietary function. While attempting to apply the law as it anticipated the North Carolina Supreme Court would, the court stated,

[t]he law of North Carolina requires that the Court look with particularity at the specific function alleged to be governmental. It is not enough to say that “construction” of a water treatment plant is governmental. The Court must look at what part of the long process of construction is alleged to be governmental and which parts are alleged to be proprietary. The decision to construct a water treatment plant, the determination of where to locate it, as well as the setting of standards for its capacity and capability are all exercises of governmental function utilizing governmental discretion. How the City of Gastonia conducts its business relationships with contractors and subcontractors is not inherently governmental—such a function requires no exercise of governmental discretion.

Id. at 774.

In the present case, ECC claims “Northwest owed [it] a duty of reasonable care in the exercise of its responsibilities on the Project[]” and Northwest breached this duty by “failing to provide Contract

TOWN OF SANDY CREEK v. COAST CONTR’G, INC.

[224 N.C. App. 537 (2012)]

Documents sufficient for construction of the Project[.]” “improperly certifying that ECC’s work was complete and in conformance with the Contract Documents[.]” accepting “Engineering Services, P.A.’s improper certification that ECC’s work was complete and in conformance with the Contract Documents[.]” “failing to direct ECC to correct the allegedly damaged Sandy Creek streets[.]” “failing to properly administer the Contract such that sufficient funds remained to pay for the work to correct the allegedly damaged Sandy Creek streets[.]” and “failing to retain a competent representative to administer the Contract in such a way so as to avoid harm to third parties.”

Northwest argues these are political decisions to which ECC attempts to attribute liability. We disagree. These allegations of breaches of the duty of reasonable care do not concern decisions of government discretion such as whether to construct a sewer system or where to locate the sewer system. Instead, the alleged breaches concern Northwest’s handling of the contract and Northwest’s business relationship with the contractor, acts that are not inherently governmental but are commonplace among private entities.

Thus, even where “the focus is on the nature of the service itself, not the provider of the service[.]” *Wright v. Gaston County*, 205 N.C. App. 600, 606, 698 S.E.2d 83, 88 (2010), we find that Northwest was involved in a proprietary function while handling its business relationship with ECC and the trial court did not err in denying Northwest’s motion to dismiss based on governmental immunity.

III. Conclusion

Accordingly, we affirm the trial court’s order on the limited basis of governmental immunity.

Affirmed.

Judges GEER and STEPHENS concur.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

WATERWAY DRIVE PROPERTY OWNERS' ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

TOWN OF CEDAR POINT, BRANCH BANKING AND TRUST COMPANY, FIRST
CITIZENS BANKS & TRUST COMPANY, WACHOVIA BANK, NATIONAL WACHOVIA
BANK, NATIONAL ASSOCIATION CAPITAL BANK, AND BANK OF AMERICA
CORPORATION, DEFENDANTS

No. COA12-614

Filed 18 December 2012

1. Highways and Streets—private road—dedication—no acceptance—no withdrawal

The trial court did not err in a declaratory judgment action by finding the road at issue to be a private road and thus granting summary judgment to plaintiffs. Although there was a dedication of the road, there was no evidence of acceptance of the dedication, either express or implied, including no evidence of official acts following the inclusion of the road on an official map. Defendant's argument that withdrawal was ineffective because the dedication had been accepted necessarily failed because there was no such acceptance. Finally, defendant's argument on the basis of necessary ingress and egress to any lots or parcels sold along it also failed.

2. Highways and Streets—private road—prescriptive easement—permissive use presumed

The trial court did not err in a declaratory judgment action by finding the road at issue to be a private road and thus granting summary judgment to plaintiffs. Defendant failed to meet its burden to establish an easement by prescription and thus permissive use was presumed.

3. Appeal and Error—affidavit stricken from record—no basis for appellate review—no prejudice

Plaintiff's argument that the trial court erred in a declaratory judgment action by striking an affidavit from the record was dismissed. Neither party requested that the trial court make findings of fact and conclusions of law in its order granting plaintiffs' motion to strike the affidavit so there was nothing upon which the Court of Appeals could review the trial court's discretionary order. Further, even if the record had been adequate to permit review, defendant failed to show it was prejudiced by the decision of the trial court.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

4. Appeal and Error—argument not supported in brief—dismissed

Defendant's argument that the trial court erred in a declaratory judgment action by denying its cross-motion for partial summary judgment which would have determined the street in question to be public was dismissed as defendant failed to make a clear argument in the body of its brief.

Judge Stroud concurring in part and dissenting in part.

Appeal by Defendant from order entered 14 February 2012 by Judge Benjamin G. Alford in Superior Court, Carteret County and order entered 13 December 2011 by Judge Jack W. Jenkins in Superior Court, Carteret County. Heard in the Court of Appeals 24 October 2012.

Poyner Spruill, LLP by J. Nicholas Ellis and Christopher R. Boothe, for Plaintiffs-Appellees.

Kirkman, Whitford, Brady, Berryman & Farias, P.A. by Neil B. Whitford and Jane A. Gordon, for Defendant-Appellant Town of Cedar Point.

BEASLEY, Judge.

The Town of Cedar Point (Defendant) and several financial institutions (included in the suit for notice purposes only) appeal from the trial court's entry of summary judgment in favor of Waterway Drive Property Owners' Association, Inc., by and through its members, (Plaintiffs) declaring Front Street/Waterway Drive a private road. For the following reasons, we affirm the orders of the trial court.

I. Factual Background

On 13 August 2010 Plaintiffs brought suit against Defendant to (1) establish by declaratory judgment that Defendant has no ownership interest to the area of Cedar Point known as "Front Street," which forms at least part of the street named Waterway Drive; (2) in the alternative, request compensation through inverse condemnation for a "taking" of the Front Street area; (3) in the alternative, request compensation through inverse condemnation for a "taking" of the portion of Waterway Drive outside of the Front Street right-of-way (encroachment area)¹; and (4) request a temporary restraining order and pre-

1. It is unclear exactly when the name changed from Front Street to Waterway Drive, but both parties contend it occurred around 1990. It is also unclear to what

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

liminary injunction. Defendant filed an answer generally denying the allegations of Plaintiffs' complaint and raising a counterclaim also requesting declaratory judgment that (1) Front Street is a public right of way based upon dedication and acceptance; (2) Front Street/Waterway Drive and the encroachment area are public rights of way based upon prescriptive easement; and (3) no inverse condemnation has occurred as Defendant "is not seeking to exercise control or claim a right-of-way over Front Street/Waterway Drive by inverse condemnation or any other legal theory" if the trial court were to determine that it is not a public right of way by either dedication or prescription. The parties took depositions, submitted affidavits, and filed cross-motions for partial summary judgment on the declaratory judgment claim.

The evidence forecast by the parties' submissions to the trial court shows the following facts. It is undisputed that Front Street/Waterway Drive was dedicated to public use. In 1936, a landowner named John S. Jones filed a subdivision plat ("1936 Plat") in Carteret County wherein he indicated that a portion of his land abutting the Intracoastal Waterway was to be used for a fifty-foot wide right-of-way named "Front Street." From around the 1950s until about the early 1970s, the area designated as Front Street between Hill Street and Bell Street was used for vehicular traffic.² During the 1970s, motorists stopped using Front Street as a through-street. However, the property owners along the street continued to use it as an access road and considered it a private drive.

In 1978, Carteret County franchised a cable TV company to install cable in public streets in the area; cable was installed on Front Street. This was later franchised by Defendant in 1989. Defendant was incorporated in 1988. In 1988, Defendant franchised West Carteret Water Corporation to construct and maintain a water main system, which was installed on Front Street, along with a fire hydrant.

In 1989, Defendant adopted a Resolution granting the mayor authority to accept dedications of certain streets, of which Front

extent the two overlap. Part of the Front Street right-of-way has been eroded and as a result, the roadbed "shifted" to its current location. It appears from the record that at least part of Waterway Drive is outside of the Front Street dedication, and Plaintiff's third claim in the alternative was for inverse condemnation of that portion which was outside of the dedication over which defendant has asserted ownership. We will refer to this area as the "encroachment area."

2. Much of the evidence before the trial court was in the form of affidavits from local residents discussing their childhood memories of the area. As a result, the evidence discusses decades or portions thereof, rather than particular months or years.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

Street/Waterway Drive was not included. A catch-all provision was included to extend that authority roughly one month into the future for any dedications offered in that time. In 1990, Defendant recorded a Notice of Acceptance that claims Defendant previously accepted several dedicated streets, including Front Street.

Around 1990, Plaintiffs paved a portion of Front Street at their own expense, renamed it Waterway Drive without petitioning Defendant for a name change, and posted a sign reading "Private Road" at the entrance. Defendant never objected to these actions. The eastern end of the street remains unpaved. Residents receive mail at post boxes at one end of the street, not at each individual residence.

There is evidence of Defendant clearing debris (consisting of a carpet) from the area of Waterway Drive following a hurricane in 1996. In 1998, Defendant had an additional fire hydrant installed on Waterway Drive. In 2001, Defendant contracted for garbage trucks to use the street to pick up garbage from the property residents. There is evidence of Defendant patching asphalt in 2006 and 2010.

In 2005, Waterway Drive was added to Defendant's "Powell Bill" map. Defendant uses this map to submit to the state how many miles of streets it has within its borders so that it may receive maintenance money for them. Neither the North Carolina Department of Transportation (NCDOT) nor Carteret County has any record of the maintenance of Front Street/Waterway Drive. "From and after July 1, 1931, the exclusive control and management and responsibility for all public roads in the several counties shall be vested in the Department of Transportation." N.C. Gen. Stat. § 136-51 (2011).

There is evidence of payments by the property owners, in the form of personal checks, for maintenance and repair of the road from the 1970s through the 1990s and of the Association's by-laws and agreement that it would be responsible for maintenance and repairs. There is evidence in the form of a deed, deposition, and town minutes, of a private easement existing on Waterway Drive for the use of property owners.

In 2006, Defendant sent the property owners a letter stating that Defendant had previously accepted the dedication and planned on making improvements to the street. This prompted discussions between the parties such that in 2010 the Plaintiffs formally petitioned Defendant to abandon the street, maintaining the claim that it is a private street. Defendant held a public hearing and declined. Plaintiffs filed a declaration of withdrawal, followed by the instant lawsuit.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

Prior to the summary judgment hearing, Defendant submitted the affidavit of John R. Jones, son of the original Front Street dedicator. Plaintiffs noticed a deposition of Mr. Jones and issued and served a subpoena for his appearance at the deposition. Mr. Jones, through counsel, objected to the subpoena and moved to quash it on the grounds that it imposed an undue burden on him for health reasons. In response, Plaintiffs filed a motion to compel Mr. Jones to appear to be deposed or, in the alternative, to strike Mr. Jones' affidavit on the grounds that lack of an opportunity to depose Mr. Jones would "unduly prejudice Plaintiffs." The trial court granted Plaintiffs' motion to strike the Jones affidavit and denied their motion to compel by an order entered 13 December 2011.

As to the motions by both parties for partial summary judgment, the trial court gave the following order, in pertinent part, on 14 February 2012:

3. Plaintiffs' Motion for Partial Summary Judgment is granted and the relief sought in Plaintiffs' First claim for relief is allowed based on the Court's ruling that Waterway Drive is a private road.

4. Cedar Point's Cross-motion for Partial Summary Judgment is denied.

...

6. This is a final adjudication of all issues in this case.³

Defendant timely filed notice of appeal to this Court on 14 March 2012.

II. Dedication and Acceptance

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows

3. We note on our own accord that despite the fact that the trial court granted only partial summary judgment, the order resolved all issues in this case. It appears that the trial court actually determined, by its terse ruling that "Waterway Drive is a private road" that there was no genuine issue of material fact as to any issue such that: (1) the Plaintiffs were entitled to withdraw the dedication of Front Street, so the area shown on the 1936 Plat was not a public road by dedication; and (2) Defendant had not acquired any prescriptive rights as to either the area shown on the dedication map or to the encroachment area. This is because the trial court expressly granted the relief sought in Plaintiff's first claim of its complaint, which requested both recognition of the legal effect of Plaintiff's withdrawal and recognition of Defendant's lack of right to enforce any purported easement. As this is then a final ruling on all issues, the appeal is not interlocutory and it is properly before this Court.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

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)).

[1] Defendant first argues that the trial court erred in finding Waterway Drive to be a private road and thus in granting summary judgment to Plaintiffs. Specifically, Defendant first asserts that Front Street/Waterway Drive⁴ is a public municipal street by dedication. We disagree.

There is no argument that a dedication was not made, so it is not necessary to examine the merits of the dedication. Thus, our discussion turns on the merits of any purported acceptance.

A dedication of a road is a revocable offer until it is accepted on the part of the public in some recognized legal manner and by a proper public authority. A proper public authority is a governing body having jurisdiction over the location of the dedicated property, such as . . . an incorporated town . . . or any public body having the power to exercise eminent domain over the dedicated property. Accepting in some recognized legal manner includes both express and implied acceptance.

Kraft v. Town of Mt. Olive, 183 N.C. App. 415, 420-21, 645 S.E.2d 132, 137 (2007)(citations omitted)(internal quotation marks omitted). Defendant argues that the dedication was accepted expressly through formal acceptance, implicitly through acts of control, and through its inclusion on an official map. It also argues that Plaintiffs attempt to withdraw the dedication is ineffective as a matter of law. We examine each in turn.

a. Express Acceptance

“Express acceptance can occur, *inter alia*, by ‘a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council’s vote of approval, or the signing of a written instrument by proper authorities.’ ” *Kraft*, 183 N.C. App. at 420-21, 645 S.E.2d at 137 (citation omitted). Defendants claim that the dedication was accepted through the Resolution in 1989 and by the Notice of Acceptance of Dedication in 1990.

4. We will hereinafter refer to the street in question as “Waterway Drive” only, unless the context requires otherwise.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

Plaintiff correctly asserts that the Resolution does not mention either Front Street or Waterway Drive. The catch-all provision pertains only to those dedications made from the date of the Resolution (27 June 1989) to 31 July 1989. The catch-all states, "Such other streets as shall be offered for dedication prior to July 31, 1989." The word 'shall' indicates a prospective perspective. Further, the Resolution only serves to grant the mayor power to accept; it does not itself accept any dedications. Consequently, the Resolution is not, by itself, sufficient evidence of express acceptance of the dedication.

Thus, Defendant turns to the Notice of Acceptance: this document declares that the town has previously accepted several dedications, including Front Street. However, this still fails to satisfy the requirement of an express acceptance because it does not *actually accept* the dedication, but merely notes a previous acceptance of which there is no express record. *See Kraft*, 183 N.C. App. at 420-21, 645 S.E.2d at 137 (requiring some sort of written express acceptance or evidence of a vote). Even if this Notice was intended as an acceptance, our precedent deems intent and acceptance as separate requirements, despite the fact that the former informs the latter. *Kraft*, 183 N.C. App. at 418, 645 S.E.2d at 135 ("Where an intention to dedicate is found, and *followed by an acceptance* by the public, the dedication is complete." (emphasis added)).

Further, the validity of the Notice is called in to question, as according to the testimony of the Town Administrator, several of the streets listed in this Notice as having been previously accepted were and are still maintained by the Department of Transportation and were never actually accepted for dedication by the town.

We are not able to conclude that such a document provides evidence of express acceptance. Consequently, we find that neither document independently establishes acceptance and that, when read together, the documents do nothing more than loosely establish an intent to accept, either prospectively or retrospectively. Because this is not evidence of actual acceptance, we find no express acceptance of the dedication.

b. Implied Acceptance

An implicit dedication occurs when: (1) the dedicated property is used by the general public; and (2) coupled with control of the road by public authorities for a period of twenty years or more. To be clear, it is not

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

enough for the public to use the alley for twenty years, but the public authorities must assert control over [the alley].

Kraft, 183 N.C. App. at 420-21, 645 S.E.2d at 137 (alteration in original)(citations omitted)(internal quotation marks omitted). “[M]erely providing municipal services to homeowners in a subdivision within a municipality does not constitute an implied acceptance by the municipality of dedication of a road when the homeowners have paid for those services by the payment of their *ad valorem* taxes.” *Concerned Citizens of Brunswick County Taxpayers Ass’n v. Holden Beach Enterprises, Inc.*, 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989), *rev’d on other grounds sub nom. Concerned Citizens of Brunswick County Taxpayers Ass’n v. State ex rel. Rhodes*, 329 N.C. 37, 404 S.E.2d 677 (1991).

Defendant argues that its control over the street is evidenced from its improvements (a water main in 1988 and fire hydrants in 1988 and 1998; cable TV lines in 1989), repairs (cleaning storm debris after hurricanes in 1996, 1999, and 2006), and patching asphalt in 2006 and 2010, plus sending garbage trucks down it weekly from 2001 on, adding it to the town’s map in 2005, refusing to abandon it on Plaintiff’s request in 2010, and applying for a permit to improve it in 2010.

In *Kraft*, this Court found town acceptance of a dedication implicit by making improvements and repairs to the road.

First, the Town paved the alley in approximately 1976. Second, the Town, without a utility easement, dug up portions of the alley to maintain and repair the sewer lines and other utilities. Third, the Town provided municipal service to the alley such as garbage, police, and fire service. Finally, as to the length of public use, there is evidence in the record indicating that the public and the Town had used the alley for over forty (40) years. Accordingly, under the rule in *Gregorie*, this evidence establishes that the Town has implicitly accepted the dedication of the alley.

Kraft, 183 N.C. App. at 421, 645 S.E.2d at 137. This is distinguishable from the case *sub judice*.

In Defendant’s own deposition, it stated that the trash collection was paid for by citizen’s taxes and garbage fees. Further, this activity started in 2001, less than twenty years ago. Excepting only the addi-

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

tion of the water main, fire hydrants, and cable lines, none of Defendant's claims establish control for the requisite period of twenty years, if they even establish control at all. Thus, if these three additions dating back to the 1980's fail to establish control, there can be no implied acceptance, regardless of the control that may have begun in 2001, because the length of the time of control is not long enough.

Defendants fail to establish control over Waterway Drive with the additions of the water main, fire hydrants, and cable lines. Unlike in *Kraft*, where the utilities work on the road in question was performed by the town itself, *see* 183 N.C. App. at 421, 645 S.E.2d at 137, the water main work on Waterway Drive was performed by the water company. The town did not perform the work. The same is true of the cable TV lines. This case is further distinguishable from *Kraft* because the town's own recorded minutes from 27 April 2010 state that the taxpayers paid for the installation of the hydrants but the town is not responsible for their maintenance or for the water main maintenance. Thus, not only does *Concerned Citizens of Brunswick County* appear to resolve this due to the fact that the homeowners own taxes paid for the hydrant installation, *see* 95 N.C. App. at 46, 381 S.E.2d at 815, but the town has maintained no control over the street as a result of the installation because they have no maintenance responsibility.

Because these three additions which date back to the 1980s fail to establish control and Defendant provides no other evidence of control for the requisite period of time, there is no implied acceptance evidenced on the record.

c. Inclusion on Town Map

Defendants next claim that the town manifested acceptance through inclusion of the street on an official map in 2005. "[S]imply including the road on the town map is insufficient evidence of the town's intent to accept the road for public use." *Wiggins v. Short*, 122 N.C. App. 322, 326, 469 S.E.2d 571, 575 (1996). More evidence is needed: "Acceptance may be manifested not only by maintenance and use as a public street, but by official adoption of a map delineating the area as a street, *followed by* other official acts recognizing its character as such." *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 141, 461 S.E.2d 17, 21 (1995)(emphasis added)(citation omitted). As discussed above, there is no evidence of official acts following this inclusion in 2005 that would suffice to mark acceptance of the road.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

d. Abandonment/Withdrawal

Defendant argues that Plaintiffs' attempt to withdraw the dedication was ineffective as a matter of law due to the fact that the dedication had already been accepted, Plaintiffs are not successors-in-interest to the dedicator, and/or the street is necessary for access to the lots should they be sold. We disagree.

North Carolina law presumes any dedicated land abandoned if it has "not . . . been actually opened *and* used *by the public* within 15 years from and after the dedication thereof." N.C. Gen. Stat. § 136-96 (2011)(emphasis added). While the presumption does not occur until a filing of withdrawal is made, the clock begins to run on the fifteen year period from the time of dedication. *Id.* "The dedication of a street . . . may not be withdrawn if the dedication has been accepted **and** the street, *or any part of it*, is actually opened and used by the public." *Tower Dev. Partners*, 120 N.C. App. at 142, 461 S.E.2d at 21 (first emphasis added)(citation omitted). Thus, the street must both have some portion used *and* be accepted before the ability to withdraw the dedication is nullified. If the street is never accepted, withdrawal may still be made. And, if withdrawal occurs after the failure to open the street and fifteen years of nonuse by the public from the time of dedication, the dedicated land is presumed abandoned upon that filing.

Defendant's argument that withdrawal is ineffective because the dedication had been accepted necessarily fails based on our above discussion in which we found no such acceptance. With regard to Defendant's argument that the individual property owners are not the successors in interest to the original owner, John Jones, the record is full of references to Plaintiff's members as owners of the properties through which the street runs and which derive from John Jones' original property. Further, this argument is waived for failure to raise it before the trial court. *See Regions Bank v. Baxley Commercial Props., LLC*, 206 N.C. App. 293, 298-99, 697 S.E.2d 417, 421 (2010)(citations omitted)("In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue. . . . [I]t cannot 'swap horses between courts in order to get a better mount [on appeal].' ").

Finally, Defendant's argument on the basis of necessary ingress and egress to any lots or parcels sold along it also fails. Plaintiff provided deposition testimony, evidence in a property owner's deed (Defendant's own exhibit), and statements from the Town's meeting

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

minutes indicating that a private easement existed for property owners to use the street for ingress and egress, which runs to all heirs, assigns, and successors in interest. Thus, this argument is without merit; public access is not required in order to ensure ingress or egress to the property owners and their successors in interest.

We note that there is ambiguity in the record as to whether Defendant accepted some portion of the original dedication, now referred to as Sunset Drive, prior to Plaintiffs' withdrawal of the Waterway Drive portion or whether this portion was abandoned by Defendant. Such acceptance would render withdrawal of any other portion of the original dedication, including Waterway Drive, ineffective as a matter of law. *See Tower Dev. Partners*, 120 N.C. App. at 142, 461 S.E.2d at 21. However, Defendant fails to make this argument in its brief and we are not at liberty to make it for Defendant. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

III. Easement by Prescription

[2]

In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period. An easement by prescription is not favored in the law, and it is the better-reasoned view to place the burden of proving every essential element on the party who is claiming against the interests of the true owner.

Deans v. Mansfield, ___ N.C. App. ___, ___, 707 S.E.2d 658, 662 (2011)(citations omitted)(internal quotation marks, brackets, and ellipses omitted). North Carolina law presumes the use of another's land is permissive, and, as such, the party claiming the easement must rebut this presumption with a showing of hostile use. *Yadkin Valley Land Co., L.L.C. v. Baker*, 141 N.C. App. 636, 639, 539 S.E.2d 685, 688 (2000). Thus, we need not examine the evidence of permissive use provided by Plaintiffs unless Defendant's evidence successfully rebuts this presumption sufficiently for a prima facie showing of hostility.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

“Mere use alone of a purported easement is not sufficient to establish the element of hostile use” *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 504, 631 S.E.2d 884, 888 (2006). In *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974), our Supreme Court found that even the “slight maintenance” of “raking leaves and scattering oyster shells in the roadway” may constitute hostile use under a claim of right. *Id.* at 583, 201 S.E.2d at 901. However, the “slight maintenance” found in this case was continuous for the requisite period. *Id.* There was no single instance of raking leaves or spreading shells that operated to make the use hostile, but rather the continued maintenance “to keep [the road] in passable condition” over the entire use did so. *Id.*

Here, the only evidence of hostile use other than the public using the road for non-automotive travel is sporadic maintenance by the town, including removal of debris, installation of water mains and fire hydrants, and patching potholes. By Defendant’s own admission in its deposition, it does not consider its removal of debris after hurricane maintenance. Such removal of debris is better categorized as waste or refuse removal, a service that the property owners paid for in their property taxes. There is no evidence on the record to indicate whether the installation of a water main and fire hydrants was permissive or not. Thus this fact does not help Defendant meet its burden. Considering, as discussed above, the taxpayers themselves paid for the installation of these hydrants, the evidence actually suggests that such installation was indeed permissive.

There are only two instances of pothole repairs and they occur in 2006 and 2010. Even though the use by the public may have continued for the requisite twenty years, because that alone is insufficient, *see Koenig*, 178 N.C. App. at 504, 631 S.E.2d at 888, the Defendants’ evidence does not exemplify a hostile use until 2006. Thus, even if these two single acts are sufficient to put Plaintiffs on notice of Defendant’s claim of right, these acts do not meet the required length of time to claim a prescriptive easement. Consequently, Defendant failed to meet its burden and permissive use is presumed.

IV. John Jones Affidavit

[3] Defendant argues that the trial court erred in striking the John Jones affidavit from the record. “We review an order striking an affidavit for abuse of discretion. The appellant must show not only that the trial court abused its discretion in striking an affidavit, but also that prejudice resulted from that error. This Court will not presume

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

prejudice.” *Barringer v. Forsyth Cnty. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 246, 677 S.E.2d 465, 471-72 (2009)(citations omitted)(internal quotation marks omitted).

[W]hen a trial court makes a discretionary decision, the court should make appropriate findings of fact and conclusions of law, sufficient to allow appellate review for abuse of discretion. . . . Failure to make findings upon request constitutes error. . . . But where no request is made, it is presumed that the judge, upon proper evidence, found facts sufficient to support the judgment. Thus, when no findings are made there is nothing for the appellate court to review.

Barringer, 197 N.C. App. at 253, 677 S.E.2d at 475 (citations omitted)(internal quotation marks and brackets omitted).

“[O]ur review is limited to the record” before us. *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008). There is nothing in the record indicating that any party requested that the trial court make findings of fact and conclusions of law in its order granting Plaintiffs’ motion to strike Mr. Jones’ affidavit. Accordingly, there is nothing upon which we can review the trial court’s discretionary order and we dismiss Defendant’s argument on this point. *See Barringer*, 197 N.C. App. at 253, 677 S.E.2d at 475.

However, we note that even if the record were adequate to permit our review, Defendant fails to show it was prejudiced by the decision of the trial court.

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” N.C. Gen. Stat. § 1A-1, Rule 56(e)(2011).

First, Defendant relies on the fact that the affiant, John R. Jones, is the son of the dedicator, John S. Jones, and original owner of the plats across which the street passes. However, this is irrelevant as it is clear from the affidavit that John R. Jones is not the owner of any of the lots that touch the street. Thus, his intent for the street to be public is of no matter here.

Second, Defendant argues that the affidavit is needed to explain county commissioner minutes in the 1950s and demonstrate that gov-

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

ernment funds were expended on the maintenance of the street in the mid-1950s. However, the affidavit does not allege personal knowledge of the county commissioner minutes, as it fails to allege that the affiant was present at these meetings. Further, it is clear from the affidavit that these government funds were not expended by Defendant because the town had not yet been incorporated. While the affiant freely admits he does not know where these government funds came from, it is irrelevant because this single act of clearing the street following a storm is not sufficient to establish control, as discussed above. Additionally, as Plaintiffs argue, the evidence on the record includes the deposition of the Clerk to the County Board of Commissioners, who declared that there were no records of any such maintenance ever occurring or being requested. Consequently, Defendant has failed to establish that they were prejudiced the trial court's striking of this affidavit. The decision of the trial court should be affirmed.

V. Denial of Defendant's Cross-Motion

[4] Lastly, we note that Defendant argues that the trial court erred in denying its cross-motion for partial summary judgment which would have determined the street in question to be public. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Defendant asserts this argument in its brief under its "Issues Presented" section, but fails to make a clear argument in the body of the brief. It is thus abandoned. It is concluded in the first section of Defendant's brief after each argument for a finding of acceptance of the dedication that the trial court erred in this manner, despite being set out as a separate issue. However, even if this is sufficient, the findings above preclude a finding of error on this point.

For the reasons stated above, the order of the trial court is affirmed.

Affirmed.

Judge ELMORE concurring.

Judge STROUDS concurring in part and dissenting.

STROUD, Judge concurring in part and dissenting in part.

I agree with the majority that the trial court did not abuse its discretion in striking the John Jones affidavit. I therefore concur in section IV of the majority's opinion. I must respectfully dissent as to the

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

remainder, however, as I believe that the evidence shows that the Town of Cedar Point has expressly accepted the portion of Front Street now part of Waterway Drive and that there are genuine issues of material fact as to whether plaintiffs' withdrawal was effective and whether the Town has acquired a prescriptive easement as to the portion of Waterway Drive outside of the original Front Street dedication.

VI. Interlocutory appeal

Although I agree that this appeal is from a final order and is thus subject to review, the majority does not address why this appeal is not interlocutory except by a footnote. I believe that we should address this issue more fully. Both parties had filed motions for partial summary judgment which limited the scope of their request to the issues regarding dedication of the street as shown on the map and excluding the additional area, known as the "encroachment area." The plaintiff's motion for *partial* summary judgment requested that the trial court grant the relief sought in their first claim for relief: which was specifically for

a decision pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 et seq., holding that any public dedication of the Front Street Area and any public right-of-way thereby created have been abandoned by the public; that any such public dedication has been effectively and conclusively withdrawn upon the recording of the Declaration of Withdrawal; and that no person, including Cedar Point, shall have any right or cause of action to enforce any public easement or right-of way over the Front Street area."

Defendant's' motion is also entitled as a motion for *partial* summary judgment and requests summary judgment on the following issues:

- a. For a judgment declaring that the right-of-way of Front Street between Hill and Bell Streets as shown on the map titled "Part of the John S. Jones Property 'known as' Cedar Point," dated June 8, 1936 and recorded in Map Book 1, Page 113, Carteret County, Register of Deeds office is a public municipal street within Cedar Point's municipal street system;[Fn 1] and,
- b. For a judgment dismissing Plaintiffs' First, Second and Third Claims for Relief.

[Fn 1]

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

It is factually undisputed that part of the 1936 Front Street right-of-way has been washed away and that the travelled portion of the street in these areas has shifted to the north out of the original 1936 right-of-way lines (the “encroachment area”). However, at the time of filing this response and cross motions Cedar Point is not prepared to argue that the undisputed facts as a matter of law establish the encroachment area as part of the Cedar Point municipal street system. Cedar Point does strenuously contend that the encroachment area has become a part of its municipal street system, and reserves the right to either amend its cross motion to include this issue on a summary judgment proceeding, or to carry the issue to a trier of fact at trial.

A ruling only upon both of the motions for *partial* summary judgment would still leave open the issues raised in (1) plaintiffs’ third claim, which was “in the alternative” to the first claim and (2) defendant’s counterclaim as to a determination of any prescriptive easement rights over the encroachment area, as specifically noted in footnote 1 of defendant’s motion for partial summary judgment. Yet it also appears from the record that THYE parties both presented evidence and argued fully both the issues of dedication and prescriptive easement at the summary judgment hearing and no party has raised any objection that the trial court improperly considered any issues at that hearing.¹ Thus it appears that the trial court actually determined, by its terse ruling that “Waterway Drive is a private road” that there was no genuine issue of material fact as to any issue such that: (1) the plaintiffs were entitled to withdraw the dedication of Front Street, so the area shown on the 1936 Plat was not a public road by dedication; and (2) defendant had not acquired any prescriptive rights as to either the area shown on the dedication map or to the encroachment area. As this is a final ruling on all issues, the appeal is not interlocutory.

1. The record does not include a transcript of the summary judgment hearing, so I must rely only on the documents which were filed with the trial court and which are in our record. Further, even if the parties have only moved for partial summary judgment, it is not error for the trial court to grant summary judgment on all claims where both parties are given the opportunity to submit evidence on all claims before the trial court. See *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979) (holding that summary judgment on all claims was proper in that case because evidence was submitted on all claims, although the relevant motion only requested summary judgment as to some of the claims before the trial court).

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

VII. Summary Judgment

I respectfully disagree with the majority's analysis as to the issues of acceptance and withdrawal. Therefore, I dissent as to section II of the majority opinion.

A. Standard of Review

We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Beeson v. Palombo, ___ N.C. App. ___, ___, 727 S.E.2d 343, 346-47 (2012).

B. Dedication of Front Street

"Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands." *Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 418, 645 S.E.2d 132, 135 (2007) (citation omitted). "Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply." *Tower Development Partners v. Zell*, 120 N.C. App. 136, 140, 461 S.E.2d 17, 20 (1995). The original owner's intent to "dedicate must clearly appear, though such intention may be shown by deed, by words, or by acts." *Id.* (quotation marks, citation, and emphasis omitted).

A dedication of a road to the general public is a revocable offer until it is accepted on the part of the public in some recognized legal manner and by a proper public authority. A 'proper public authority' is a governing body having jurisdiction over the location of the dedicated property, such as a municipality, an incorporated town, a county, or any public body having the power to exercise eminent domain over the dedicated property.

Bumgarner v. Reneau, 105 N.C. App. 362, 366, 413 S.E.2d 565, 568 (quotation marks and citations omitted), *aff'd as modified*, 332 N.C. 624, 422 S.E.2d 686 (1992). Acceptance by a proper public authority can be express or implied. *Metcalfe v. Black Dog Realty, LLC*, 200 N.C. App. 619, 631, 684 S.E.2d 709, 718 (2009).

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

1. Express Acceptance of Dedication

“Express acceptance can occur, *inter alia*, by a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council’s vote of approval, or the signing of a written instrument by proper authorities.” *Kraft*, 183 N.C. App. at 420, 645 S.E.2d at 137 (citation and quotation marks omitted). Both parties agree that the 1936 plat dedicates the portion of John S. Jones’ land known as Front Street to public use, so the first contested issue is whether the Town of Cedar Point accepted the 1936 dedication of the right-of-way known as Front Street prior to plaintiffs’ withdrawal of that dedication in 2010. Plaintiffs contend that Cedar Point’s 1989 resolution (“1989 Resolution”) authorizing the town to accept certain streets and the town’s subsequent 1990 “Notice of Acceptance of Dedication” (“1990 Notice”) are so fundamentally flawed as to be insufficient to constitute an express acceptance of the 1936 dedication. While I agree that neither document is a model to be emulated, for the following reasons I would hold that, read together, they are more than sufficient to constitute an express acceptance.

On 27 June 1989 the Town of Cedar Point Board of Commissioners passed a resolution authorizing “the Mayor, as agent for the town, to accept the dedication of” six specific streets and “7. Such other streets as shall be offered for dedication prior to July 31, 1989.” In the following year, 1990, the Town of Cedar Point issued a “Notice of Acceptance of Dedication”, stating that Cedar Point

has previously accepted the dedication of the following streets within said Town:

....

4. Front Street

Described as that portion of the street named “Front Street” as the same is shown on that Map of the John S. Jones Property, known as Cedar Point, recorded in Map Book 1, Page 113, Carteret County Registry, that runs between Bell and Hill Street.

Both the 1989 Resolution and the 1990 Notice of Acceptance were also recorded with the Carteret County Register of Deeds. The question is whether these provisions are sufficient to constitute an acceptance by official written instrument.

An acceptance is a manifestation of intent to be bound following an offer. *See Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

735, 737 (2007). In the context of a dedication, an acceptance must demonstrate the intent of the town or municipality to assent to the offer of the dedicator.

Dedications are normally considered under the rubric of the common law of offer and acceptance. See *Tower Development Partners*, 120 N.C. App. at 140, 461 S.E.2d at 20. However, where the acceptance is by resolution or ordinance, it is proper to construe the text purported to accept the dedication under the rules for statutory construction. See *Clark v. City of Charlotte*, 66 N.C. App. 437, 439, 311 S.E.2d 71, 72 (1984) (stating that the rules of statutory construction apply to local ordinances). A basic rule of statutory construction is that courts should “give effect to the intent of the legislature.” *Wal-Mart Stores East, Inc. v. Hinton*, 197 N.C. App. 30, 39, 676 S.E.2d 634, 642 (2009) (quotation marks and citation omitted).² “The primary indicator of legislative intent is statutory language; the judiciary must give clear and unambiguous language its plain and definite meaning.” *Id.* (quotation marks and citation omitted). However, “[w]here a literal reading of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975) (quotation marks and citation omitted). Thus, in considering the 1989 Resolution and the 1990 Notice, the fundamental question we must consider is whether the Town of Cedar Point manifested an intent to accept the Front Street dedication. I would find that the Town did manifest such intent.

The 1989 Resolution clearly and in plain language indicates that the Town of Cedar Point authorized the Mayor to accept dedicated streets with that resolution. The only question is whether provision 7 includes the Front Street dedication. Plaintiffs contend that the language of provision 7 of the 1989 Resolution is clear. That provision uses the future tense “as shall be offered . . . prior to July 31, 1989[,]” which would not cover Front Street, and not the past “as have been offered” or future perfect “as shall have been offered[,]” which would.

2. The same would be true if I considered the acceptance under the common law of contracts. See *Mosely v. WAM, Inc.*, 167 N.C. App. 594, 598-99, 606 S.E.2d 140, 143 (2004) (stating that “[i]f a question arises concerning a party’s assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties.” (citation omitted)); *Miller v. Russell*, ___ N.C. App. ___, ___, 720 S.E.2d 760, 764 (2011) (“The ultimate test in construing any written agreement is to ascertain the parties’ intentions in light of all the relevant circumstances.” (citations, quotation marks, and brackets omitted)).

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

However, reading provision 7 of the 1989 Resolution literally would mean that the Board of Commissioners meant to authorize only the acceptance of the named streets and any other street that would happen to be dedicated in the month between 27 June and 31 July 1989. There is no reason to think that the Board intended this resolution to have that effect. *See State v. Humphries*, 210 N.C. 406, 410 186 S.E. 473, 476 (1936) (observing that “[i]f the grammatical sense of the words is inconsistent with the purpose of the statute or would involve absurdity, the grammatical sense must be modified or extended to avoid such inconvenience.”).

“[W]hen the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose.” *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782, *disc. rev. denied*, 304 N.C. 392, 285 S.E.2d 833 (1981). The 1989 Resolution is entitled “Resolution Authorizing the Town of Cedar Point to Accept Certain Streets Within the Town.” The creation of public rights-of-way by acceptance of a dedication is one of the important powers of a city or town. *See* N.C. Gen. Stat. § 160A-296(a) (establishing that cities have general authority over public streets, including to acquire “land therefor by dedication”). Given that the Town of Cedar Point was only incorporated in 1988, the Town could not have formally accepted past dedications much earlier than this resolution.

The intent of this resolution as a whole is to accept *past* dedications of rights of way as part of the initial organization and establishment of the Town of Cedar Point. All six of the listed streets were dedicated prior to the Resolution, as they are listed in the Resolution by their recorded plat numbers. Read literally, provision 7 would be the only future-looking provision in an otherwise backward-looking document, and a quite limited one at that. Therefore, it is more rational to read provision 7 as authorizing acceptance of all dedications that “shall have been dedicated” before 31 July 1989. *See Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (stating that “the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute.” (citations omitted)). Read this way, it operates as a catch-all backward-looking authorization of acceptance of prior dedications that, after 1988, fall under the jurisdiction of Cedar Point.

Read in context with the above authorization and rules of construction, the 1990 Notice confirms that the Town intended to accept Front Street. Although replete with errors, such as accepting streets

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

that had not been dedicated and inconsistent dates, the 1990 Notice indicates that the Mayor, with authorization from the Town, did in fact accept Front Street. In the relevant parts, this Notice describes the Front Street dedication in detail and notes that it has been accepted. The Notice specifically mentions Front Street, describes the location of the right-of-way, and references the correct plat. This document could be read as having the opposite tense problem from the 1989 resolution in that it refers to the relevant dedication as having been previously accepted (as opposed to stating that the dedication “is hereby accepted” or something to that effect). It could also be read as confirming the prior acceptance of Front Street as expressed in the 1989 Resolution, indicating that the Town believed that Front Street was “previously accepted” by the 1989 Resolution. Either way, as it clearly references the Front Street dedication in a document indicating that the listed streets have been accepted, it demonstrates the intent of the Town of Cedar Point to accept the dedication made by John S. Jones. I would hold that this intent to accept manifested in an official writing signed by the Mayor of the Town of Cedar Point, read together with the 1989 Resolution authorizing acceptance of rights-of-way for the newly-formed town, is more than sufficient to constitute express acceptance of the Front Street dedication.

2. Abandonment and Withdrawal

“It is now well settled that the dedication of a street may not be withdrawn, if the dedication has been accepted and the street *or any part of it* is actually opened and used by the public.” *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 29, 265 S.E.2d 123, 129 (1980) (quotation marks, citation, and parentheses omitted, emphasis in original).³ Having concluded that the Town of Cedar Point accepted the Front Street dedication, I must consider whether the dedication remained revocable under N.C. Gen. Stat. § 136-96 at the time plaintiffs filed their 2010 withdrawal of the dedication. If no part of a road dedicated to public use is so used within the fifteen years after the initial dedication, that dedication “shall be thereby conclusively presumed to have been abandoned by the public[,]” N.C. Gen. Stat. § 136-96, and becomes “subject to withdrawal” under § 136-96. *Steadman v. Town of Pinetops*, 251 N.C. 509, 516, 112 S.E.2d 102, 107 (1960). However, “no abandonment . . . shall be presumed until the dedicator or some one or more of those claiming under him file and

3. It is therefore possible for a dedication to remain revocable under N.C. Gen. Stat. § 136-96 even after acceptance, such as where the acceptance is by resolution or written instrument, but the dedication is never opened as a street and used by the public.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

cause to be recorded in the register's office of the county where such land lies a declaration withdrawing" the dedication. N.C. Gen. Stat. § 136-96.

Moreover, abandonment is not presumed retroactively once a withdrawal is filed. *Janicki v. Lorek*, 255 N.C. 53, 58, 120 S.E.2d 413, 417 (1961) (holding that if the dedication is accepted and opened to the public "at any time before withdrawal, the dedication is complete and it may not thereafter be withdrawn." (citation and emphasis omitted)); see *Osborne v. Town of North Wilkesboro*, 280 N.C. 696, 700, 187 S.E.2d 102, 104 (1972) (noting that "[i]f the authorities for the statutory period fail to use the dedicated strips, the right to use is destroyed by a withdrawal." (emphasis added)). Thus, a dedication only becomes *subject to* withdrawal under § 136-96 after fifteen years of non-use, but the conclusive presumption of abandonment does not become effective until the filing of the withdrawal. See *Steadman*, 251 N.C. at 516, 112 S.E.2d at 107; *Janicki*, 255 N.C. at 58, 120 S.E.2d at 417. If the withdrawal was filed after both public acceptance and use of at least part of the dedicated land, that withdrawal will not be effective, even if the land remained unused for the initial fifteen year period after the dedication. *Janicki*, 255 N.C. at 58, 120 S.E.2d at 417.

Here, although the Town's acceptance was significantly more than fifteen years after the initial dedication, plaintiffs' withdrawal was filed only in 2010. Another part of Front Street, the section east of Jones Street now called Sunset Drive, has been formally opened, paved, and incorporated into the town's street system. It is not clear when that section of Front Street was accepted and opened by the Town. "[T]he dedication of a street may not be withdrawn, if the dedication has been accepted and the street *or any part of it* is actually opened and used by the public." *Food Town Stores, Inc.*, 300 N.C. at 29, 265 S.E.2d at 129 (quotation marks, citation, and parentheses omitted, emphasis in original). Thus, if the Town had opened Sunset Drive before plaintiffs' withdrawal, the withdrawal of the portion of Front Street on Waterway Drive would be ineffective. Therefore, I would hold that there is a genuine issue of material fact as to whether plaintiffs' withdrawal was effective.

C. Prescriptive easement over encroachment area

I would also hold that there is a genuine issue of material fact as to whether the Town acquired a prescriptive easement over that area of Waterway Drive outside of the Front Street dedication. Therefore, I dissent from Section III of the majority opinion.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

It is undisputed that at least part of the street known as Waterway Drive includes land outside of the 1936 Front Street dedication. Defendants contend that they have prescriptive rights over that encroachment area outside of Front Street and that the trial court erred in granting summary judgment in plaintiffs' favor on this claim. Plaintiffs counter that the public's use of Waterway Drive was permissive and therefore the public could not acquire rights to that land by prescription. Plaintiff also argues that defendant is required to show public maintenance of Waterway Drive in order to establish a *prima facie* case for a public prescriptive easement. The majority holds that even if maintenance is not required, defendant failed to establish a prescriptive easement because they cannot show that public use was hostile.

In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period. An easement by prescription is not favored in the law, and it is the better-reasoned view to place the burden of proving every essential element on the party who is claiming against the interests of the true owner.

. . . .

In North Carolina, the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. To establish a hostile use of another's land, it does not require a heated controversy or a manifestation of ill will; rather, a hostile use is a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right.

Deans v. Mansfield, ___ N.C. App. ___, ___, 707 S.E.2d 658, 662 (2011) (quotation marks, citations, brackets, and ellipses omitted).

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

Here, there is substantial evidence of public use, but conflicting evidence about whether the use was in such a manner as to “manifest and give notice that the use is being made under a claim of right.” *Id.* Use by the public of a right-of-way alone is generally insufficient to establish hostile use. *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 504, 631 S.E.2d 884, 888 (2006) (observing that “[m]ere use alone of a purported easement is not sufficient to establish the element of hostile use.”); see *Roten*, 135 N.C. App. at 475, 521 S.E.2d at 144-45 (holding that evidence of twenty continuous years of public use of the road in question failed to rebut the permissive use presumption). “Notice of a claim of right may be given in a number of ways, including . . . by open and visible acts such as repairing or maintaining the way over another’s land.” *Johnson v. Stanley*, 96 N.C. App. 72, 75, 384 S.E.2d 577, 579 (1989) (citations omitted).

The evidence tending to support hostile use is as follows: The public has used Waterway Drive as a pedestrian and bicycle right-of-way for over twenty years, including since the residents erected a “Private Drive” sign along Waterway Drive in the early 1980s. The West Carteret Water Company installed a water main under Waterway Drive and the Town of Cedar Point installed fire hydrants along the street, although there is no evidence indicating whether this action was permissive or not.⁴ There is no evidence of discussions between members of the public and the landowners about Waterway Drive, but according to the affidavits submitted by defendant, the public believed Waterway Drive was a public road and that they had a right to use it. Defendant also highlights that Waterway Drive has never been closed to public use. That fact, however, supports plaintiffs’ position more than defendant’s because evidence of an ineffective objection to or attempted closure of the easement tends to support a finding of hostility. See *Concerned Citizens of Brunswick County Taxpayers Ass’n v. State ex rel. Rhodes*, 329 N.C. 37, 54, 404 S.E.2d 677, 688 (1991).

Additionally, the Town performed some minor maintenance of Waterway Drive. The Town filled in two potholes in 2006 and 2010 and removed some debris following hurricanes in the 1990s and 2000s. There is no evidence that the Town asked the landowners’ permission to patch Waterway Drive. Hostile use can be shown in part by

4. I note that plaintiff filed a motion that we take judicial notice of some documents regarding the water main and hydrants which were not submitted to the trial court for purposes of the summary judgment hearing. We have denied that motion by separate order.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

maintenance of the path of an easement without permission from the landowner. *See Johnson*, 96 N.C. App. at 75, 384 S.E.2d at 579; *Town of Sparta v. Hamm*, 97 N.C. App. 82, 87, 387 S.E.2d 173, 176-77 (1990) (holding that where the town maintained the street in question, albeit poorly, hostile use had been established); *West v. Slick*, 313 N.C. 33, 58-60, 326 S.E.2d 601 615-16 (1985) (holding that where the state had built and graded the road, filled in ruts, and cleared branches, there was sufficient evidence to reach the jury).

Although the maintenance here was quite minor, our Supreme Court has found similarly minor maintenance to be sufficient evidence of hostile use to avoid a directed verdict. In *Dickinson v. Pake*, the Supreme Court found that the evidence was sufficient to rebut the presumption of permissive use and that the case should have gone to the jury. *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E.2d 897, 902 (1974). The plaintiffs in that case had used the unpaved road for over twenty years to access their property and “performed what slight maintenance was required to keep [the road] in passable condition.” *Id.* at 582-83, 201 S.E.2d at 901. That maintenance consisted of raking leaves and scattering seashells on the roadway. *Id.* at 583.

As here, the landowners in *Dickinson* also modified the road by placing “shrubby and old tires along one edge of the road so as to restrict travel to the well-defined roadway.” *Id.* at 582. There was no indication that the plaintiffs had ever asked for or received permission to use the road. *Id.* at 583, 201 S.E.2d at 902. The Court held that this evidence “would permit, but not compel a jury to find” in the plaintiffs’ favor. *Id.* at 583, 201 S.E.2d at 902. The majority finds that *Dickinson* is distinguishable because the maintenance in that case was continual. I note, however, that the court in *Dickinson* did not mention the frequency of the repairs or when they began.

Plaintiff contends that the evidence only supports a conclusion that the public’s use was permissive. The landowners believed Waterway Drive was private, and were aware of the public’s use of Waterway Drive, but thought that the public’s use was merely permissive and therefore never directly objected to the public’s use. “Mere failure of the owner of the servient tenement to object—even if he was aware of the use—is insufficient” to establish hostile use, *Caldwell v. Branch*, 181 N.C. App. 107, 111, 638 S.E.2d 552, 555 (2007), *disc. rev. denied*, 361 N.C. 690, 654 S.E.2d 248. Here, although an objection was never directly expressed, the “Private Drive” sign could communicate a lack of permission.

WATERWAY DRIVE PROP. OWNERS' ASS'N, INC. v. TOWN OF CEDAR POINT

[224 N.C. App. 544 (2012)]

Perhaps most significantly, plaintiffs paved a large portion of Waterway Drive themselves without asking for permission from the Town. This fact, while highly relevant, *see Town of Sparta*, 97 N.C. App. at 87, 387 S.E.2d at 176 (“The defendants appearing at the Town Council meeting and apparently asking for their consideration in paving the ‘street’ gives rise to a strong inference that he thought it was a public way since the town could not pave a private driveway.”), is not dispositive. In *Concerned Citizens*, the landowner and his predecessor in interest had graded and paved the road in question. *Concerned Citizens*, 329 N.C. at 41-42, 404 S.E.2d at 680. The associated costs were paid entirely by the landowner. *Id.* Nevertheless, the Supreme Court found that the evidence in that case went “far beyond what this Court has required to establish the use as being ‘hostile,’ thus repelling any inference that it is permissive.” *Id.* at 51, 404 S.E.2d at 686.

Thus, neither party’s cited facts are dispositive on the issue of hostile use. Any individual piece of the evidence as presented here would likely be insufficient to rebut the permissive use presumption. Taken together, however, I would hold that they demonstrate a genuine issue of material fact as to whether the public’s use of Waterway Drive was hostile and that the trial court erred in granting summary judgment to plaintiffs on defendants’ claim of prescriptive rights in the encroachment area of Waterway Drive outside of the 1936 Front Street dedication.

VIII. Conclusion

For the foregoing reasons, I would reverse the trial court’s order granting summary judgment for plaintiffs and remand for entry of summary judgment for the Town on the issue of acceptance. I would also reverse the trial court’s order as to the issue of plaintiffs’ withdrawal and a prescriptive easement over the encroachment area and remand for further proceedings regarding the parties’ rights to that area. Therefore, I respectfully dissent in part.

FRANCE v. FRANCE
 [224 N.C. App. 570 (2012)]

BRIAN Z. FRANCE
 v.
 MEGAN P. FRANCE

No. COA12-284

Filed 31 December 2012

1. Appeal and Error—interlocutory orders and appeals—substantial right—unsealing of documents

Plaintiff’s appeal from an interlocutory order in a divorce case was properly before the Court of Appeals because a substantial right was affected by the trial court’s order unsealing documents.

2. Divorce—unsealing documents—change in circumstance—open courtroom proceedings

The trial court did not abuse its discretion in a divorce case by entering the 12 October 2011 order unsealing the documents in this action and overruling Judge Owens’ 18 December 2008 order. The fourth finding of change in circumstance, ordering that the case proceed in an open courtroom, was sufficient alone to warrant a reconsideration of whether Judge Owens’ order sealing documents in the actions was still proper.

Appeal by Plaintiff from order entered 18 December 2009 by Judge Jena P. Culler in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 September 2012.

Horack Talley Pharr & Lowndes, P.A., by Kary C. Watson and Gena Graham Morris, and Alston & Bird, LLP, by John E. Stephenson, Jr.

Davis Harwell & Biggs, P.A., by Loretta C. Biggs and Joslin Davis, and Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr.

Higgins & Owens, PLLC, by Raymond E. Owens, Jr., for the Charlotte Observer and WCNC, amicus curiae.

THIGPEN, Judge.

Brian France (“Plaintiff”) appeals from an order unsealing documents associated with the actions in this case. We find no abuse of discretion in the order of the trial court, which finds and concludes

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

there has been a substantial change in circumstances. Therefore, we affirm the order of the trial court.

I. Facts

The evidence of record tends to show the following: Plaintiff and Megan France (“Defendant”) have been married to each other twice. Each marriage lasted approximately two years. Prior to their second marriage, on 27 December 2007, Plaintiff and Defendant entered into a prenuptial agreement (“the Agreement”), replacing an earlier prenuptial agreement, which provided financial benefits to Defendant in consideration for which Defendant agreed to abide by the terms of the Agreement. The Agreement contained the following confidentiality provision:

Plaintiff and Defendant agreed that “neither party [would] disclose any financial information relating to the other party or any provision of th[e] Agreement to anyone except” certain professionals, such as their attorneys and financial advisors, unless compelled by law. Plaintiff and Defendant further agreed to keep private certain personal information regarding each other “unless either party is legally compelled to disclose any such information[.]” The Agreement stated that breach of the confidentiality provision would constitute a material breach. In the final paragraph of the confidentiality clause, Plaintiff and Defendant agreed

that if either of them institutes or responds to litigation that relates to and requires disclosure of any of the terms of th[e] Agreement, [Plaintiff and Defendant] agree to use their best efforts so that any reference to the terms of th[e] Agreement and the Agreement itself will be filed under seal, with prior notice to the other party.

France v. France, 209 N.C. App. 406, 407-08, 705 S.E.2d 399, 402 (2011) (alterations in original).

On 11 September 2008, Plaintiff filed a complaint (File No. 08 CVD 20661), alleging Defendant had breached the Agreement and seeking an order directing the clerk of court to seal Plaintiff’s amended complaint, which Plaintiff had not yet filed, and any future documents filed in the action. The trial court, Judge N. Todd Owens (“Judge Owens”) presiding, granted Plaintiff’s motion to seal the doc-

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

uments associated with the case in File No. 08 CVD 20661 and issued an order on 18 December 2008, which provided the following rationale for the trial court's ruling:

2. There is a compelling countervailing public interest in protecting the privacy of the parties as relates to the provisions of the Agreement concerning their young children and their financial affairs, and in avoiding damage or harm to the parties, their business interests, and their children which could result from public access to such provisions of the Agreement.

3. There is a compelling countervailing public interest in protecting the sanctity of contracts such as the Agreement, where people bargain for and agree upon a mechanism to resolve future disputes in a confidential manner and other contract terms which are not contrary to law, and where each party relies on the other party to perform his or her obligations under the contract.

4. The aforesaid countervailing public interests in paragraphs 2 and 3 above outweigh the public's interest in access to the documents filed in this court proceeding and in future proceedings between the parties concerning the Agreement.

5. The Court has considered whether there are alternatives to sealing the court files in order to protect the public interests referred to in paragraphs 2 and 3 above, and finds there are no such alternatives.

Based on the foregoing, the trial court concluded:

The Clerk of Superior Court shall seal the pleadings and other documents [and] [t]he Clerk . . . is directed to file under seal any pleadings and documents filed in any subsequent actions between the parties related to the Agreement [and all such pleadings, documents, and orders] may be unsealed only by further order of the [c]ourt, after reasonable notice to the parties.

In the order, Judge Owens also provided the following specifications:

Once sealed, such pleadings and documents shall be accessible only to the District Court, any appellate court, the parties, attorneys for the parties and parale-

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

gals and other staff members of such attorney, and may be unsealed only by further order of the Court, after reasonable notice to the parties.¹

On 31 December 2008, Plaintiff filed, under seal, the amended complaint with a different file number, File No. 08 CVS 28389. The amended complaint set forth the terms of the Agreement and specified how Defendant breached those terms. Therefore, the amended complaint necessarily disclosed the terms of the Agreement and hypothetically may have constituted a breach of the confidentiality provision in the Agreement, but for the fact that the amended complaint was filed under seal.

The parties filed a series of discovery and substantive motions in the action under File No. 08 CVS 28389. On 29 September 2009, in anticipation of hearings on the foregoing motions, Plaintiff filed a motion requesting that the trial court close proceedings to the public. Defendant joined Plaintiff in the motion to close proceedings. The trial court, Judge Jena P. Culler (“Judge Culler”) presiding, heard the foregoing motion to close proceedings, along with several other motions, on 15 October 2009, after which Judge Culler denied the motion to close proceedings. Judge Culler entered a written order on 13 November 2009 concluding that “[p]roceedings in this case shall be conducted in open court” and providing the following rationale for the decision:

Although both parties affirmatively sought the relief of closing the court proceedings in this litigation, there are no compelling countervailing public interests as related to these parties which outweigh the public’s right and access to open court proceedings.

Plaintiff appealed Judge Culler’s 13 November 2009 order. Plaintiff also moved in open court for a stay, which was denied. Plaintiff filed notice of appeal from this order.

On 17 November 2009, The Charlotte Observer Publishing Company and WCNC-TV, Inc. (“Media Movants”) filed a motion requesting that Judge Culler (1) “[o]rder [that] the courtroom remain open to the public and press in both 08 CVD 20661 and 08 CVD 28389” and (2) order that “the records and court files in both [actions] be

1. Judge Owens’ 18 December 2008 order was not included in the record on appeal; however, we have extracted the above excerpts from Judge Owens’ order as they were recited in Judge Culler’s subsequent orders.

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

unsealed[.]” Judge Culler heard Media Movant’s motion on 11 December 2009. In an order filed 18 December 2009, Judge Culler acknowledged both Judge Owens’ order—which ordered that the pleadings and documents associated with the action in File No. 08 CVD 20661 shall be sealed—and her own order that the proceedings of the action in File No. 08 CVD 28389 shall remain open to the public. Judge Culler then ordered that all “proceedings in connection with 08 CVD 20661 shall be open to the public [and that] the court has already ordered that all courtroom proceedings in connection with 08 CVD 28389 shall be open, and that order has been appealed [and that all court files relating to both 08 CVD 20661 and 08 CVD 28389] shall be unsealed.” Judge Culler reasoned that there were “no compelling countervailing public or governmental interest[s] sufficient” to keep the court filings under seal, or to conduct the proceedings in a closed courtroom. Judge Culler further reasoned:

There [are] no compelling countervailing public or governmental interest[s] to be protected as it relates to the parties that outweighs the public’s longstanding presumptive right to open courts as espoused in the North Carolina Constitution, North Carolina statutory law, . . . and the related case law[.]

On 21 December 2009, Plaintiff filed a notice of appeal from Judge Culler’s 18 December 2009 order. Plaintiff also filed a motion to stay this order, which was denied.

On 22 December 2009, Plaintiff filed a motion in this Court to stay Judge Culler’s 13 November 2009 and 18 December 2009 orders. Our Court granted Plaintiff’s motion to stay “pending determination of [Plaintiff’s] petition for writ of supersedeas” by order entered 23 December 2009. On 4 January 2010, our Court granted Plaintiff’s petition for writ of supersedeas, and stayed implementation of Judge Culler’s first and second orders “pending further orders of this Court.”

On 1 February 2011, this Court issued an opinion, *France*, 209 N.C. App. 406, 705 S.E.2d 399, resolving the first appeal. This Court concluded that “Plaintiff’s appeal of Judge Culler’s first order on 13 November 2009 divested the trial court of jurisdiction in the matter and jurisdiction transferred to this Court. Thus, Judge Culler’s second order is a nullity because the trial court was without jurisdiction to hear the matter on 11 December 2009.” *Id.* at 411, 705 S.E.2d at 404. This Court vacated the 18 December 2009 order.

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

This Court further held that “[b]ecause Judge Culler’s first order did not rule that the pleadings and documents in these actions should be unsealed, Judge Culler’s first order does not impermissibly overrule Judge Owens’ order.” *Id.* at 412, 705 S.E.2d at 405. This Court affirmed Judge Culler’s 13 November 2009 order, holding that the trial court did not err by refusing to close the proceedings. *Id.* at 417-18, 705 S.E.2d at 408-09. However, we noted that “Judge Owens’ order remains in effect, and the trial court must conduct the proceedings in a manner which will not run counter to Judge Owens’ order.” *Id.* at 418, 705 S.E.2d at 408. “Upon remand,” we stated, “the trial court must determine how best to reconcile Judge Owens’ order [sealing the documents pertaining to the action] with Judge Culler’s first order [ruling that the proceedings in the action shall remain open to the public].” *Id.* at 418, 705 S.E.2d at 408-09.

On 2 June 2011, the first hearing in this case following remand, Judge Culler instructed the parties that although arguments and testimony would generally take place in open court, the documents associated with the action would remain under seal “as long as the Owens Order was in effect.” Judge Culler advised the parties that “while there would be occasions when testimony or argument would make reference to documents in the court files, ‘there should be no excessive reading aloud from any document that is under seal or any unnecessary reference to details in the [Agreement].’ ”

On 10 June 2011, Media Movants filed a second access motion, urging the trial court to overrule Judge Owen’s order and unseal the documents associated with 08 CVD 20661 and 08 CVD 28389. While this motion was pending, Judge Culler entered an order consolidating 08 CVD 20661 and 08 CVD 28389 into one case, 08 CVD 28389 (hereinafter, “the action”). On 12 October 2011, Judge Culler entered an order granting Media Movants motion to unseal the documents associated with the action,² reasoning that Judge Owen’s order was void for two reasons: (1) the trial court lacked subject matter jurisdiction to enter the order,³ and (2) the order violated the North Carolina Declaratory Judgment Act.⁴ Alternatively, Judge Culler

2. The trial court reserved the right, however, to seal future documents.

3. Judge Culler stated that “trial court’s do not have subject matter jurisdiction to enter orders governing separate actions”; however, Judge Owens’ order “purported to seal the court files in all future, and therefore not yet asserted actions.”

4. Judge Culler reasoned that “a declaratory judgment may only decide the respective rights and obligations of adversary parties[,]” and “[n]o declaration may prejudice the rights of persons not parties to the proceedings”; however, Judge Culler

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

based her decision to unseal the documents on four material changes in circumstance.⁵

On 13 October 2011, Plaintiff filed a notice of appeal of Judge Culler's 12 October 2011 order overruling Judge Owens' 18 December 2008 order and unsealing the documents associated with this action. Plaintiff also filed a motion for temporary stay and a petition for writ of supersedeas in this Court. On 24 October 2011, we granted Plaintiff's motion for a stay, pending our ruling on the petition for writ of supersedeas. On 2 November 2011, we allowed Plaintiff's petition for writ of supersedeas.

On appeal, Plaintiff argues the trial court erred by entering the 12 October 2011 order unsealing the documents in this action and overruling Judge Owens' 18 December 2008 order for the following reasons: (1) the trial court failed to carry out the mandate of this Court's opinion in *France*, 209 N.C. App. 406, 705 S.E.2d 399; (2) the trial court lacked authority to overrule Judge Owens' 18 December 2008 order as one trial judge cannot overrule another; (3) Judge Owens' 18 December 2008 order was not void, as the trial court had subject matter jurisdiction to enter the order; (4) the order did not violate the North Carolina Declaratory Judgment Act because the "public" is not a necessary party; (5) and there was no material change of circumstances. Plaintiff also argues on appeal that the trial court's findings of fact in the 12 October 2011 are not based on competent evidence. We affirm the order of the trial court.

II. Interlocutory Appeal

[1] We must first address the question of whether this appeal from an interlocutory order is properly before the Court. We conclude it is.

that the order entered by Judge Owens "purports to prejudice the public's right to access court files pursuant to the United States and North Carolina Constitutions" and is "outside the scope of the Declaratory Judgment Act."

5. Judge Culler stated that four substantial changes in circumstance have occurred in this case: (1) a substantial change occurred when Plaintiff filed the amended complaint, alleging an alternative claim for the rescission of the Agreement because Plaintiff relied on the confidentiality provision of the Agreement as the basis for his motion to seal the documents associated with the action, and Judge Owen relied on the confidentiality provision in the Agreement as the basis for ordering that the documents be entered under seal; (2) a substantial change occurred based on "the mere fact that Media Movants filed their Access Motions"; (3) a substantial change occurred when certain details concerning the Agreement were discovered and published by various media outlets; (4) and a substantial change occurred when this Court, according to Judge Culler, "direct[ed] this case to proceed in an open courtroom."

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

“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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, “immediate appeal is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation and quotation marks omitted).

This Court has held in cases such as this that “[a]bsent immediate review, documents that have been ordered sealed will be unsealed, and proceedings will be held open to the public[;] [b]ecause the only manner in which [a party] may prevent this from happening is through immediate appellate review, we hold that a substantial right . . . is affected[.]” *France*, 209 N.C. App. at 411, 705 S.E.2d at 405 (citing *Evans v. United Servs. Auto. Ass’n*, 142 N.C. App. 18, 23-24, 541 S.E.2d 782, 786, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

We believe that here, as in the first appeal, a substantial right is affected by the trial court’s order unsealing documents. We conclude, therefore, that although Plaintiff appeals from an interlocutory order, the appeal is properly before the Court.

III. Standard of Review

“It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). “The judicial officer’s decision to seal . . . is subject to review under an abuse of discretion standard.” *In re Investigation into Death of Cooper*, 200 N.C. App. 180, 186, 683 S.E.2d 418, 423 (2009), *disc. review denied*, 363 N.C. 855, 694 S.E.2d 201 (2010) (citation omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

IV. Substantial Change in Circumstances

[2] We first address Plaintiff’s argument that the trial court erred in finding and concluding that there was a material change in the circumstances of the parties, and as such, the trial court erred in entering an

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

order unsealing the documents associated with the consolidated actions in this case and overruling Judge Owens' 18 December 2008 order. We conclude the trial court did not err.

"It is well established that one trial court judge may not overrule another trial court judge's conclusions of law when the same issue is involved[;] [n]o appeal lies from one Superior Court judge to another; . . . one Superior Court judge may not correct another's errors of law; and . . . ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.'" *France*, 109 N.C. App. at 411-12, 705 S.E.2d 399, 405 (2011) (quoting *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003)). The rationale for this rule is to discourage parties from judge shopping. *Woolridge*, 357 N.C. at 550, 592 S.E.2d 194.

"This rule does not apply to interlocutory orders given in the progress of the cause[,] . . . [and] a judge does have the power to modify an interlocutory order when there is a showing of changed conditions which warrant such action." *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981) (citations omitted). "However, when the judge rules as a matter of law, not acting in his discretion, the ruling finally determines the rights of the parties unless reversed upon appellate review." *Id.* "One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order." *Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 189, 697 S.E.2d 449, 456, *cert. denied, and disc. review denied*, 364 N.C. 607, 703 S.E.2d 442 (2010) (citations and quotation marks omitted).

In this case, Judge Owens' 18 December 2008 order stated that "[o]nce sealed, such pleadings and documents shall be accessible only to the District Court, any appellate court, the parties, attorneys for the parties and paralegals and other staff members of such attorney, and *may be unsealed only by further order of the Court*, after reasonable notice to the parties." (emphasis added). Judge Owens' order, itself, made an allowance for the future unsealing of documents. Moreover, this Court in *France*, 209 N.C. App. 406, 705 S.E.2d 399, did not mandate that Judge Owens' order remain undisturbed. Rather, this Court held that "Judge Owens' order must remain in effect until and *unless it is properly overturned*["] *Id.* at 417, 705 S.E.2d at 408 (emphasis added). The phrase, "[p]roperly overturned["]

FRANCE v. FRANCE

[224 N.C. App. 570 (2012)]

required that Judge Culler only had authority to overrule Judge Owens' order upon a finding of changed circumstances. *Id.* at 412, n.3, 705 S.E.2d at 405, n.3; *see also Morris v. Gray*, 181 N.C. App. 552, 552–53, 640 S.E.2d 737, 738 (2007) (stating that “[u]nless a material change of circumstances in the situations of the parties so warrants, one trial judge cannot modify, overrule, or change the judgment of another, equivalent trial judge”).

“A substantial change in circumstances exists if since the entry of the prior order, there has been an intervention of new facts which bear upon the propriety of the previous order. The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge.” *Crook*, 206 N.C. App. at 189, 697 S.E.2d at 456 (citations and quotation marks omitted).

The trial court found several changes in circumstances in its order in this case, including the following: (1) Plaintiff now seeks rescission of the Separation Agreement, which is the document from which the order to seal the files is derived; (2) the Media Movants are an intervening party and a member of the public seeking access to the documents; (3) some details regarding the actions have already been disclosed to the public during the course of the litigation; and (4) the Court of Appeals ordered that the case proceed in an open courtroom.

We believe the fourth finding of change in circumstance—that this Court ordered that the case proceed in an open courtroom—is sufficient, alone, to warrant a reconsideration of whether Judge Owens' order sealing documents in the actions was still proper. We find no indication of abuse of discretion in the trial court's findings of fact. The findings of fact are supported by the evidence and each reasonably supports the conclusion of law that a change in circumstances has occurred. Therefore, we affirm the trial court's order unsealing the documents associated with the actions in this case. As we affirm on this ground, it is not necessary for us to address Plaintiff's remaining arguments on appeal.⁶

6. Plaintiff also argues on appeal that the trial court erred in disregarding the public's compelling interest in preserving the constitutionally protected rights of freedom to contract, remedy for an injury incurred, and privacy. Specifically, Plaintiff claims that his rights to contract, right to a remedy in the trial court for an injury he incurred, and his right to privacy have been violated by the trial court's order overruling Judge Owens' Order. These arguments were each addressed by *France*, 209 N.C. App. 406, 705 S.E.2d 399, and are *res judicata*. *Williams v. Peabody*, ___ N.C. App. ___, ___, 719 S.E.2d 88, 92 (2011) (stating that *res judicata* “prevents the relitigation of all matters that were or should have been adjudicated in the prior action”). With respect to Plaintiff's breach of contract claim, this Court stated in *France* that “Plaintiff's right

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

AFFIRMED.

Judges McGEE and BEASLEY concur.

Judge Beasley concurred in this opinion prior to 18 December 2012.

SHEILA GREGORY, ADMINISTRATRIX OF THE ESTATE OF TRAVIS BRYAN KIDD

v.

BARRY BLAINE PEARSON, IN HIS INDIVIDUAL CAPACITY

SHEILA GREGORY, ADMINISTRATRIX OF THE ESTATE OF TRAVIS BRYAN KIDD

v.

CLEVELAND COUNTY, SELF-MCNEILLY SOLID WASTE MANAGEMENT FACILITY

No. COA12-742

No. COA12-813

Filed 31 December 2012

**Workers' Compensation—exclusivity—temporary staffing—
expressly not an employee—no implied contract**

Plaintiff's negligence claims were not barred by the exclusivity provisions of the Workers' Compensation Act where plaintiff's decedent, who worked for a temporary employment agency, was not a County employee under the express language of the agree-

to contract is in no way violated; we merely hold that Plaintiff cannot, by contract, circumvent established public policy. . . . Plaintiff must show some independent countervailing public policy concern sufficient to outweigh the qualified right of access to civil court proceedings. . . . We hold that, in the present case, the trial court was correct to determine whether proceedings should be closed based upon the nature of the evidence to be admitted and the facts of this specific case. Evidence otherwise appropriate for open court may not be sealed merely because an agreement is involved that purports to render the contents of that agreement confidential. Certain kinds of evidence may be such that the public policy factors in favor of confidentiality outweigh the public policy factors supporting free access of the public to public records and proceedings." *France*, 209 N.C. App. at 415-16, 705 S.E.2d at 407. With respect to Plaintiff's argument pertaining to access to a remedy for an injury he incurred, this Court stated in *France* that "Plaintiff fails to show that the decision to deny Plaintiff's request for closed proceedings will deny Plaintiff 'redress in the court for an injury done to him[;]' Plaintiff has in no manner been prevented from proceeding with his action[,] [and] [a]gain, if Plaintiff succeeds in his primary action for rescission of the Agreement, the confidentiality clause contained in the Agreement will no longer have any effect." *Id.* at 417, 705 S.E.2d at 408. With respect to Plaintiff's right to privacy claim, this Court stated in *France* that "Plaintiff's claim that his 'constitutional right of privacy, particularly with respect to matters surrounding the parenting of minor children,' will be violated is without merit, and Plaintiff fails to show that any such right to privacy outweighs the qualified right of the public to open proceedings." *Id.*

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

ment between the agency and the County. Because the County chose not to establish an employment relationship with decedent, it eschewed both the liabilities and protections of the Workers' Compensation Act.

Appeals by Sheila Gregory from order entered on 23 March 2012 by Judge Richard Doughton in Cleveland County Superior Court. Heard in the Court of Appeals 29 November 2012.

James M. Roane III for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by William A. Bulfer and Rebecca Rausch, and Womble Carlyle Sandridge and Rice, by Sean F. Perrin and Jackson Price, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

Sheila Gregory, in her capacity as administratrix of the estate of Travis Bryan Kidd, appeals from a 23 March 2012 order dismissing her cases against Barry Blaine Pearson and Cleveland County (collectively, "Defendants"). Her appeals have been consolidated for review by this Court. Upon review, we reverse the trial court's order.

I. Facts & Procedural History

Travis Bryan Kidd ("Kidd") was twenty-four years old and lived with his mother, Sheila Gregory ("Plaintiff"). Kidd was employed by WorkForce Staffing, Inc. ("WorkForce"), a temporary employment agency. WorkForce contracted with Cleveland County (the "County") to send temporary workers to the County's Self-McNeilly Solid Waste Management Facility (the "Landfill").

WorkForce and the County entered into a Staffing Vendor Agreement (the "Staffing Vendor Agreement" or the "Agreement"). Under the terms of the Agreement, the County regularly paid WorkForce, and WorkForce in turn paid its temporary workers. The Agreement stated WorkForce was responsible for workers' compensation insurance. According to the Agreement, the County could terminate the workers from the Landfill at any time. The Agreement expressly stated the temporary employees were not employees of the County.

WorkForce subsequently assigned Kidd to work at the Landfill as a "spotter," helping dump trucks and other vehicles navigate the terrain. The Landfill provided Kidd with protective equipment, including

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

gloves and a reflective orange vest. While Kidd worked at the Landfill, he did not take any other assignments from WorkForce.

On or about 22 February 2010, Kidd was working as a spotter at the Landfill. Barry Blaine Pearson (“Pearson”), a full-time County employee, was driving a mobile trash compactor near Kidd, despite Landfill policies requiring a 20-foot buffer between trash compactors and spotters. Also, the trash compactor’s “backup camera” did not provide adequate visibility. This defect had resulted in previous collisions with other equipment. On that day, Pearson accidentally ran over Kidd with the trash compactor, driving him into a pile of trash. A few minutes later, another truck driver noticed Kidd lying in the trash pile. That driver approached, saw Kidd was severely injured but still alive, and called EMS. Although EMS extracted Kidd and took him to a hospital, he died that same day as a result of the injuries he received.

After Kidd’s death, Plaintiff filed a workers’ compensation claim with the North Carolina Industrial Commission against WorkForce. She collected from WorkForce all her entitled benefits under the North Carolina Workers’ Compensation Act (the “Workers’ Compensation Act”).

On 19 August 2011, Plaintiff filed a Complaint against Pearson in Cleveland County Superior Court alleging (i) negligence; and (ii) wrongful death. On 21 February 2012, Plaintiff also filed a companion complaint against Cleveland County for (i) negligence; (ii) negligence *per se* (due to alleged statutory health and safety violations at the Landfill); and (iii) wrongful death.

On 6 March 2012, the County filed a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(1). After a hearing, the trial court dismissed both Plaintiff’s complaints on 23 March 2012 because Plaintiff’s allegations were exclusively covered by the Workers’ Compensation Act. Plaintiff filed timely notice of appeal on 10 April 2012.

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011). “We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings.” *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). “‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

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 Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

Plaintiff contends her claims are not barred by the exclusive remedy of the Workers' Compensation Act because Kidd was not a County employee. Specifically, she argues: (i) the express contract between WorkForce and the County stated Kidd was not a County employee; (ii) the County did not exercise control over Kidd's work; and (iii) the "special employment" doctrine has a decreased burden of proof. Upon review, we reverse the trial court's order.

Under the Workers' Compensation Act, employers generally must "pay . . . compensation [to employees] for personal injury or death by accident arising out of and in the course of [employees'] employment." N.C. Gen. Stat. § 97-3 (2011). "No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided." N.C. Gen. Stat. § 97-6 (2011).

The Workers' Compensation Act provides an exclusive remedy for unintentional work-related injuries. *See* N.C. Gen. Stat. § 97-10.1 (2011) ("If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death."). Thus, the remedial provisions of the Workers' Compensation Act bar other claims against an employer, such as negligence. *See, e.g., Reece v. Forga*, 138 N.C. App. 703, 706, 531 S.E.2d 881, 883 (2000) (barring a negligence claim against an employer when the employee already recovered under the Workers' Compensation Act).

Similarly, an employee who recovers under the Workers' Compensation Act cannot raise a negligence claim against a co-employee acting in the scope of employment. *See Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985) ("We also have interpreted the Act as foreclosing a worker who is injured in the course of his employment from suing a co-employee whose negligence caused the injury."); *Strickland v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977) ("[A]n employee subject to the Act whose injuries arise out of and in the course of his employment may not

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

maintain a common law action against a negligent co-employee.”); *Altman v. Sanders*, 267 N.C. 158, 161, 148 S.E.2d 21, 24 (1966).

According to the Workers’ Compensation Act, “[t]he term ‘employee’ means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written.” N.C. Gen. Stat. § 97-2(2) (2011). Furthermore, under the “special employment” doctrine:

“a general employee of one [employer] can also be the special employee of another while doing the latter’s work and under his control [citation omitted] [a]nd it goes without saying that if a loaned servant is the borrower’s servant also when doing the borrower’s work and under his control, a servant especially hired for that very purpose is likewise.”

Brown v. Friday Services, Inc., 119 N.C. App. 753, 759, 460 S.E.2d 356, 360 (1995) (quoting *Henderson v. Manpower of Guilford Cnty., Inc.*, 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984)) (second and third alterations in original). Thus, if N.C. Gen. Stat. § 97-10.1 bars an employee’s suit against a general employer, it also bars suit against a “special employer.”

In *Collins v. James Paul Edwards, Inc.*, this Court established a three-part test to determine when the “special employment” doctrine applies:

When a general employer lends an employee to a special employer, the special employer becomes liable for workmen’s compensation only if

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen’s compensation.

21 N.C. App. 455, 459, 204 S.E.2d 873, 876 (1974) (quotation marks and citation omitted); see also *Anderson v. Demolition Dynamics*,

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

Inc., 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000) (applying the *Collins* test).

As Defendants describe, this Court has previously applied the *Collins* test to determine employees of temporary employment agencies may also become “special employees” of the businesses where they are assigned, barring non-workers’ compensation claims against their “special employers.” For instance, in *Brown*, a temporary worker fell through a skylight and died while working for a roofing contractor. *Brown*, 119 N.C. App. at 754-55, 460 S.E.2d at 358. The worker’s estate brought a wrongful death claim against the roofing contractor. *Id.* at 755, 460 S.E.2d at 358. There, this Court affirmed dismissal of the case because the circumstances satisfied all three parts of the *Collins* test. *Id.* at 759, 460 S.E.2d at 360.

In *Poe v. Atlas-Soundelier/American Trading and Production Corp.*, 132 N.C. App. 472, 512 S.E.2d 760 (1999), a temporary worker’s hand was crushed by a machine while working for Atlas. *Id.* at 473, 512 S.E.2d at 761. The plaintiff recovered workers’ compensation from his temporary employment agency, but also brought a negligence claim against Atlas. *Id.* at 476, 512 S.E.2d at 763. In that case, this Court again applied the “special employment” doctrine to determine the exclusivity provisions of the Workers’ Compensation Act barred Poe’s negligence claim. *Id.* at 478, 512 S.E.2d at 764.

In *Henderson*, 70 N.C. App. 408, 319 S.E.2d 690, a temporary worker was injured by a falling tree while working for a construction company. *Id.* at 409, 319 S.E.2d at 691. There, we held both the temporary employment agency and the construction company were liable for workers’ compensation because they were both Henderson’s employers under the “special employment” doctrine. *Id.* at 410, 319 S.E.2d at 691.

In the present case, Plaintiff contends the exclusivity provisions of the Workers’ Compensation Act do not bar her cases because Kidd was not a County employee. Plaintiff argues the circumstances do not satisfy the first prong of the *Collins* test because the Agreement stated Kidd was not a County employee. We agree.

Under the first portion of the *Collins* test, we consider whether “the employee has made a contract of hire, express or implied, with the special employer.” *Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876. In this analysis, we may examine the contract between a temporary employment agency and the business hiring temporary workers. *See*

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

Brown, 119 N.C. App. at 760, 460 S.E.2d at 360-61; *Poe*, 132 N.C. App. at 477, 512 S.E.2d at 763.

Here, the Staffing Vendor Agreement expressly stated temporary employees are not employees of the County. Significantly, none of the cases cited by Defendants contain a similar contractual provision. In fact, we have discovered no North Carolina workers' compensation case involving a temporary employment agency with this type of contractual language. Therefore, we distinguish the instant case from *Brown*, *Poe*, and *Henderson* based on this contractual provision.

We are further guided by *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 677 S.E.2d 485 (2009). In *Shelton*, the plaintiff was an employee of Drew, LLC ("Drew"), a cleaning company. *Id.* at 407, 677 S.E.2d at 489. Steelcase, Inc. ("Steelcase"), contracted for Drew to clean its maintenance area. *Id.* The plaintiff was injured by a falling fire door at Steelcase and sued Steelcase for negligence. *Id.* at 408, 677 S.E.2d at 490. In *Shelton*, this Court applied the *Collins* test to determine the plaintiff was not barred from bringing suit. *Id.* at 410-11, 677 S.E.2d at 491. Under the first prong of the *Collins* test, we concluded Shelton was not a "special employee" of Steelcase because the contract between Drew and Steelcase expressly stated Drew staff "will be employees of [Drew]," not Steelcase. *Id.* at 412, 677 S.E.2d at 492.

Similarly, because the Staffing Vendor Agreement expressly states the temporary workers are not County employees, we conclude the circumstances do not satisfy the first prong of the *Collins* test. "It is a well established principle that an express contract precludes an implied contract with reference to the same matter." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962). Therefore, given the Agreement's express language, we decline to consider any implied contract between Kidd and the County.

The Agreement's language indicates the County intended to avoid workers' compensation liability by forming an independent contracting relationship with the temporary workers rather than an employment relationship. See *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) ("An independent contractor is not a person included within the terms of the Workers' Compensation Act."). For instance, the Agreement (i) expressly disavows an employment relationship, and (ii) requires WorkForce, rather than the County, to obtain workers' compensation insurance.

Because the County chose not to establish an employment relationship with Kidd, it eschews both the liabilities and protections of

GREGORY v. PEARSON

[224 N.C. App. 580 (2012)]

the Workers' Compensation Act. In this regard, we note the Workers' Compensation Act:

seeks to balance competing interests and implement trade-offs between the rights of employees and their employers. It provides for an injured employee's certain and sure recovery without having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule. In return the Act limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damages awards in civil actions. [W]hile the employer assumes a new liability without fault he is relieved of the prospect of large damage verdicts.

Woodson v. Rowland, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (alteration in original)(internal citation and quotation marks omitted). Having made a contract which allocated the risk of workers' compensation liability to WorkForce, the County may not now use the Workers' Compensation Act as a shield against the risk of "large damage verdicts" for civil tort liability. *Id.*

Since we determine the County did not form an employment relationship with Kidd, we reject Defendants' argument regarding the applicability of N.C. Gen. Stat. § 97-6. This statute states "[n]o contract . . . shall in any manner operate to relieve an employer . . . of any obligation created by this Article . . ." N.C. Gen. Stat. § 97-6 (2011). The County argues this statute invalidates its contractual provision stating Kidd was not an employee. However, we hold N.C. Gen. Stat. § 97-6 does not apply here because the County was not Kidd's "employer."

Because the circumstances here do not satisfy the first prong of the *Collins* test, we conclude Kidd was not a "special employee" of the County. Consequently, the exclusivity provisions of the Workers' Compensation Act do not bar Plaintiff's suit and we reverse the trial court's order. Since we reverse the entire order based on Plaintiff's first argument, we decline to address her other arguments.

IV. Conclusion

We conclude Plaintiff's claims are not barred by the exclusivity provisions of the Workers' Compensation Act because Kidd was not a County employee under the "special employment" doctrine. Consequently, the trial court's order dismissing Plaintiff's case is

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

Reversed.

Judges STROUD and BEASLEY concur.

Judge BEASLEY concurred prior to 17 December 2012.

SHARON MONEA MOREHEAD

v.

JUNE TURNER WALL

No. COA12-750

Filed 31 December 2012

Appeal and Error—appealability—untimely appeal—Rule 60 motions not a substitute

Although plaintiff appealed the dismissal of her appeal from small claims court to district court for trial *de novo* in an action arising from an automobile accident, the appeal was dismissed because plaintiff's first notice of appeal to the Court of Appeals was untimely filed. Plaintiff could not use N.C.G.S. § 1A-1, Rule 60 motions as a substitute for appeal.

Appeal by plaintiff from orders entered 2 March 2011, 28 April 2011, 11 January 2012, and 2 April 2012 by Judge Doretta Walker in District Court, Durham County. Heard in the Court of Appeals 14 November 2012.

The Law Offices of Martin J. Horn, PLLC by Martin J. Horn, for plaintiff-appellant.

Law Offices of Robert E. Ruegger by Robert E. Ruegger, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from the dismissal of her appeal from Small Claims Court to District Court for trial *de novo*. Because plaintiff's first notice of appeal to this Court was not timely filed and she then attempted to use motions under Rule 60 as a substitute for appeal, we must dismiss her appeal.

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

I. Procedural History

On 22 November 2010, Sharon Morehead (“plaintiff”), represented by counsel, filed a “Complaint for Money Owed” with the District Court Small Claims Division in Durham County, seeking to recover “damages for personal injuries and injury to her personal property for a sum as much as \$5,000.00 and attorney fees.” Plaintiff’s claim was based upon her allegations of defendant’s negligence in causing an automobile collision on 26 October 2010. On 10 December 2010, defendant answered plaintiff’s complaint, denying the allegations of negligence and raising affirmative defenses of contributory negligence and sudden emergency. The case was heard before the Small Claims Court on 10 December 2010; both parties were present for trial. The magistrate rendered judgment in favor of the plaintiff on 10 December 2010 in open court and signed the judgment on that date. On 13 December 2010, the magistrate filed the judgment against defendant and in favor of plaintiff, awarding her the sum of \$5,000.00 in damages and taxing costs in the sum of \$86.00 to the defendant.

Plaintiff filed notice of appeal to the District Court on 21 December 2010 (and 22 December 2010).¹ Defendant filed a motion to dismiss plaintiff’s appeal on 24 January 2011, based upon N.C. Gen. Stat. §§ 7A-228 and 224. Defendant argued that §§ 7A-228 and 224 require that notice of appeal to District Court be given within 10 days of the Magistrate’s rendition and signing of judgment in open court and not from the “file stamp” date of filing of the written judgment. On 28 February 2011, the District Court heard defendant’s motion to dismiss the appeal. The District Court entered an order allowing defendant’s motion to dismiss plaintiff’s appeal on 2 March 2011. In this order, the District Court found that plaintiff’s notice of appeal to District Court was filed on 23 December 2010.²

Plaintiff filed a “Motion for Relief from Judgment or Order” under N.C. Gen. Stat. § 1A-1, Rule 60, on 28 February 2011 (the “first Rule 60 motion”) claiming that if the notice of appeal to District Court was

1. Plaintiff actually filed notices on both dates. The parties had an extended dispute regarding the date which should appear on the Notice of Appeal. On 18 April 2010, plaintiff filed a “Motion for Judicial Declaration” pursuant to N.C. Gen. Stat. § 7A-103 requesting that the Clerk of Superior Court “order that the Notice of appeal file stamped on Monday, December 21, 2010 is valid and effective, Nunc Pro Tunc”. The Clerk determined that the notice was filed on 21 December 2010.

2. As noted above, there was a dispute as to whether the order was filed on 21 December or 22 December, 2010. No other document in the record reflects a filing date of 23 December 2010.

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

filed a day late, it was due to the fact that personnel in the Clerk's office "misinformed/informed the Firms' (sic) paralegal as to the deadline for filing [the notice of appeal] which the clerk calculated as 10 days from the date the judgment was file stamped (that date being December 13, 2011)."³ On 28 April 2011, the District Court entered an order denying plaintiff's first Rule 60 motion. In this order, the District Court found that the notice of appeal to District Court was filed on 22 December 2010 and concluded that the appeal was not timely filed under N.C. Gen. Stat. §§ 7A-224, 228 (2011) and *Provident Finance Co. v. Locklear*, 89 N.C. App. 535, 366 S.E.2d 599 (1988).⁴

Plaintiff then filed a "Motion to Reconsider and Second Motion for Relief from Judgment or Order" ("second Rule 60 motion") under N.C. Gen. Stat. § 1A-1, Rule 60,⁵ again claiming for various reasons that her notice of appeal was not filed late and noting that the Clerk of Court had declared the notice to have been filed on 21 December 2010, or if the notice was a day late, this delay was based upon excusable neglect. On 28 April 2011, the District Court heard the second Rule 60 motion, and on 11 January 2012, the District Court entered an order denying plaintiff's second Rule 60 motion.

On 18 May 2011, plaintiff filed notice of appeal to this Court from the District Court's order dismissing plaintiff's appeal to District Court, the order denying plaintiff's first Rule 60 motion entered on 28 April 2011, and the order denying plaintiff's second Rule 60 motion. As noted above, the District Court entered an order on 11 January 2012 denying plaintiff's second Rule 60 motion. Thus, the notice of appeal from the 11 January 2012 order was filed prior to entry of the order.

On 26 January 2012 plaintiff filed a motion to reconsider and a third motion for relief from judgment or order ("third Rule 60 motion") pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, requesting correction of Finding of Fact 8 in the order entered 11 January 2012, which said

3. Although it was filed prior to entry of the order on 2 March 2011, plaintiff's Second Motion for Relief under N.C. Gen. Stat. § 1A-1, Rule 60 refers to that order.

4. Although we cannot consider the substantive issues raised by plaintiff's appeals for the reasons noted below, in the interest of the efficient operation of our courts, we do wish to point out that the clerk did not "misinform" anyone. *Provident Finance Co. v. Locklear*, 89 N.C. App. 535, 366 S.E.2d 599 (1988) has been abrogated by the 1994 modifications to Rule 58 and Rule 58 now specifically provides that entry of judgment in a small claims action occurs when the judgment is "reduced to writing, signed by the judge, and filed with the clerk of court." Unfortunately, it appears that neither the attorneys nor the District Court were aware of the 1994 amendments.

5. The District Court's order notes that plaintiff proceeded under Rule 60(b)(1) and (6).

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

that the Clerk of Court held an “ex parte” hearing, when actually “both parties were present and represented by counsel.” On or about 9 March 2012, Defendant filed a motion for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11, based upon two grounds: (1) plaintiff repeatedly filed motions asking the District Court to reconsider the same issues; and (2) plaintiff had no right to appeal to District Court for trial *de novo* because she was not an aggrieved party, as the magistrate had awarded her all the damages she sought. Defendant then withdrew the motion for sanctions in open court.

On 2 April 2012, the District Court entered an order allowing plaintiff’s third Rule 60 motion. This order allowed plaintiff’s request to strike the “words “ex parte” from paragraph 8 of the 11 January 2012 order;” there was no substantive change to the order. This order also noted that defendant raised the argument that plaintiff had no right to appeal to District Court for trial *de novo* under N.C. Gen. Stat. § 7A-228 because she was not an “aggrieved party,” but the District Court “did not make any ruling on that point and declined to make such a provision as the basis for its decision.”

Plaintiff filed another notice of appeal to this Court, entitled “***AMENDED*** NOTICE OF APPEAL” on 10 April 2012, from all of the orders of the District Court noted above, including the 2 April 2012 order.

II. Timeliness of Appeal to this Court

Although neither party has addressed this issue, we must first consider whether this Court has jurisdiction to consider this appeal. With this Court, Plaintiff filed two notices of appeal, to four different orders, with many motions and the first notice of appeal being filed even before some of the relevant orders were entered. In addition, the notices of appeal contain errors as to various dates. This makes the analysis unduly complex, and the fact that neither party recognizes the issue is somewhat ironic as the parties thoroughly briefed the issue of timeliness of the appeal to District Court and neglected to realize that the appeal to this Court was untimely.

Under our North Carolina Rules of Appellate Procedure, Rule 3(c), “Time for Taking Appeal,” states, in pertinent part, the following:

In civil actions and special proceedings, a party must file and serve a notice of appeal:

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period....

N.C. R.App. P. 3(c) (2007). The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal. Motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal. See N.C. R.App. P. 3(c) (2007).

Wallis v. Cambron, 194 N.C. App. 190, 192-93, 670 S.E.2d 239, 241 (2008) (other citation and quotation marks omitted).

First, as to the 2 March 2011 order allowing the motion to dismiss the appeal to District Court, the first notice of appeal to this Court was filed on 28 April 2011, more than 30 days after entry of the order, and thus was not timely filed. N.C.R. App. P. 3(c). Plaintiff's appeal as to the first order is therefore dismissed.

III. Rule 60 Motions

The second order, which denied plaintiff's first Rule 60 motion, was entered on 28 April 2011,⁶ and the first notice of appeal to this Court was filed on 18 May 2011. However, plaintiff's first motion for relief was based upon Rule 60, as noted above.

A motion pursuant to Rule 60 cannot be used as a substitute for an appeal of the underlying order to correct errors of law. *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1998). "[I]t is settled law that erroneous judgments may be corrected only by appeal. Neither a Rule 59 motion nor a Rule 60 motion may be used as a substitute for an appeal." *Musick v. Musick*, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010) (citations, quotation marks, and brackets omitted). A motion under Rule 59 (although not Rule 60) will toll

6. Although the Notice of Appeal incorrectly identifies the order as having been entered on 27 April 2011, it also identifies the order as the "ruling of the Honorable Judge Doretta L. Walker, District Court Judge Presiding . . . on . . . Plaintiff's Motion for Relief from Judgment pursuant to Rule 60 [which] was heard on March 28, 2011." No order was entered by the District Court on 27 April 2011, although the order by the Clerk of Court was entered on that date.

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

the time for appeal of the underlying order. *See Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006) (“An aggrieved party is not required to file a Rule 59 motion to preserve the right to appeal, but upon timely motion under Rule 59, the thirty day period for taking an appeal is tolled until an order disposing of the motion is entered. N.C.R. App. P. 3(c)(3). Thus, in addition to obtaining review of the denial of a Rule 59 motion, an aggrieved party who gives proper and timely notice of appeal from the underlying ruling may have the underlying judgment or order reviewed on appeal.”)

Plaintiff’s appeal from the order denying her first Rule 60 motion must also be dismissed. Plaintiff’s first Rule 60 motion did not toll the time for appeal from the dismissal of the notice of appeal to District Court. Plaintiff also may not use a Rule 60 motion to correct the District Court’s legal error in calculating the time to file the notice of appeal to District Court. Her only avenue for review of the dismissal order was a timely appeal or a petition for certiorari, *see* N.C.R. App. P. 21(a)(1) (“The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]”), not a Rule 60 motion.

The same is true of plaintiff’s appeal from the 11 January 2012 order denying her second Rule 60 motion, which also attempted to correct an error of law, and we must also dismiss her appeal from this order.

Plaintiff’s third Rule 60 motion, filed on 30 January 2012, was after the notice of appeal, but this motion addressed only an error in the 11 January 2012 order. Although the motion does not identify the subsection of Rule 60 under which it was filed, it would appear to be based upon subsection (a), which provides that

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. Gen. Stat. § 1A-1, Rule 60(a).

MOREHEAD v. WALL

[224 N.C. App. 588 (2012)]

The District Court's order was entered on 2 April 2012, and the order granted the relief requested, by striking the words "ex parte" in paragraph 8 of the 11 January 2012 order. The trial court still had jurisdiction to enter this order as the appeal was not docketed in the appellate division until 20 June 2012. Plaintiff's amended notice of appeal, filed on 9 April 2012, included this order as well as the same three as in the first notice of appeal. The second notice of appeal to this Court was timely as to the 2 April 2012 order.

The 2 April 2012 order only made a clerical correction to the 11 January 2012 order, and plaintiff's notice of appeal was apparently filed only to address the other issue raised in that order: the District Court's decision not to address the issue raised by defendant as to whether plaintiff was an "aggrieved party" in her appeal from Small Claims Court to District Court. As the District Court granted the relief which plaintiff sought by correcting the clerical error in the 11 January 2012 order—removal of the words "ex parte"—plaintiff is not an aggrieved party entitled to appeal to this Court. *See Diaz v. Smith*, ___ N.C. App. ___, ___, 724 S.E.2d 141, 144 (2012) ("If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed." (citations and quotation marks omitted)). Further, for the reasons stated above, we cannot consider the portion of the 2 April 2012 order concerning the District Court's dismissal of plaintiff's appeal to that court. Therefore, we also dismiss plaintiff's appeal as to the District Court's 2 April 2012 order.

For the reasons stated above, we dismiss plaintiff's appeals as to the District Court's orders of 2 March 2011, 28 April 2011, 11 January 2012, and 2 April 2012.

DISMISSED.

Judge ELMORE concurs.

Judge BEASLEY concurred prior to 17 December 2012.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

STATE OF NORTH CAROLINA

v.

ALLAN COMEAUX

No. COA11-1289

Filed 31 December 2012

1. Constitutional Law—public trial—closure of trial during victim’s testimony—findings sufficient

The trial court did not err by closing the courtroom during the testimony of the victim where the court’s findings showed that the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure. Even in the absence of the findings challenged by defendant, the remaining, detailed findings were sufficient to uphold the trial court’s order.

2. Indictment and Information—multiple charges—defendant sufficiently informed

Indictments for indecent liberties sufficiently informed defendant of the conduct for which he was charged where each of the indictments was couched in the language of the statute, and each indictment alleged that defendant committed the offense within a specific, non-overlapping six-month period between July 2005 and December 2007.

3. Constitutional Law—unanimous verdict—multiple charges—instructions and verdict sheets

Defendant’s contention that he was deprived of his right to a unanimous jury verdict in a prosecution for five indecent liberties charges was overruled where the trial court’s instructions explicitly distinguished among the five charges, directed the jurors to find defendant guilty on each count only if they determined that defendant had committed the requisite acts within the designated time period, each verdict sheet was paired with a particular indictment, and it was evident that the jury was able to distinguish among the indictments and verdict sheets, as it convicted defendant on only four of the five counts.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

Appeal by Defendant from judgments entered 14 March 2011 by Judge C. Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 21 March 2012.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Jane Rankin Thompson, Assistant Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for the defendant.

THIGPEN, Judge.

Allan Comeaux (“Defendant”) appeals from judgments convicting him of four counts of taking indecent liberties with a child. On appeal, Defendant contends that his Sixth Amendment right to a public trial was violated because the trial court closed the courtroom during the victim’s testimony without making findings of fact as required under *Waller v. Georgia*, 467 U.S. 39 (1984). Defendant also contends that the trial court erred by denying his motions to dismiss, or by failing to arrest judgment, because the indictments, jury instructions, and verdict forms were “duplicitous” and “generic” in violation of his constitutional and statutory rights to a unanimous jury. For the following reasons, we find no error.

I. Factual & Procedural Background

The State’s evidence at trial tended to show that K.D., the victim in this case, was born on 24 January 1992. When she was approximately 9 or 10 years old, K.D. went to live with a distant relative, Connie Comeaux (“Connie”), and Connie’s husband, Defendant, in Napoleonville, Louisiana. K.D. testified that Defendant began sexually abusing her when she was 10 years old and living in Napoleonville. The sexual abuse which allegedly occurred in Napoleonville included K.D. performing oral sex on Defendant; Defendant fondling and sucking K.D.’s breasts; and one incident of Defendant ejaculating on her.

When K.D. was eleven, she moved with Connie and Defendant to New Jersey, where the sexual abuse continued. They then moved to Montreat when K.D. was thirteen, where the abuse stopped during the six months that they lived there. In early 2006, when K.D. was still thirteen, she moved with Connie and Defendant to Asheville, North Carolina. K.D. testified, “[t]hat’s when it got really bad[,]” with Defendant frequently abusing her at night. The sexual abuse in North

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

Carolina included Defendant putting his hands down K.D.'s pants; touching and sucking her breasts; and touching the outside of her vagina. K.D. testified that the sexual abuse lasted approximately seven years and that it did not stop until she left the Comeaux's home on 1 July 2009.

In August of 2009, K.D. contacted the Buncombe County Department of Social Services ("DSS") to report the sexual abuse. Following K.D.'s report, DSS contacted the Buncombe County Sheriff's Department. K.D. was subsequently interviewed by a police officer and a social worker from DSS. K.D.'s explanation of the history of sexual abuse to the police officer and social worker was consistent with her testimony at trial.

Defendant was charged with five counts of taking indecent liberties with a child. At trial, the jury convicted Defendant of four counts of taking indecent liberties with a child. Defendant was sentenced to four consecutive sentences of 16 to 20 months imprisonment and ordered to register as a sex offender for thirty years. Defendant appeals from these judgments.

On 8 May 2012, this Court entered an order remanding the case "for the limited purpose of the trial court indicating whether it made findings consistent with *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994)[.] in clearing the courtroom." This Court further decreed in its 8 May 2012 order that "[t]he trial court shall enter an order stating whether it made such findings, and if so, it shall reduce those findings of fact and conclusions of law to writing[.]" Defendant's appeal was "held in abeyance pending receipt of the trial court's order."

On 30 May 2012, Judge Philip Ginn entered an order stating that the "facts needed for granting the State's Motion and ordering the limited closure of the courtroom during the testimony of the Victim" were "establish[ed][.]" However, the trial court failed to memorialize the facts in writing in its 20 May 2012 order, instead stating that, "in the opinion of [the trial court]," it was not "required to engage in any Constitutional analysis or make any Constitutionally-based findings as contemplated by the Jenkins Court[.]"

On 20 August 2012, this Court entered a second order again remanding the case to the trial court "to make findings of fact and conclusions of law in accordance with *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994), utilizing the four-part test enumerated in *Waller v.*

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

Georgia, 467 U.S. 39, 48, 81 L. Ed. 2d 31, 39, 104 S. Ct. 2210, 2216 (1984).” This Court again instructed that “[t]he trial court shall then reduce those findings of fact and conclusions of law to writing[,]” and Defendant’s “appeal shall again be held in abeyance pending receipt of the trial court’s order.”

On 19 September 2012, Judge Philip Ginn entered an order containing written findings of fact as ordered by this Court.

II. Analysis

A. Closure of the Courtroom During K.D.’s Testimony

[1] On appeal, Defendant contends that his constitutional right to a public trial was violated when the trial court closed the courtroom during K.D.’s testimony without making findings of fact as required by *Waller v. Georgia*, 467 U.S. 39 (1984).¹ We disagree.

This Court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). Pursuant to the Sixth Amendment of the United States Constitution, a criminal defendant is entitled to a “public trial.” U.S. Const. amend. VI.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

1. The State asserts that Defendant did not preserve this constitutional argument for appeal. We disagree. Defendant objected to closure of the proceedings, and the trial court noted Defendant’s “exception to the ruling of the court to clear the courtroom.” Defendant’s right to a public trial is a Sixth Amendment right. U.S. Const. amend. VI. It is apparent, in this context, that Defendant’s objection to “clear[ing] the courtroom” was an objection to the prosecutor’s attempt to close the trial in violation of Defendant’s constitutional right to a public trial. *See* N.C. R. App. P. 10(a)(1) (2012) (stating that an objection is preserved so long as the specific ground for the objection is “apparent from the context”); *see also State v. Rollins*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 76 (2012) (holding that the defendant’s objection that the “[c]ourt should be open” was sufficient to preserve the constitutional argument for appeal); *compare State v. Cornell*, ___ N.C. App. ___, ___, 729 S.E.2d 703, 707 (2012) (holding that the defendant’s reference to the “First Amendment” during his motion to dismiss based upon the alleged insufficiency of the evidence did not preserve a constitutional issue for appeal because the trial court did not pass upon the constitutional question). Defendant’s constitutional argument was thus preserved and is properly before this Court on appeal.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

Waller, 467 U.S. at 46 (citations and quotation marks omitted). “[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.” *In re Oliver*, 333 U.S. 257, 270 (1948). “[T]he public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.” *In re Oliver*, 333 U.S. at 270.

The central aim of a criminal proceeding is to try the accused fairly and the public trial guarantee serves the purpose of ensuring that judge and prosecutor carry out their duties responsibly, encouraging witnesses to come forward, and discouraging perjury. Hence, the right to a public trial is not only to protect the accused but to protect as much the public’s right to know what goes on when men’s lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant.

Bell v. Jarvis, 236 F.3d 149, 165 (4th Cir. 2000) (citations and quotation marks omitted) (alterations removed). “The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis.” *Id.*

“Although there is a strong presumption in favor of openness, the right to an open trial is not absolute. The trial judge may impose reasonable limitations on access to a trial in the interest of the fair administration of justice.” *Bell v. Evatt*, 72 F.3d 421, 433 (4th Cir. 1995). “[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” *Waller*, 467 U.S. at 45.

Accordingly, within the boundaries of these constitutional principles, N.C. Gen. Stat. § 15-166 (2011) permits the exclusion of certain persons from the courtroom in cases involving rape and other sexually-based offenses:

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

Id. Before a trial court may allow a courtroom closure pursuant to N.C. Gen. Stat. § 15-166, however, the court must comply with the rule set forth in *Waller*; see, e.g., *State v. Smith*, 180 N.C. App. 86, 98, 636 S.E.2d 267, 275 (2006); *State v. Starner*, 152 N.C. App. 150, 154, 566 S.E.2d 814, 816-17 (2002); *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625 (1994), which requires the following:

- (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
- (2) the closure must be no broader than necessary to protect that interest;
- (3) the trial court must consider reasonable alternatives to closing the proceeding; and
- (4) the trial court must make findings adequate to support the closure.

Jenkins, 115 N.C. App. at 525, 445 S.E.2d at 625 (citing *Waller*, 467 U.S. at 48). “[W]hile the trial court need not make exhaustive findings of fact, it must make findings sufficient for this Court to review the propriety of the trial court’s decision to close the proceedings.” *Rollins*, ___ N.C. App. at ___, 729 S.E.2d at 79.

Here, the trial court memorialized the following pertinent findings of fact in its 19 September 2012 order:

1. The matter for courtroom closure came before this Court at trial specifically for the closure of the courtroom for the limited purpose of the State’s written Motion for Closure of the Courtroom for the Testimony of the Victim pursuant to N.C.G.S. § 15-166 (2010).
2. The victim in this matter was a young girl who, if she had not already turned 18, was near that age at the time of the trial and the testimony of the victim involved matters of a personal and delicate sexual nature.
3. The victim also had been in the custody of the defendant and his wife since an early age and her testimony included matters which began when she was less than ten years old.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

4. The Defendant's wife, the sole party whom the Defendant objected to . . . leaving the Courtroom during the Victim's testimony, had engaged in behavior designed to intimidate the then minor Victim after the Defendant's wife believed the minor Victim had reported the Defendant's conduct to law enforcement. This behavior on the part of the Defendant and his wife was testified to as part of these proceedings and included but is not limited to:

a. Canceling the minor Victim's health insurance, knowing she was a severe asthmatic requiring regular medication and medical treatment;

b. Filing a false police report against the minor Victim alleging she had stolen jewelry, when in fact she had not; testimony from a Detective from another agency who handled that theft allegation, testified to the same and that he had closed the case against the minor Victim filed by the Defendant and his wife;

c. Reporting the minor Victim as a run-away and requiring her to leave the home environment of the Victim's friend's parents whom the Victim had been staying with following the Defendant and his wife removing [her] from their home due to her allegations against the Defendant; the Defendant and his wife further required the Victim live in a teenage runaway shelter and later group home where they restricted her access to mail and contact from individuals supportive of the minor Victim;

d. Transferring the minor Victim into another high school to remove her from supportive friends; and

e. Discontinuing financial support of the minor Victim.

5. Further, the Victim testified outside the presence of the jury on issues related to 404(b) and 412. During that testimony and at other points during the Court's colloquy with her, she became very emotional, crying and becoming visibly upset and shaken in the Courtroom.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

6. The testimony of the victim involved sexual abuse by one standing in a parental role and which occurred at a time in which she was legally incapable of granting consent.

7. The testimony of the victim was of a graphic sexual nature making it uncomfortable for the witness to discuss openly.

8. The particular circumstances of this case involved sexual abuse of a minor who had been in the custody of both the defendant and wife and that at the time of the abuse the defendant had taken on the role of a parent.

9. The delicate nature of this relationship between the defendant, his wife and the victim [was] an integral part of her testimony during the trial.

10. There existed a particularly fragile mental and emotional state of the victim due to the circumstances of the crime and the prior attempted intimidation of the victim on the part of the defendant and his wife.

11. That the defendant had made a motion to sequester witnesses and had also listed the wife of the defendant as one of his witnesses.

12. The wife of the defendant was also called as a witness by the defendant during the course of his presentation of evidence.

. . . .

14. There were less than 8 spectators excluded from the courtroom and the only person excluded who was favorable to the defendant was his wife, who should have also been sequestered pursuant to the defendant's motion to sequester witnesses.

15. There was no media present in the courtroom who were excluded and no one from the media contacted the court at any time seeking admission.

16. The parties excluded by the Court had no actual knowledge of the specific facts committed by the defendant that led to the particular charges before the Court, including his wife.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

17. A chilling effect on the completeness and openness of the victim's testimony is likely to occur if she feels overly intimidated, embarrassed or emotional by the presence of the defendant's wife during the course of her testimony.

18. The victim will be less inhibited in testifying completely and the "chilling effect" will be reduced.

19. The overriding interest in providing an environment for truthful testimony of the victim and the pursuit of justice would be prejudiced by allowing the wife of the defendant and even other spectators who supported the defendant to be present during the testimony of the victim.

20. The courtroom was closed only temporarily for the limited purpose of the testimony of the victim and there were many other witnesses whose testimony was open to the public.

21. The defendant has access to a transcript of the testimony of the victim and the Court would have allowed a reasonable time in which the defendant, and any other person directed by the defendant and his counsel, could review its contents.

22. That no reasonable alternatives to closing the courtroom during the victim's testimony exist.

We believe these findings of fact show that the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure. We note Defendant's contention that findings of fact 10, 16, 17, and 19 are unsupported by the evidence of record, and, as such, they cannot support the trial court's conclusion that, in seeking closure, the State "advanced an overriding interest that [was] likely to be prejudiced" absent closure. However, "findings of fact" 17 and 19 set forth legal conclusions, and the portion of finding of fact 16 challenged by Defendant, namely, the finding that Connie "had no actual knowledge of the specific facts committed by the defendant that led to the particular charges before the Court," is supported by Connie's testimony on direct examination, during which

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

she denied knowledge of the abuse and stated that she “definitely” would have known if any sexual abuse or inappropriate touching of the victim had occurred in her house. Regardless, we conclude that the trial court’s remaining, detailed findings are sufficient to uphold its order, even in the absence of the findings at issue. We accordingly hold that the trial court complied with the requirements of *Jenkins* and *Waller*,² and Defendant’s contention is overruled.

II. Indictments, Jury Instructions, and Verdict Forms

[2] Defendant next contends that the trial court erred by denying his motions to dismiss, or by failing to arrest judgment, because the indictments, jury instructions, and verdict forms were “duplicitous” and “generic” in violation of his constitutional and statutory rights to a unanimous jury. We disagree.

We first address Defendant’s challenge to the sufficiency of the five indecent liberties indictments upon which he was charged. Defendant argues that the indictments were insufficient because they included “non-specific allegations” and the only distinction among them was the time frame within which the alleged acts occurred. This argument is meritless.

The sufficiency of an indictment is reviewed *de novo* on appeal. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). “In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense.” *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46 (1998). It is “generally true tha[t] an indictment need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged.” *Id.* Moreover, our courts have consistently held that the requirement of temporal specificity described under N.C. Gen. Stat. § 15A-924(a)(4) “diminishes in cases involving sexual assaults on children.” *Id.* at 696, 507 S.E.2d at 45.

Defendant was charged pursuant to N.C. Gen. Stat. § 14-202.1 (2011), which provides as follows:

2. We also note that the trial court’s findings of fact 4 and 13 set forth the erroneous conclusion of law that Defendant “did not raise a constitutional issue as to the closing of the courtroom[.]” Although this conclusion is contrary to *Jenkins*, 115 N.C. App. at 525, 445 S.E.2d at 625, and *Waller*, 467 U.S. at 48, as interpreted and applied in *Rollins*, ___ N.C. App. ___, 729 S.E.2d 73, this does not alter our determination that the trial court’s findings were sufficient to justify closure under *Jenkins* and *Waller*.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Id. Applying the foregoing principles to the five indictments brought against Defendant, we conclude that the indictments sufficiently informed Defendant of the conduct for which he was charged. Each of the indictments was couched in the language of the statute, and each indictment alleged that Defendant committed the subject offense within a specific, non-overlapping six month period between July 2005 and December 2007. For example, one indictment alleged the date of the offense as “[o]n, about or during 7/1/05 through 12/31/05[.]” while another stated, “[o]n, about or during 1/1/06 through 6/30/06[.]” Accordingly, we find no error in the indictments. *See Blackmon*, 130 N.C. App. at 697, 507 S.E.2d at 45 (holding that the eight indictments charging the defendant with multiple counts of first-degree statutory sexual offense and taking indecent liberties with a child were sufficiently specific where the only reference made to time or dates was that the “defendant committed the subject offenses between January 1 and September 12, 1994”).

[3] Defendant further contends that the trial court’s “generic” jury instructions and verdict sheets deprived him of his constitutional right to a unanimous jury verdict. More specifically, Defendant contends that because the State’s evidence “described multiple occurrences of the same form of touching[.]” because the jury instructions provided the “language of the indecent liberties statute[.]” and because the “only distinguishing feature” of the verdict forms “was the dates[.]” the instructions and verdict forms lacked “unanimity as to which criminal offense, and particularly the actus reus of any crime . . . [D]efendant committed.” We are not persuaded.

“Article I, Section 24 of the North Carolina Constitution states that “[n]o person shall be convicted of any crime but by the unani-

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

mous verdict of a jury in open court.’ ” *State v. Wilson*, 363 N.C. 478, 482-83, 681 S.E.2d 325, 329 (2009) (quoting N.C. Const. art. I, § 24) (alteration in original).

The transcript reveals that the trial court delivered the following instructions to the jury at the close of all the evidence:

Now, ladies and gentleman, the crime of indecent liberties is a single offense, which may be proved by evidence of the commission of any one or a number of acts. And the requirement of . . . unanimity . . . is met even if some jurors find that one type of sexual conduct occurred and others find that another has transpired.

In these cases, the defendant has been charged with five separate counts of taking indecent liberties with a child. While you need not agree, each agree to a specific act or attempt to act, you must agree unanimously that at least five distinct and separate acts or attempts occurred in order to convict the defendant of all five counts. Not only that, but *as to each count, you must unanimously agree that the specific act or attempt to act occurred during the time period set forth in the particular charge.*

Let me see if I can explain that to you. And in doing so, I'm just going to use the file numbers for your reference. And I guess this is as good a place as any to tell you, there are going to be five verdict sheets that are going to be sent back to you eventually, and these are set forth: The State of North Carolina vs. Joel Allen Comeaux. And they're going to have Buncombe County at the top, and there's going to be a file number up in the right-hand corner. And that's how you will delineate the difference in them. They're going to be identical except for that file number in the upper right-hand corner. And it just simply says:

We, the jury, unanimously return as our verdict that the defendant is:

1. Guilty of taking indecent liberties with a minor.
2. Not guilty.

And then there will be a place for the date and the signature of your foreperson.

STATE v. COMEAUX

[224 N.C. App. 595 (2012)]

But in taking these file numbers individually, in 09-CRS-63936, you must find that the events occurred during the time period between July 1, 2005 and December 31, 2005.

Likewise, in 63937, you must find that the events occurred between January 1, 2006 and June 30th of 2006.

In 63938, between July 1, 2006 and December 31, 2006.

In 63939, between January 1, 2007 and June 30th, 2007.

Finally, in 63940, between July 1, 2007 and December 31, 2007.

(Emphasis added).

The trial court's instructions explicitly distinguished among the five indecent liberties charges and directed the jurors to find Defendant guilty on each count only if they determined that Defendant had committed the requisite acts within the designated time period. The designated time periods were set forth in the indictments, and, as the court informed the jurors in its instructions, each verdict sheet was paired with a particular indictment as indicated in the top right-hand corner of the verdict sheet. We must presume that the jurors heeded these instructions, *see State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (1993) (presuming the jury "attend[s] closely[,] . . . strive[s] to understand, . . . and follow[s] the instructions given them'" (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985))), and it is evident that the jury was able to distinguish among the indictments and verdict sheets, as it convicted Defendant on only four of the five counts charged.

We note Defendant's assertion that "[a] denial of the right to a unanimous verdict of guilt occurs" where "there is evidence of more than one criminal offense which may be the basis for a particular verdict and, from the indictments, verdicts and jury instructions, there is no way to be certain that all twelve jurors found the state had proven beyond a reasonable doubt the elements of the same criminal offense for each guilty verdict." Defendant cites no authority in support of this proposition, and, indeed, this proposition is inconsistent with precedent set by our Supreme Court in *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006) (holding that the "defendant was unanimously convicted of three counts of indecent liberties with a

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

minor, notwithstanding that the short-form indictments charging each crime [were] identical[,]” and, further, that “a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents”). Defendant’s contention is meritless and is accordingly overruled.

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and ERVIN concur.

STATE OF NORTH CAROLINA

v.

WILLIAM P. DANIELS

No. COA12-417

Filed 31 December 2012

1. Jurisdiction—subject matter—constitutional challenge—statute divisible and separable—defendant not indicted under statute

The trial court lacked subject matter jurisdiction to rule that N.C.G.S. § 14-208.18(a)(2) was unconstitutional. N.C.G.S. § 14-208.18(a)(2) and (a)(3) are divisible, separable, and constitute separate crimes and defendant was only indicted on charges of violating N.C.G.S. § 14-208.18(a)(3).

2. Jurisdiction—standing—constitutional challenge—facial challenge—as-applied challenge

The trial court did not err by declaring N.C.G.S. § 14-208.18(a)(3) unconstitutional based on defendant’s lack of standing. Although defendant lacked standing to raise a facial challenge to the statute, defendant had standing to bring an as-applied challenge.

3. Constitutional Law—statute unconstitutionally void—as applied

The trial court did not err by entering an order declaring N.C.G.S. § 14-208.18(a)(3) unconstitutional as the statute is

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

unconstitutionally vague as applied to defendant upon the facts surrounding incidents involving defendant on 6 and 7 May 2009.

Appeal by the State of North Carolina from order entered 5 December 2011 by Judge Wayland J. Sermons, Jr., in Dare County Superior Court. Heard in the Court of Appeals 25 September 2012.

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

Glenn Gerding for Defendant.

THIGPEN, Judge.

The State of North Carolina (“the State”) appeals from an order entered 5 December 2011 declaring N.C. Gen. Stat. § 14-208(a)(2) and (a)(3) unconstitutional on grounds that both are unconstitutionally overbroad and unconstitutionally vague. We affirm in part and vacate in part.

The evidence of record tends to show the following: William Daniels (“Defendant”) is a convicted and registered sex offender, having been convicted of second degree rape in violation of N.C. Gen. Stat. § 14-27.3 on 10 October 1996 and assault with intent to commit rape in violation of N.C. Gen. Stat. § 14-22¹ on 12 September 1973.

On 6 May 2009, Defendant, along with Defendant’s wife and son, went to Westcott Park in Manteo, North Carolina. Westcott Park is maintained and operated by the Dare County Parks and Recreation Department and has three small fields used for tee ball or Little League baseball games. Westcott Park also has a facility called the Lion’s Club Center, which is used for community events, including, e.g., dance and gymnastics classes. The Lion’s Club Center provides office space for Dare County Parks and Recreation staff. Westcott Park is open between six to seven days per week, serving youths from age three to age eighteen. Tee ball, Cal Ripken’s, and Babe Ruth league games are played at the park. Baseball, soccer and other sports camps take place at Westcott Park during the summer season.

When Defendant and his family arrived at Westcott Park, Defendant’s daughter—for whom Defendant had come to deliver onion bulbs for planting—had been watching her grandson playing in a tee ball game at Westcott Park. The game had just ended, and par-

1. This statute was subsequently repealed by 1979 N.C. Sess. Laws, ch. 682, § 7.

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

ents were leaving with their children. Defendant, Defendant's wife and son, and Defendant's daughter met on the east side of the tee ball field, between the road and the field, and talked for about an hour. During this time, children were playing a boy's baseball game and a girl's softball game on the other fields.

On 7 May 2009, Defendant, along with his daughter and son-in-law, went to Walker Park in Wanchese, North Carolina, to practice softball. Walker Park is also maintained by the Dare County Parks and Recreation Department, and contains an adult baseball field, a youth baseball field, soccer fields, and a playground and picnic area. Defendant and his daughter and son-in-law were members of a coed softball league. While they practiced, Defendant's wife sat in the car to watch. They practiced playing softball for about an hour and a half.

Alan Moran ("Deputy Moran"), a deputy for the Dare County Sheriff's Office, was at Walker Park umpiring a tee ball game. Deputy Moran recognized Defendant and knew that Defendant was a registered sex offender. Deputy Moran contacted Deputy Shawn Barrera, who drove to Walker Park to confirm that Defendant was playing softball there.

On 6 December 2010, Defendant was indicted² on two charges of violating N.C. Gen. Stat. § 14-208.18(a)(3) in file numbers 09 CRS 50792 and 09 CRS 20796, which proscribes the following conduct: "It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations: . . . At any place where minors gather for regularly scheduled educational, recreational, or social programs." On 20 October 2010, Defendant filed a motion to declare N.C. Gen. Stat. § 14-208.18 unconstitutional, and on 13 April 2011, Defendant filed a superceding motion to declare N.C. Gen. Stat. § 14-208.18 unconstitutional. A hearing was held on 2 June 2011 on the question of the constitutionality of N.C. Gen. Stat. § 14-208.18. On 5 December 2011, the trial court entered a written order declaring N.C. Gen. Stat. §§ 14-208.18(a)(2) and (a)(3) unconstitutionally vague and overbroad and dismissing the pending charges

2. These two 6 December 2010 indictments were superceding indictments. The record shows that Defendant was first indicted on these two charges, in file numbers 09 CRS 50792 and 09 CRS 20796, on 8 June 2009. A superceding indictment in file number 09 CRS 50792 was filed on 6 December 2010. A superceding indictment in file number 09 CRS 20796 was filed on 15 March 2010, and a second superceding indictment was filed in file number 09 CRS 20796 on 6 December 2010.

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

against Defendant. On 7 December 2011, the State filed a written notice of appeal of the trial court's 5 December 2011 order.

On appeal, the State argues the trial court erred in entering the 5 December 2011 order declaring N.C. Gen. Stat. § 14-208.18 unconstitutional for the following reasons: (1) the trial court lacked subject matter jurisdiction to rule that N.C. Gen. Stat. § 14-208.18(a)(2) was unconstitutional because Defendant was only indicted on charges of violating N.C. Gen. Stat. § 14-208.18(a)(3); (2) the trial court erred because Defendant lacked standing to raise a facial challenge to the constitutionality of N.C. Gen. Stat. §§ 14-208.18(a)(2) and (a)(3); (3) the trial court erred because N.C. Gen. Stat. §§ 14-208.18(a)(2) and (a)(3) are not, in fact, unconstitutionally overbroad or vague. We address each argument in turn.

I: Jurisdiction

[1] In the State's first argument, it contends the trial court lacked subject matter jurisdiction to rule that N.C. Gen. Stat. § 14-208.18(a)(2) was unconstitutional because Defendant was only indicted on charges of violating N.C. Gen. Stat. § 14-208.18(a)(3). We agree.

A. Severability

The State's argument that the trial court did not acquire subject matter jurisdiction to enter an order on the constitutionality of N.C. Gen. Stat. § 14-208.18(a)(2) because Defendant was indicted pursuant only to a violation of N.C. Gen. Stat. § 14-208.18(a)(3) presumes that N.C. Gen. Stat. §§ 14-208.18(a)(2) and (a)(3) are severable. We first address the question of the severability of N.C. Gen. Stat. § 14-208.18(a)(1), (a)(2) and (a)(3).

Our Supreme Court has stated, in the context of the severability of a criminal statute, the following:

(I)t is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. . . .

In line with the rule of severability, the courts will decline to consider the constitutionality of a particular statutory provision where (1) that provision is not necessarily involved in the litigation before the court, and

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

(2) that provision may be severed from the provisions which are necessarily before the court.

The question whether the rule of severability shall be applied to save partially unconstitutional legislation from being struck down in toto (sic) involves, fundamentally, a determination of and conformity with the intent of the legislative body which enacted the legislation. However, in determining what was (or must be deemed to have been) the intention of the legislature, certain tests of severability have been developed. Thus, it is held that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions.

State v. Fredell, 283 N.C. 242, 244-45, 195 S.E.2d 300, 302 (1973) (quoting 16 Am. Jur. 2d, Constitutional Law §§ 181-182).

In this case, the trial court noted, and we also take into consideration, the severability clause in the legislative history of N.C. Gen. Stat. § 14-208.18. House Bill 933, Session Law 2008-117 § 21.1, which is a portion of the act that created these crimes, states the following: “If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.” *Id.* This severability clause, in addition to the separate, distinct delineations of types of behaviors prohibited in N.C. Gen. Stat. § 14-208.18(a)(1), (a)(2) and (a)(3), suggest to this Court that, when enacting N.C. Gen. Stat. § 14-208.18(a), the General Assembly intended to provide for “three separate and independent offenses, none dependent on the other.” *Fredell*, 283 N.C. at 247, 195 S.E.2d at 303. We therefore hold that N.C. Gen. Stat. § 14-208.18(a)(1), (a)(2) and (a)(3) are divisible and separable.

B. Subject Matter Jurisdiction

We next address the State’s argument on appeal that the trial court did not acquire subject matter jurisdiction to address the question of the constitutionality of N.C. Gen. Stat. § 14-208.18(a)(2).

“Jurisdiction [is] . . . the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

enforce a judgment[.]” *High v. Pearce*, 220 N.C. 266, 17 S.E.2d 108, 112 (1941). “Properly speaking, there can be no jurisdiction of the person where there is none of the subject matter, although the converse might indeed, and often does, occur.” *Id.* “Where there is no jurisdiction of the subject matter the whole proceeding is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose.” *Id.*

Jurisdiction of the subject matter of a criminal offense is derived from the law. *State v. Tickle*, 238 N.C. 206, 208, 77 S.E.2d 632, 634 (1953), *cert. denied*, 346 U.S. 938, 98 L. Ed. 426 (1954). N.C. Const. Art. IV, § 12(3) provides that “[e]xcept as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State.” *Id.* “The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division[.]” meaning, generally, that in criminal cases, superior courts have jurisdiction over felonies and, in some circumstances, misdemeanors. N.C. Gen. Stat. § 7A-271 (2011). However, “[p]rosecutions originating in the superior court must be upon pleadings as provided in Article 49[.]” N.C. Gen. Stat. § 15A-642 (2011). In Article 49, our General Assembly has required that “[t]he pleading in felony cases and misdemeanor cases initiated in the superior court division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. 15A-642.” N.C. Gen. Stat. § 15A-923 (2011); *see also State v. Willis*, 285 N.C. 195, 201, 204 S.E.2d 33, 37 (1974) (stating that “[t]he court acquires jurisdiction of the offense by valid information, warrant, or indictment”); *State v. Hardy*, 298 N.C. 191, 199, 257 S.E.2d 426, 431 (1979) (stating that “[a] valid warrant or indictment encompassing the offense for which the defendant is convicted is essential to the jurisdiction of the court. . . . [and a defendant] may not, upon his trial under that indictment, be lawfully convicted of any other criminal offense, whatever the evidence introduced against him may be; *State v. Wolfe*, 158 N.C. App. 539, 540-41, 581 S.E.2d 117, 118 (2003) (stating that “[b]oth our State Constitution and Criminal Procedure Act require indictment or waiver thereof in order for a superior court to have jurisdiction in a criminal case[.]” and holding that the trial court was without jurisdiction to rule upon the defendant’s motion to suppress and vacating the order entered by the trial court denying the defendant’s motion to suppress because the defendant had not been indicted or waived indictment at time of suppression hearing).

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

The superior court acquired subject matter jurisdiction over the two offenses charged in this case by means of two superseding indictments found to be true bills of indictment on 6 December 2010. Whether an indictment gives a trial court subject matter jurisdiction over a matter depends on whether the indictment alleges the essential elements of the crime charged. *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31–32 (2007), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008) (stating that “[w]hen an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment”) (internal citation and quotation marks omitted); *see also State v. Mather*, ___ N.C. App. ___, ___, 728 S.E.2d 430, 432 (2012) (stating that “[n]o indictment, whether at common law or under a statute, is sufficient if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged”) (internal citation and quotation marks omitted).

The question presented on appeal in this case, whether the trial court had subject matter jurisdiction to declare N.C. Gen. Stat. § 14–208.18(a)(2) unconstitutional depends on whether the indictment properly charged Defendant with a violation of N.C. Gen. Stat. § 14–208.18(a)(2). This question requires our Court to determine whether N.C. Gen. Stat. § 14–208.18(a)(2) and N.C. Gen. Stat. § 14–208.18(a)(3) constitute different crimes. The question of whether N.C. Gen. Stat. § 14–208.18(a)(2) and N.C. Gen. Stat. § 14–208.18(a)(3) constitute different crimes hinges upon whether the sections of N.C. Gen. Stat. § 14–208.18(a) define crimes with separate and distinct essential elements. *See, generally, Mather*, ___ N.C. App. at ___, 728 S.E.2d at 432.

In *State v. Harris*, ___ N.C. App. ___, 724 S.E.2d 633 (2012), this Court stated the following in determining whether an indictment alleging a violation of N.C. Gen. Stat. § 14–208.18(a)(1) was sufficient to confer subject matter jurisdiction on the trial court:

[T]he essential elements of the offense defined in N.C. Gen. Stat. § 14–208.18(a) are that the defendant was (1) knowingly on the premises of any place intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

an offense involving a victim who was under the age of 16 at the time of the offense.

Id. at ___, 724 S.E.2d at 637. However, in *State v. Herman*, ___ N.C. App. ___, 726 S.E.2d 863 (2012), this Court noted that an “offense pursuant to N.C. Gen. Stat. § 14–208.18(a)(1) and [an offense] . . . pursuant to N.C. Gen. Stat. § 14–208.18(a)(2) . . . would have different first ‘elements[.]’ ” *Id.* at ___, 726 S.E.2d at 867. Ultimately, neither *Herman* nor *Harris* are determinative of the question presented in this case, because both *Herman* and *Harris* construed only the language contained in N.C. Gen. Stat. § 14–208.18(a)—specifically, the portion of N.C. Gen. Stat. § 14–208.18(a) stating that “[i]t shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations[.]” *Id.*, and whether the foregoing language constituted an essential element.³ The Court did not, in either case, construe N.C. Gen. Stat. § 14–208.18(a)(1), (a)(2), and (a)(3) to determine whether the language in the different subsections of N.C. Gen. Stat. § 14–208.18(a) constituted different essential elements and, thereby, created different crimes.

Subsection (a) of N.C. Gen. Stat. § 14-208.18, which is entitled “Sex offender unlawfully on premises,” provides the following:

- (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
 - (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children’s museums, child care centers, nurseries, and playgrounds.

3. In *Herman*, the Court held that the “indictment before us fails to allege that defendant was convicted of an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense[.]” and therefore, the “trial court did not have subject matter jurisdiction to consider a charge against defendant based on N.C. Gen. Stat. § 14–208.18(a)[.]” *Id.* at ___, 726 S.E.2d at 867. Likewise, in *Harris*, the Court held that “[a]n allegation that the underlying offense requiring sex offender registration was an offense listed in Article 7A of Chapter 14 of the North Carolina General Statutes or involved a victim under the age of 16 is an essential element for purposes of the offense set out in N.C. Gen. Stat. § 14–208.18(a) and cannot, for that reason, be treated as mere surplusage.” *Id.* at ___, 724 S.E.2d at 639.

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

- (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
- (3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

Id. On its face, the foregoing statute provides three distinct scenarios in which a defendant may unlawfully be on certain premises: (1) on the premise of any place intended primarily for the use of minors; (2) within 300 feet of any location intended primarily for the use of minors; and (3) at any place, regardless of the intent of its primary use, where minors gather for regularly scheduled programs. *Herman*, ___ N.C. App. at ___, 726 S.E.2d at 867, stands for the proposition that the three provisos in N.C. Gen. Stat. § 14-208.18 create three distinct crimes, because the Court in *Herman* stated, in dicta, that an “offense pursuant to N.C. Gen. Stat. § 14–208.18(a)(1) and [an offense] . . . pursuant to N.C. Gen. Stat. § 14–208.18(a)(2) . . . would have different first ‘elements[.]’ ” *Id.* Moreover, the Court in *Harris*, ___ N.C. App. at ___, 724 S.E.2d at 637, provided the essential elements of the crime defined by N.C. Gen. Stat. § 14–208.18(a)(1) in its analysis by reciting the language contained *only* in N.C. Gen. Stat. § 14–208.18(a)(1), without reference to N.C. Gen. Stat. § 14–208.18(a)(2) or (a)(3). The foregoing suggests that three crimes, with distinct elements, are defined in N.C. Gen. Stat. § 14–208.18(a). Therefore, based on the foregoing, we conclude that N.C. Gen. Stat. § 14–208.18(a)(1), (a)(2), and (a)(3) create separate and distinct criminal offenses, each with its own set of essential elements require to be proven by the State.

We now address the question of whether the indictments in this case were sufficient to confer subject matter jurisdiction on the trial court to determine whether N.C. Gen. Stat. § 14–208.18(a)(2) was constitutional. In this case, the first indictment against Defendant stated the following:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

named above the defendant named above unlawfully, willfully and feloniously did, as a person subject to the registration provisions of Article 7A of Chapter 14 of the North Carolina General Statutes in that he was convicted of 2nd Degree Rape ([N.C. Gen. Stat. §] 14-27.3) on 10/10/1996 in Dare County Superior Court, was (sic) knowingly present *at Walker Park*, a Dare County Parks and Recreation facility, located at 206 Pond Road, Wanchese, NC, which is *a place where minors gather for regular scheduled educational, recreational or social programs*. At the time of the offense, minors were present at the park playing tee-ball. (emphasis added).

The second indictment differed only as to the particular park at which Defendant was alleged to have knowingly been present and stated the following:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did, as a person subject to the registration provisions of Article 7A of Chapter 14 of the North Carolina General Statutes in that he was convicted of 2nd Degree Rape ([N.C. Gen. Stat. §] 14-27.3) on 10/10/1996 in Dare County Superior Court, was knowingly present at The Lions Club Center *at Wescott Park*, a Dare County Parks and Recreation facility, located at 1000 Wescott Park Drive, Manteo, NC, which is *a place where minors gather for regular scheduled educational, recreational or social programs*. At the time of the offense, minors were present at the park playing tee-ball. (emphasis added).

Both of the foregoing indictments charge violations of N.C. Gen. Stat. § 14–208.18(a)(3) and do not charge violations of N.C. Gen. Stat. § 14–208.18(a)(2). As such, the trial court did not have subject matter jurisdiction to rule upon any challenge brought by Defendant with regard to N.C. Gen. Stat. § 14–208.18(a)(2).⁴ The portions of the trial court’s order declaring N.C. Gen. Stat. § 14-208.18(a)(2) unconstitu-

4. Because we conclude the trial court did not have subject matter jurisdiction to rule upon any challenge brought by Defendant as to N.C. Gen. Stat. § 14–208.18(a)(2), we need not address the State’s argument regarding Defendant’s standing to challenge N.C. Gen. Stat. § 14–208.18(a)(2) or the constitutionality of N.C. Gen. Stat. § 14–208.18(a)(2).

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

tional are, therefore, void. *Wolfe*, 158 N.C. App. at 541, 581 S.E.2d at 118 (holding that because the trial court did not have subject matter jurisdiction to rule on the defendant's motion to suppress that "[the] order is void and the judgments entered upon defendant's pleas must therefore be vacated"). Resultantly, we need not address the State's remaining arguments pertaining to N.C. Gen. Stat. § 14-208.18(a)(2). See *Fredell*, 283 N.C. at 247, 195 S.E.2d at 303 (stating that "[c]ourts are reluctant to hold invalid any Act of the General Assembly[,] [and] [b]efore deciding any Act unconstitutional the question must be squarely presented by a party whose rights are directly involved[;] [c]ourts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution" (internal citations and quotation marks omitted)).

II. Standing

[2] In the State's second argument on appeal, the State contends the trial court erred in declaring N.C. Gen. Stat. § 14-208.18(a)(3) unconstitutional because Defendant lacked standing to raise a facial challenge to the constitutionality of N.C. Gen. Stat. § 14-208.18(a)(3). We agree that Defendant did not have standing to raise a facial challenge to N.C. Gen. Stat. § 14-208.18(a)(3). However, Defendant had standing to bring an as-applied challenge against N.C. Gen. Stat. § 14-208.18(a)(3), with regard to the facts surrounding his arrest for being "at any place[,]" *Id.*, on 6 May 2009 and 7 May 2009, on the issue of whether N.C. Gen. Stat. § 14-208.18(a)(3) is unconstitutionally vague.

"A litigant who challenges a statute as unconstitutional must have standing. To have standing, he must be adversely affected by the statute." *State v. Barker*, 138 N.C. App. 304, 307, 531 S.E.2d 228, 230, *cert. denied*, 352 N.C. 592, 544 S.E.2d 787 (2000) (citation and quotation marks omitted).

As a general proposition, the vagueness of a criminal statute must be judged in the light of the conduct that is charged to be violative of the statute. In other words, the question is whether the statute is unconstitutionally vague as applied to the defendant's actions in the case presented. Thus a party receiving fair warning, from the statute, of the criminality of his own conduct is not entitled to attack the statute on the ground that its language would not give fair warning with respect to other conduct. If, however, the statute reaches "a substantial

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

amount of constitutionally protected conduct,” the statute is vulnerable to a facial attack. In this event, the defendant can challenge the constitutional vagueness of the statute, even though his conduct clearly is prohibited by the statute.

State v. Nesbitt, 133 N.C. App. 420, 424, 515 S.E.2d 503, 506-07 (1999) (internal citations omitted). “A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully.” *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281 (1998) (citation and quotation marks omitted). “An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid.” *Id.* at 491, 508 S.E.2d at 282; *see also U.S. v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987).

We believe there are sets of circumstances under which the statute is *not* vague as to prohibitions regarding a defendant’s presence at a place. N.C. Gen. Stat. § 14-208.18(a)(3). For example, N.C. Gen. Stat. § 14-208.18(a)(3) would have clearly prohibited Defendant from entering onto a baseball field where children have regularly scheduled games. “One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” *Barker*, 138 N.C. App. at 307, 531 S.E.2d at 230 (2000) (holding that the defendants did not have standing to challenge a statute forbidding the operation of a motorcycle or moped upon a highway “[u]nless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles” because the defendants were not wearing any safety helmets at all) (quoting *Parker v. Levy*, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 458 (1974)). “A statute which by its terms, or as authoritatively construed, applies without question to certain activities, but whose application to other behavior is uncertain, is not vague as applied to ‘hard-core’ violators of the statute.” *Barker*, 138 N.C. App. at 307, 531 S.E.2d at 230 (2000). Therefore, Defendant does not have standing to bring a facial challenge against N.C. Gen. Stat. § 14-208.18(a)(3).

In this case, however, Defendant has standing to bring an as-applied challenge against N.C. Gen. Stat. § 14-208.18(a)(3) on the facts surrounding the 6 May 2009 and 7 May 2009 incidents. Defendant argues that the portion of N.C. Gen. Stat. § 14-208.18(a)(3) which prohibits Defendant from knowingly being “at any place” where minors gather for regularly scheduled programs is unconstitu-

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

tionally vague. There is no definition for “place” in Article 27A, the Sex Offender and Public Protection Registration Program. *See* N.C. Gen. Stat. § 14–208.6.

With regard to the 6 May 2009 incident, Defendant was indicted on a charge of violating N.C. Gen. Stat. § 14-208.18(a)(3) by being present at a place “kind of close to the parking lot area” of Westcott Park. Defendant’s daughter, when looking at a map of the Westcott Park, gave the following explanation:

[T]his is the road that you have to walk down beside along the fence and get here to the bleachers. As I was leaving off the bleachers you have to come by the dugout[.] . . . And then you walk out here. As I got in this section . . . that is when [Defendant] met me and handed me the onion bulbs.

The defense attorney asked the trial court to “let the record reflect that [Defendant’s daughter] met [Defendant] between the ball park and the road that accesses Westcott Park[,]” and the trial court responded, “Record will so reflect.” At a different point in the daughter’s testimony, she affirmed that she met Defendant on 6 May 2009 “out kind of close to the parking lot area or that little dirt road area[.]”

We believe the facts of this case, regarding the events of 6 May 2009, are sufficient to give Defendant standing to challenge N.C. Gen. Stat. § 14-208.18(a)(3) on the ground that it is unconstitutionally vague as applied to Defendant in this case. In other words, we do not believe it would be clear to a reasonable person whether being “kind of close to the parking lot area” of a park is conduct that might put him at risk of violating N.C. Gen. Stat. § 14-208.18(a)(3) which prohibits sex offenders from being “[a]t any place where minors gather for regularly scheduled educational, recreational, or social programs.” *Id.* (emphasis added). Therefore, we conclude Defendant had standing to bring a challenge regarding the vagueness of N.C. Gen. Stat. § 14-208.18(a)(3) as applied to him upon the particular set of facts surrounding the 6 May 2009 incident.

We also believe Defendant has standing to bring an applied constitutional vagueness challenge against N.C. Gen. Stat. § 14-208.18(a)(3) upon the set of facts surrounding the 7 May 2009 incident. On 7 May 2009, Defendant, along with his daughter and son-in-law, went to Walker Park where, for about an hour and a half, they practiced softball on the diamond of the “adult softball field” located at the park “adjacent” to a field where “Deputy Alan Moran . . . was

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

off duty and umpiring a tee ball game.” Defendant practiced at the third base on the “adult softball field.” With regard to the 7 May 2009 incident, we do not believe it would be clear to a reasonable person whether being on an “adult softball field” that is adjacent to a “tee ball” field is conduct that might put him at risk of violating N.C. Gen. Stat. § 14-208.18(a)(3) which prohibits sex offenders from being “[a]t any place where minors gather for regularly scheduled educational, recreational, or social programs.” *Id.* (emphasis added).

III: Constitutionality

[3] In the State’s final argument on appeal, it contends the trial court erred in entering the order declaring N.C. Gen. Stat. § 14-208.18(a)(3) unconstitutional, because N.C. Gen. Stat. § 14-208.18(a)(3) is not, in fact, unconstitutionally vague. We disagree and conclude that N.C. Gen. Stat. § 14-208.18(a)(3) is unconstitutionally vague as applied to Defendant upon the facts surrounding the 6 May 2009 incident and 7 May 2009 incident.

“The standard of review for questions concerning constitutional rights is *de novo*.” *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009), *cert. denied*, ___ U.S. ___, 177 L. Ed. 2d 337, *aff’d*, 364 N.C. 404, 700 S.E.2d 215 (2010). “Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act.” *Id.* “In passing upon the constitutionality of [a] statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision.” *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 770-71 (1961).

In *Hales*, 256 N.C. 27, 122 S.E.2d 768, the Court stated the following:

“A criminal statute must be definite as to the persons within the scope of the statute and the acts which are penalized. If it is not definite, the due process clause of State Constitutions and of the Fifth and Fourteenth Amendments of the Federal Constitution, whichever is applicable, is violated. If the statute is so vague and uncertain that a reasonable man would be compelled to speculate at his peril whether the statute permits or prohibits the act he contemplates committing, the statute is unconstitutional. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable

STATE v. DANIELS

[224 N.C. App. 608 (2012)]

precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct.”

Id. (quoting Wharton’s Criminal Law and Procedure, Vol. I, § 18). We reiterate that “a statute is unconstitutionally vague if it either: (1) fails to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’; or (2) fails to ‘provide explicit standards for those who apply [the law].’” *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 556, 553 S.E.2d 217, 218 (2001), *disc. review denied and appeal dismissed*, 355 N.C. 221, 560 S.E.2d 359 (2002) (alteration in original) (quoting *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999)). “A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999).

In this case, Defendant argues the phrase “at any place” is unconstitutionally vague. We believe it is unclear on the evidence presented in this particular case whether Defendant was “at any place” proscribed by N.C. Gen. Stat. § 14-208.18(a)(3) on 6 May 2009 and on 7 May 2009. On those dates, Defendant was “out kind of close to the parking lot area or that little dirt road area[,]” between the ballpark and the road, and Defendant was on an “adult softball field” adjacent to a “tee ball” field. We believe the portion of N.C. Gen. Stat. § 14-208.18(a)(3), “at any place,” is unconstitutionally vague as applied to Defendant upon the facts surrounding the 6 May 2009 and 7 May 2009 incidents because it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and it fails to provide explicit standards for those who apply the law. *Sanford Video & News, Inc.*, 146 N.C. App. at 556, 553 S.E.2d at 218. We therefore affirm the portion of the trial court’s order concluding that N.C. Gen. Stat. § 14-208.18(a)(3) is unconstitutionally vague as to the 6 May 2009 and 7 May 2009 incidents.

AFFIRMED, in part; VACATED, in part.

Judge McGEE concurs.

Judge BEASLEY concurs in result only.

Judge Beasley concurred in this opinion prior to 18 December 2012.

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

STATE OF NORTH CAROLINA

v.

BRANDI LEA GRAINGER

No. COA12-444

Filed 31 December 2012

1. Accomplices and Accessories—instruction erroneously not given—direct or constructive presence

The trial court erred by not instructing the jury on accessory before the fact to first-degree murder in a prosecution where the evidence indicated that defendant and others planned the killing of her father, she dropped off two men near his house, waited at a K-Mart, and picked them up at a Food Lion after the killing. There was no evidence that defendant was present when the crime was committed, no evidence of the distance from her father's house to the K-Mart or Wal-Mart, and none of the evidence mentioned by the State showed that defendant remained close enough to be able to render assistance if needed.

2. Accomplices and Accessories—instruction not given—no jury determination of uncorroborated testimony—prejudicial

The trial court's failure to give an instruction on accessory before the fact in a first-degree murder prosecution was prejudicial because the proper instruction to the jury would have been accompanied by a question to the jury regarding the basis of its verdict, which in turn would have determined whether defendant should have been sentenced to a class A or class B felony. N.C.G.S. § 14-5.2 provides for sentencing for a Class B felony if an accessory before the fact is sentenced for a capital felony and is convicted upon the uncorroborated testimony of principals, coconspirators, or accessories. Defendant was not tried capitally, but first-degree murder is a capital crime because death is a potential punishment, and the language of the statute requires that the jury determine whether the conviction was based solely on the uncorroborated testimony of principals, coconspirators, or accessories.

Appeal by defendant from judgment entered on or about 4 October 2011 by Judge Edgar B. Gregory in Superior Court, Randolph County. Heard in the Court of Appeals 29 November 2012.

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

Attorney General Roy A. Cooper, III, by Assistant Attorney General Mary Carla Hollis, for the State.

Duncan B. McCormick, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting her of first degree murder, arguing that the trial court erred in failing to provide the jury with an instruction for accessory before the fact of first degree murder. For the following reasons, we remand for a new trial.

I. Background

The State's evidence tended to show that in 2008, Mr. Phillip Mabe, Mr. Dylan Boston, defendant's mother, and defendant planned to murder defendant's father. On the day of the murder, defendant picked up Mr. Mabe and Mr. Boston and drove them to her father's home. Mr. Boston brought a gun, and defendant dropped both men off near the home where defendant's father was located and drove away. Defendant later told Detective Ed Blair of the Randolph County Sheriff's Office that she drove to a Kmart after dropping Mr. Mabe and Mr. Boston off near her father's home.¹ Once inside the home, Mr. Mabe shot and killed defendant's father. Mr. Mabe and Mr. Boston then went through a lock box and took a few items to make it appear that a robber had killed defendant's father; they then left in defendant's father's car. Mr. Boston called defendant, and she met them in a Food Lion parking lot a minute or two after they arrived.²

Defendant was indicted for first degree murder. During defendant's trial, defendant requested that the jury be instructed on accessory before the fact of first degree murder; the trial court denied defendant's request. The jury found defendant guilty of first degree murder. Defendant was sentenced to life imprisonment without parole. Defendant appeals.

1. We have not found nor has the State directed our attention to, any evidence in the record of the distance from defendant's father's house to Kmart.

2. We have not found nor has the State directed our attention to, any evidence in the record of the distance from defendant's father's house to Food Lion. We realize that the trial judge and jurors in Randolph County may have been familiar with the locations of the local Kmart and Food Lion, but we cannot discern these distances, even by judicial notice, without evidence of the miles between locations, addresses or travel time between locations.

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

II. Requested Jury Instruction

[1] Defendant's only contention on appeal is that

the court erred by refusing to instruct the jury on the lesser included offense of accessory before the fact to first degree murder where the jury could have concluded that . . . [defendant] was an accessory and that her conviction was solely based on the uncorroborated testimony of Dylan Boston.

Defendant requested that an accessory before the fact to first degree murder instruction be given, and the trial court declined to give it. "We review the trial court's denial of the request for an instruction on the lesser included offense de novo." *State v. Laurean*, ___ N.C. App. ___, ___, 724 S.E.2d 657, 660, *disc. review denied and appeal dismissed*, ___ N.C. ___, 731 S.E.2d 416 (2012).

A. Failure to Provide Requested Jury Instruction Was Error

In *State v. Willis*, the defendant appealed and made the same argument as defendant here assigning error

to the failure of the court to submit to the jury as a possible verdict accessory before the fact of murder. . . .

. . . .

[The defendant] contend[ed] that there was evidence from which the jury could find she was an accessory before the fact of first degree murder and the evidence against her consisted of the uncorroborated testimony of principals or accessories. If the jury had so found, she would have escaped the death penalty.

332 N.C. 151, 176, 420 S.E.2d 158, 170 (1992).

Our Supreme Court stated,

N.C.G.S. § 14-5.2 provides:

All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B felony.

. . . .

An accessory before the fact is one who is absent from the scene when the crime was committed but who participated in the planning or contemplation of the crime in such a way as to counsel, procure, or command the principal(s) to commit it. Thus, the primary distinction between a principal in the second degree and an accessory before the fact is that the latter was not actually or constructively present when the crime was in fact committed.

The crime of accessory before the fact to first degree murder is a lesser included offense of first degree murder. If there is evidence showing the commission of a lesser included offense, the judge must instruct on this offense. If all the evidence shows the commission of the greater offense, the court should not charge on the lesser included offense simply because the jury might not believe some of the evidence.

In this case, all the evidence showed that when the killing occurred, the defendant Cox was on the front porch of her house within sight of the killing, which was done at the end of her driveway. If the jury believed this evidence, it would have to find the defendant Cox was at least constructively present as we have defined it. It was not error to decline to submit accessory before the fact as a lesser included offense. This assignment of error is overruled.

Id. at 176-77, 420 S.E.2d at 170 (citations and quotation marks omitted).

Here, the State has not directed our attention to any evidence which indicates defendant was actually present during the commission of the crime; the evidence indicated that defendant dropped Mr. Boston and Mr. Mabe off near her father's home and then met them

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

again after the murder was completed and the men had left the crime scene. The evidence does not reveal the actual distance between the murder scene and the Kmart, where defendant claimed she waited during the murder, or the location of the Food Lion, where defendant met Mr. Boston and Mr. Mabe after the murder. The evidence shows that Mr. Boston and Mr. Mabe drove defendant's father's car from the crime scene to Food Lion and indicates that it took at least a few minutes to drive between these two locations; the evidence further shows that it took defendant a minute or two longer to arrive at the Kmart parking lot than it did Mr. Mabe and Mr. Boston. Thus, considering all this evidence, even in the light most favorable to the State, it appears that the murder scene was not immediately adjacent to either Kmart or Food Lion. Thus, we must consider whether defendant was constructively present while her father was being murdered. "A person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *Id.* at 175, 420 S.E.2d at 169.

The State contends that the evidence shows defendant was constructively present during the commission of the crime and directs this Court's attention to cases in which constructive presence was found on the part of the defendant; however, in all of these cases there was evidence the defendant actually remained near the crime scene with the purpose of rendering aid. *See State v. Price*, 280 N.C. 154, 156-59, 184 S.E.2d 866, 868-69 (1971) (noting that the defendant waited by the corner of the store where a man was robbed in order to pick up the robbers and stating, "The remaining question is whether the evidence is sufficient to show that the defendant was a perpetrator of it. One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, *remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator.* By its express terms G.S. § 14-87 extends to one who aids and abets in an attempt to commit armed robbery. The State's evidence, considered as above stated, is ample to support a finding by a jury that the defendant so participated in the attempt to rob Lowery." (emphasis added) (citation omitted)); *State v. Pryor*, 59 N.C. App. 1,

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

9, 295 S.E.2d 610, 616 (1982) (“The State’s evidence was sufficient for the jury to find that the defendant dropped the perpetrators off, *waited in the vicinity, was in a position to aid them by providing the get-away car*, and that this aid constituted knowing encouragement to the commission of the armed robbery.” (emphasis added) (quotation marks omitted)); *State v. Gregory*, 37 N.C. App. 693, 695, 247 S.E.2d 19, 21 (1978) (“The evidence shows that the three planned the crime, drove to the scene in defendant’s car, and *defendant remained waiting in the area*. Newsome testified that ‘John (*defendant*) would *drive his car there for the pickup*. When we went out of the theater, we proceeded to walk across the street to the parking deck. We got to the parking deck and then turned and walked up towards Oberlin Road. As we neared Oberlin Road, I saw John’s car. John pulled out to meet us.’” (emphasis added) (ellipses and quotation marks omitted)).

Here, the evidence showed that defendant’s possible criminal actions occurred before the commission of the murder and after Mr. Mabe and Mr. Boston had committed the murder and had already safely left the crime scene. None of the evidence mentioned by the State shows that defendant remained “close enough to be able to render assistance if needed[.]” *Willis*, 332 N.C. at 175, 420 S.E.2d at 169. Instead, this case is more akin to *State v. Wiggins*, wherein

[t]he evidence . . . show[ed] that defendant was not actually present during the perpetration of the robbery but was in a house ten to fifteen blocks away. However, the actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. See for instance, *State v. Chastain*, 104 N.C. 900, 10 S.E. 519, where defendant was 150 yards from the scene, armed with a rifle which would be fatal at that distance, with intent to use it to back up his brother, the perpetrator, if required. A guard who has been posted to give warning, or the driver of a get-away car, may be constructively present at the scene of a crime although stationed a convenient distance away. One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. A person is deemed to be constructively present if he is near enough to render assistance if need be and to encourage the actual perpetration of the felony.

There is no evidence in the record which would support a finding that at the time the robbery was committed, defendant was situated where he could give Anderson any advice, counsel, aid, encouragement or comfort, if needed, while Anderson was perpetrating the robbery. Thus, defendant was neither actually nor constructively present at the time, and he could be guilty, at most, of being an accessory before the fact. An accessory before the fact is one who meets every requirement of a principal in the second degree except that of presence at the time. The evidence here would support a conviction for an accessory before the fact to armed robbery.

16 N.C. App. 527, 530-31, 192 S.E.2d 680, 682-83 (1972) (citations and quotation marks omitted).

Here, there was no evidence that defendant was constructively present and thus “close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime.” *Willis*, 332 N.C. at 175, 420 S.E.2d at 169. Without evidence of defendant’s actual or constructive presence at the scene of the crime during the time her father was being murdered, the evidence against defendant showed only that she was “[a]n accessory before the fact . . . [in that she was] absent from the scene when the crime was committed but . . . participated in the planning or contemplation of the crime in such a way as to counsel, procure, or command the principal(s) to commit it.” *Id.* at 176, 420 S.E.2d at 170. Accordingly, the trial court erred in failing to instruct the jury on accessory before the fact to first degree murder. *See Wiggins*, 16 N.C. App. at 531, 192 S.E.2d at 682-83.

B. Failure to Provide Requested Jury Instruction Was Prejudicial

[2] Citing N.C. Gen. Stat. § 14-5.2, defendant contends that the trial court’s error in failing to properly instruct the jury resulted in prejudice as with a proper instruction she may have only been sentenced to a class B2 felony rather than a class A felony. N.C. Gen. Stat. § 14-5.2 provides,

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. *However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony.*

N.C. Gen. Stat. § 14-5.2 (2007) (emphasis added). The State contends that any error on the part of the trial court in the jury instructions was not prejudicial as the State presented overwhelming evidence of first degree murder and the second sentence of N.C. Gen. Stat. § 14-5.2 is not applicable to defendant.

1. Capital Felony

The first requirement of N.C. Gen. Stat. § 14-5.2 for defendant to have the potential of being sentenced to a Class B2 felony is that she was “convicted of a capital felony[.]” *Id.* Defendant was not tried capitally; however, defendant was convicted of first degree murder, “a capital felony[.]” N.C. Gen. Stat. § 14-5.2; *see State v. Cummings*, 352 N.C. 600, 631-32, 536 S.E.2d 36, 58-59 (2000), *cert. denied*, 532 U.S. 997, 149 L.Ed. 2d 641 (2001). Our Supreme Court has determined that the designation of “a capital felony” depends upon the fact that the death penalty is a potential punishment for the crime; even if a defendant is not tried capitally, first degree murder is still “a capital felony[.]” N.C. Gen. Stat. § 14-5.2; *Cummings*, 352 N.C. at 631-32, 536 S.E.2d at 58-59. In *Cummings*, our Supreme Court addressed this issue:

Defendant argues, therefore, that since he was not eligible for the death penalty by virtue of his plea, he was not convicted of a capital felony We disagree.

. . . In defining a capital felony, it is necessary to interpolate definitions outlined in two different statutes. Section 14-17 of our General Statutes provides that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premedi-

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

tated killing shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000. Section 15A-2000(a)(1) defines a capital felony as one which may be punishable by death. Reading these two sections together, there is no question that first-degree murder is a capital felony, and that the test is not the punishment which is imposed, but that which may be imposed. . . .

. . . A crime which is statutorily considered a capital felony maintains that status even if a defendant's case is not tried as a capital case. It is enough that if a defendant was tried capitally and convicted, he could have received a death sentence. Therefore, although defendant pled guilty to first-degree murder and, under the now repealed N.C.G.S. § 15-162.1, his case was not a capital case, the crime of first-degree murder was still a capital felony.

352 N.C. at 631-32, 536 S.E.2d at 58-59 (citations, quotation marks, ellipses, and brackets omitted); *see also* N.C. Gen. Stat. §§ 14-17 (2007) (“[M]urder in the first degree [is] a Class A felony, and any person who commits such murder shall be punished with death or imprisonment[.]”); 15A-2000(a)(1) (2007) (“A capital felony is one which may be punishable by death.”)

Defendant was therefore “convicted of a capital felony.”

2. Uncorroborated Testimony

Defendant argues that Mr. Boston's “testimony was critical to the first degree murder conviction. He testified that the plan was to kill the father and that he and [Mr. Mabe] went to the home to kill the father and for no other reason. [Defendant] denied any such intent.” Defendant contends that she was convicted based upon the “uncorroborated testimony” of a principal. N.C. Gen. Stat. § 14-5.2. The State argues, and we agree, that the record before us includes ample evidence corroborating the testimony of Mr. Boston. Other witnesses and evidence such as surveillance cameras corroborated various significant aspects of Mr. Boston's testimony. Yet this Court cannot determine that “the jury” did or did not “base[]” defendant's “conviction” “solely on the uncorroborated testimony” of Mr. Boston. *Id.*

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

The language of N.C. Gen. Stat. § 14-5.2 requires that “the jury” determine whether the “conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime[.]” *Id.* As the standard jury instruction in North Carolina Pattern Instruction—Criminal (“N.C.P.I.”) 101.15 states, the jury is “the sole judge[.] of the believability of (a) witness(es). [It] must decide for [itself] whether to believe the testimony of any witness. [It] may believe all, any part, or none of a witness’s testimony.” N.C.P.I.-Crim. 101.15. N.C.P.I. 101.20 provides that the jurors are “the sole judges of the weight to be given any evidence.” N.C.P.I.-Crim. 101.20. Accordingly, the jury itself must determine the credibility and weight of all of the evidence. *See* N.C.P.I.-Crim. 101.15, .20. Only the jury knows the evidence upon which it “base[d]” its verdict. *See* N.C. Gen. Stat. § 14-5.2. Thus, the jury itself must determine whether the testimony of “principals, coconspirators, or accessories to the crime” is corroborated so that the trial court may properly sentence a defendant of a class A or a class B2 felony. *See* N.C. Gen. Stat. § 14-5.2. Failure to submit this issue to the jury results in prejudicial error as there is no record of whether the jury viewed the testimony of the “principals, coconspirators, or accessories to the crime” as uncorroborated. N.C. Gen. Stat. § 14-5.2; *see State v. Larrimore*, 340 N.C. 119, 173, 456 S.E.2d 789, 818 (1995) (“In the instant case, the trial court failed to submit the special question to the jury regarding the basis of its verdict. Therefore, there is no record as to whether the jury based its decision solely on the uncorroborated testimony of McMillian or considered the corroborating evidence presented at trial as well. This constitutes error on the part of the trial court.” (quotation marks omitted))³.

3. We note that the Court in *Larrimore* concluded that the defendant was not prejudiced due to the failure of the trial court “to submit the special question to the jury regarding the basis of its verdict” because the sentencing structure at the time would result in a sentence of life imprisonment for both class A and class B felonies; however, the Court specifically noted that its holding was limited to convictions before 1994 as the new sentencing structure would result in different sentences for class A and class B felonies. *See Larrimore*, 340 N.C. at 173, 456 S.E.2d at 818-19 (“In the instant case, as in *Tucker*, were we to send this matter back to the trial court for resentencing as a Class B felony, the outcome in terms of sentence would be no different. N.C.G.S. § 15A-1371(a1) provides that a prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. No distinction is made between a Class A life sentence and a Class B life sentence either in sentencing or in the manner in which the Department of Correction handles an individual. Throughout the General Statutes regarding parole and other sentence reducing considerations, Class A and Class B are consistently grouped together, as opposed to Class C and lower felonies. For the aforementioned reasons, we do not find that the defendant has been prejudiced by the trial court’s error. We note, however, that this

STATE v. GRAINGER

[224 N.C. App. 623 (2012)]

Defendant was prejudiced as the proper instruction to the jury would have been accompanied by “the special question to the jury regarding the basis of its verdict” which in turn would have determined whether defendant should have been sentenced to a class A or class B felony. *Larrimore*, 340 N.C. at 173, 456 S.E.2d at 818; *see* N.C. Gen. Stat. §§ 15A-1443 (2007) (“A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.”), 14-5.2; *see also* N.C.P.I.-Crim. 202.30. Accordingly, defendant must receive a new trial.

III. Conclusion

For the foregoing reasons, we remand for a new trial.

NEW TRIAL.

Judge ELMORE concurs.

Judge BEASLEY concurred prior to 17 December 2012.

holding is limited to cases tried on or before 1 October 1994, as the new sentencing guidelines effective that date create marked distinctions between Class A and Class B felonies.” (citations, quotation marks, and brackets omitted)). Pursuant to North Carolina General Statute § 15A-1340.17 class A felonies subject a criminal to “[l]ife [i]mprisonment [w]ithout parole or [d]eath as [e]stablished by [s]tatute” whereas class B2 felonies subject a criminal to a specific number of months of imprisonment. N.C. Gen. Stat. § 15A-1340.17 (2007).

STATE v. OATES

[224 N.C. App. 634 (2012)]

STATE OF NORTH CAROLINA

v.

ANDREW JACKSON OATES

No. COA10-725-2

Filed 31 December 2012

Search and Seizure—search warrant—probable cause—anonymous tip—nexus—warrant affidavit

The trial court erred in a possession of a firearm by a convicted felon case by granting defendant's motion to suppress evidence seized as a result of a search of defendant's residence. Under the totality of the circumstances, a second anonymous tip had sufficient indicia of reliability, there was a sufficient nexus between the contraband and defendant's residence, and the warrant affidavit provided sufficient probable cause to permit the search of defendant's residence.

Appeal by the State from order entered 22 March 2010 by Judge Russell J. Lanier, Jr. in Superior Court, Sampson County. Heard in the Court of Appeals 30 November 2010. By opinion filed on 6 September 2011, the Court of Appeals dismissed the State's appeal. By opinion filed 5 October 2012, the North Carolina Supreme Court vacated this Court's opinion and remanded for further consideration.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joan M. Cunningham, for the State.

Anne Bleyman, for defendant-appellee.

STROUD, Judge.

This matter is before the Court on remand from the North Carolina Supreme Court. For the following reasons, we reverse the trial court's order granting defendant's motion to suppress and remand for further proceedings.

I. Background

On 7 September 2007, Judge Paul Hardison of District Court, Sampson County authorized a search warrant of defendant's residence at 451 McKoy Street, Clinton, North Carolina. As a result of that search, defendant was found to be in possession of a firearm and, on 25 February 2008, he was indicted for one count of possession of a firearm by a convicted felon. On or about 19 November 2009, defend-

STATE v. OATES

[224 N.C. App. 634 (2012)]

ant filed a motion to suppress evidence seized by police as a result of the 7 September 2007 search of defendant's residence. Defendant's motion to suppress came up for hearing at the 14 December 2009 Criminal Session of Superior Court, Sampson County. In open court, the trial court granted defendant's motion to suppress. The State filed written notice of appeal from the trial court's order on 30 December 2009. On 22 March 2010, the trial court entered a written order granting defendant's motion to suppress. On appeal, the State contends that the trial court erred in granting defendant's motion to suppress and "concluding that the affidavit supporting the issuance of the search warrant was insufficient to establish probable cause to search defendant's residence[.]"

This Court dismissed the State's appeal as untimely by opinion filed 6 September 2011. *State v. Oates*, ___ N.C. App. ___, 715 S.E.2d 616 (2011). In its opinion filed 5 October 2012, the Supreme Court vacated this Court's decision, holding that the State timely filed their notice of appeal, and remanded for consideration of the other issues raised. *State v. Oates*, ___ N.C. ___, 732 S.E.2d 571 (2012). Accordingly, we will consider the substantive issues raised by the parties.

II. Motion to Suppress

In our review of a trial court's ruling on a defendant's motion to suppress, the trial court's "findings of fact will be binding on appeal if supported by competent evidence. The trial court's findings of fact must support the conclusions of law, and the conclusions of law are reviewable *de novo*." *State v. Hensley*, 201 N.C. App. 607, 609, 687 S.E.2d 309, 311, (citations omitted), *disc. rev. denied*, 364 N.C. 244, 698 S.E.2d 662 (2010). If the State fails to challenge the trial court's findings of fact, "they 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. rev. denied*, 358 N.C. 240, 594 S.E.2d 199 (2004).

A. Findings of Fact

The State makes no challenge to the trial court's findings of fact #1-15 and #17; therefore they are binding on appeal. *See id.* The State does not argue that the findings are not supported by the evidence but only that "finding of fact #16 is incomplete and finding of fact #18 is actually a conclusion of law." As to finding of fact #16, it appears that the trial court summarized the information in the application for a search warrant:

STATE v. OATES

[224 N.C. App. 634 (2012)]

16. That the information set forth in the application for search warrant and affidavit to establish probable cause states that an “anonymous caller” states, in summary, that Julio Keith is Andrew Oates’ stepson, was coming to North Carolina to stay with his stepfather and had been observed somewhere wrapping guns. (emphasis in original)

Yet the State concedes that “the trial court was not required to make findings of fact[,]” as “there was no material conflict in the evidence” because “[t]here was no testimony taken at the hearing on defendant’s motion to suppress” and the only facts before the trial court were from the application for the search warrant. *See State v. Haymond*, 203 N.C. App. 151, 158, 691 S.E.2d 108, 116 (even though the defendant contended that certain facts had been omitted from the trial court’s findings because the detective “intentionally omitted material facts from his application for the search warrant . . . [that] would have disclosed that no probable cause existed[,]” this Court stated that “[w]here there is no material conflict in the evidence, findings and conclusions are not necessary even though the better practice is to find facts[,]” and therefore, “we must only consider whether the trial court’s conclusions are supported by the evidence.”), *disc. review denied*, 364 N.C. 600, 704 S.E.2d 275 (2010). Therefore, we need not further examine the trial court’s finding #16.

The trial court’s finding of fact #18 states:

18. That there is nothing stated in the application for the search warrant or the affidavit to establish probable cause that there had been, or was going to be any criminal activity taking place at the residence to be searched, or that the Defendant Andrew Oates, or Julio Keith, possessed, or were going to possess, any drugs or weapons at the residence to be searched.

As finding of fact #18 makes a determination as to whether the warrant application was sufficient to show probable cause, we agree with the State that finding #18 is a conclusion of law. *See Peoples v. Peoples*, 10 N.C. App. 402, 408, 179 S.E.2d 138, 141 (1971) (defining a “conclusion of law” as “the court’s statement of the law applicable to a case in view of certain facts found to be true or assumed by the jury to be true: the final judgment or decree which the law requires in view of the facts found or the verdict brought in.”). Accordingly, we turn to the State’s arguments challenging the trial court’s conclusions of law.

STATE v. OATES

[224 N.C. App. 634 (2012)]

B. Conclusions of law

In addition to finding of fact #18, the State challenges all of the trial court's other conclusions of law made in its written order granting defendant's motion to suppress:

[(1)] [N]either the application for the search warrant, nor the affidavit to support probable cause by S/A K. Eason provide probable cause for the issuance and execution of the search warrant.

[(2)] [T]here is no nexus created in the application for the search warrant, nor in the affidavit to establish probable cause by S/A K. Eason, that anyone had seen any drugs or guns at the residence to be searched, nor that there were going to be drugs or guns at the residence to be searched and that the information received from both callers was anonymous and there is insufficient indicia as to their reliability nor is there sufficient corroborating information as to their reliability.

[(3)] [N]o where in the application for the search warrant and affidavit to establish probable cause is stated a nexus for a probable cause for a search of the Defendant's residence at 451 McKoy Street, Clinton, NC 28328.

[(4)] [T]he conduct of the officers in this case violated the Defendant's Fourth and Fourteenth amendment rights as secured to him by the United States Constitution as well as the rights secured to him by the North Carolina Constitution and that said conduct was in violation of N.C.G.S. Article 11, Chapter 15A.

Specifically, the State contends that the trial court's conclusions of law are erroneous because the affidavit did provide sufficient probable cause to permit the search of defendant's residence where "the informant's information was reliable, corroborated and there was a clear nexus between the items to be seized and the premises to be searched." Defendant contends that "[t]he trial court correctly granted [defendant's] motion to suppress[,] as "the affidavit and the rest of the application in support of the search warrant did not provide probable cause for the issuance of the search warrant."

In the application for the 7 September 2007 search warrant, Kellie Eason, Special Agent for the North Carolina Bureau of Investi-

STATE v. OATES

[224 N.C. App. 634 (2012)]

gation, made the following averments as to probable cause to search defendant's residence:

On Thursday, September 6, 2007, Clinton Police Department Narcotics Detective D. Grady received a telephone call from a caller that wished to remain anonymous. The caller [stated that] Michelle Brown is the "common law" wife to Julio Keith, also known as "Poppy". Both Michelle Brown and Julio Keith reside in New York.

—The caller stated Julio Keith was on Federal Probation and was not to leave New York. The caller stated the reason Julio Keith was on Probation was due to drug charges. That caller said Julio Keith had drug charges in North Carolina.

—The caller stated he/she observed Julio Keith wrapping up guns in brown paper, bubble wrap and a long sheet of drawing paper. The caller observed four handguns. The caller described one gun being the size of a hand with a slide on top.

—The caller overheard a conversation which Julio Keith's wife asked "you're going down with a whole kilo?" The caller stated he/she has observed Julio Keith with drugs in the past. The caller stated Julio Keith has secreted drugs in his anal cavity to avoid being caught by law enforcement.

—According to the caller, Julio Keith was driven to North Carolina by someone else. Julio Keith left New York on Friday, August 31, 2007 arriving in Clinton, North Carolina on Saturday, September 1, 2007 at night. Julio Keith made the statement he could make more money selling drugs in North Carolina. According to the caller, Julio Keith left New York because he thought he had sold drugs to an undercover officer. Julio Keith said he would return to New York in a week.

—The caller stated Julio Keith was staying with his parents, Jessica and Andrew Oates, located at 451 McKoy Street in Clinton, North Carolina. Detective Grady checked with City of Clinton Water and Sewer Department and determined an Andrew Oates is listed

STATE v. OATES

[224 N.C. App. 634 (2012)]

as the customer at 451 McKoy Street, Clinton, North Carolina.

—The caller stated Andrew Oates is Julio Keith’s step-father. According to the caller, Andrew Oates had killed someone.

—The caller described Julio Keith as a light skin, half Puerto Rican half black male with numerous tattoos, one of which said “NY”.

—This Affiant contacted Officer Jim Long of US Probation and Parole Greensboro, North Carolina office on Thursday, September 6, 2007. Officer Long stated he last met with Julio Keith on September 20, 2004. Julio Keith requested a transfer of his probation to the Southern District of New York. Julio Keith’s transfer to New York was effective October 20, 2004.

—This Affiant obtained a North Carolina DMV photograph of Julio Keith. Detective Grady identified Julio Keith as the individual he observed on the front porch of 451 McKoy Street, Clinton, North Carolina on Thursday, September 6, 2007 at 3:22 p.m. Detective Grady also observed a vehicle at the residence registered to Andrew Oates.

—This Affiant obtained a copy of Julio Keith’s Criminal History which included the following information: Lists Julio Keith’s alias names as Poppyates Keith, X Poppyoates, Julia Keith, Poppy Keith, Poppy Oates, Julio S. Keith and Andrew Kennedy. Julio Keith has been charged with possession of Cocaine and Obstruct and Delay by Sampson County Sheriff’s Office, Possession of Stolen Firearm and Carrying Concealed Weapon by Clinton Police Department and Robbery with a Dangerous Weapon by Clinton Police Department. Julio Keith is currently serving Federal Probation stemming from charges of Conspiracy to Distribute Cocaine and Distribution of Crack Cocaine.

—On or about June 4, 2007, Detective Grady received a telephone call from an unidentified male stating 451 McKoy Street was a drug house and something needed to be done about it.

STATE v. OATES

[224 N.C. App. 634 (2012)]

—This Affiant obtained a copy of Andrew Oates Criminal History which showed Oates being charged with murder August 16, 1991 by Sampson County Sheriff's Office. Oates plead guilty to second degree murder and was sentenced to nine years confinement. Andrew Oates criminal history was obtained utilizing the information provided by Andrew Oates to the City of Clinton Water and Sewer Department.¹

Our Supreme Court has stated that “[t]he Fourth Amendment to the Federal Constitution prohibits the issuance of a search warrant except upon a finding of probable cause for the search.” *State v. Miller*, 282 N.C. 633, 638, 194 S.E.2d 353, 356 (1973); see *State v. McKinney*, 361 N.C. 53, 57, 637 S.E.2d 868, 871-72 (2006) (“The Fourth Amendment to the United States Constitution protects individuals ‘against unreasonable searches and seizures’ and provides that search warrants may only be issued ‘upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.’” (quoting U.S. Const. amend. IV)). N.C. Gen. Stat. § 15A-244 (2009) states that an application for a search warrant must contain:

- (1) The name and title of the applicant; and
- (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
- (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
- (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

1. The affidavit did not list the calls received in chronological order; in the affidavit, the 4 June 2007 call was listed after the more detailed 6 September 2007 call. For the sake of clarity, we will refer to the June call as the “first call” and the September call as the “second call.”

STATE v. OATES

[224 N.C. App. 634 (2012)]

“Reviewing courts should give great deference to the magistrate’s determination of probable cause and should not conduct a de novo review of the evidence to determine whether probable cause existed at the time the warrant was issued.” *McKinney*, 361 N.C. at 62, 637 S.E.2d at 875 (citation and quotation marks omitted).² Our Supreme Court has adopted the “totality of the circumstances” test for determining the existence of probable cause:

The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a “substantial basis for . . . conclud[ing] that probable cause existed.”

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L.Ed. 2d 527, 548 (1983)). “When the application is based upon information provided by an informant, the affidavit should state circumstances supporting the informant’s reliability and basis for the belief that a search will find the items sought.” *State v. Washburn*, 201 N.C. App. 93, 100-01, 685 S.E.2d 555, 560-61 (2009) (citation omitted), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). The information contained in the affidavit “must establish a nexus between the objects sought and the place to be searched.” *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citations omitted). “In cases involving an informant’s tip probable cause is determined by a totality of the circumstances test after balancing the various indicia of reliability and unreliability attendant to the informant’s tip.” *State v. Green*, 194 N.C. App. 623, 630, 670 S.E.2d 635, 640, *aff’d*, 363 N.C. 620, 683 S.E.2d 208 (2009). Accordingly, we first address the State’s arguments as to the informant’s reliability.

2. We note that in this case, a district court judge made the determination as to probable cause in the search warrant application, rather than a magistrate. The same standard would apply to our review of a determination of probable cause by either a district court judge or a magistrate.

STATE v. OATES

[224 N.C. App. 634 (2012)]

1. Informant's Reliability

The State first contends that “[u]nder the totality of the circumstances, the affidavit provides sufficient facts to show the informant’s basis of knowledge and reliability.” Defendant counters that “the anonymous sources were not sufficiently reliable or corroborated and did not provide probable cause.”

When evaluating the reliability of an informant’s tip “the informant’s veracity, reliability, and basis of knowledge must be considered.” *State v. Williams*, ___ N.C. App. ___, ___, 703 S.E.2d 905, 910 (2011) (citation omitted). “Several factors are used to assess reliability [of an informant’s tip] including: (1) whether the informant was known or anonymous, (2) the informant’s history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police.” *Green*, 194 N.C. App. at 627, 670 S.E.2d at 638 (citations and quotation marks omitted); see *State v. Earhart*, 134 N.C. App. 130, 134, 516 S.E.2d 883, 886 (“[I]ndependent police corroboration of the facts given by the informant are important in evaluating the reliability of the informant’s tip.”), *appeal dismissed*, 351 N.C. 112, 540 S.E.2d 372 (1999). We consider the totality of the circumstances in determining whether an informant’s tip “sufficiently provides indicia of reliability[.]” *Williams*, ___ N.C. App. at ___, 703 S.E.2d at 910 (quoting *Gates*, 462 U.S. at 233, 76 L.Ed. 2d at 545).

An anonymous tipster obviously cannot have a verifiable “history of reliability,” see *Green*, 194 N.C. App. at 627, 670 S.E.2d at 638, so in this situation, corroboration of facts provided by the tipster is the most useful method of determining the tipster’s veracity and reliability. In this case, the law enforcement officers independently confirmed many of the facts provided by the tipster and they did not find any inaccuracies in the tipster’s facts. Agent Eason’s affidavit in the application for the search warrant contained very specific information from the second anonymous caller regarding Mr. Keith and defendant, and much of that information was verified by Agent Eason. The anonymous caller stated, and Agent Eason independently confirmed, that Mr. Keith was known as “Poppy” and resided in New York; Mr. Keith was on federal probation in New York as the result of drug charges; Mr. Keith had prior drug charges in North Carolina; Mr. Keith was present at his parents’ home at 451 McKoy Street in Clinton, North Carolina; defendant was Mr. Keith’s stepfather; and defendant “had killed someone.” Agent Eason checked Mr. Keith’s

STATE v. OATES

[224 N.C. App. 634 (2012)]

criminal history which showed that some of Mr. Keith's alias names included: "Poppyates Keith, X Poppyoates, . . . Poppy Keith, [and] Poppy Oates[;]" Agent Eason talked with Officer Jim Long of Federal Probation and Parole and was told that Mr. Keith was on federal probation in North Carolina but his probation had been transferred to New York on 20 October 2004. Agent Eason confirmed that Mr. Keith was "serving Federal Probation stemming from charges of Conspiracy to Distribute Cocaine and Distribution of Crack Cocaine[;]" and according to his criminal record, Mr. Keith had been charged in North Carolina with drug and weapon charges, "possession of Cocaine" and "Possession of Stolen Firearm and Carrying Concealed Weapon . . . and Robbery with a Dangerous Weapon." After obtaining a North Carolina DMV photograph of Mr. Keith, Detective Grady of the Clinton Police Department, at 3:22 p.m. on 6 September 2007, observed and identified Mr. Keith on the front porch of the residence at 451 McKoy Street in Clinton, North Carolina. Detective Grady checked with City of Clinton Water and Sewer Department and determined that defendant was listed as a customer at 451 McKoy Street in Clinton and that a car parked at the residence was registered to defendant. Agent Eason checked defendant's criminal record and discovered that defendant had been charged with murder in 1991 but had "plead guilty to second degree murder and was sentenced to nine years confinement." Additionally, a prior anonymous caller on 4 June 2007 told police "451 McKoy Street was a drug house and something needed to be done about it." Although the information provided by the first anonymous caller alone certainly would not have been sufficient to support issuance of a search warrant, it tended to support the additional and more detailed information provided by the second anonymous caller. Given the specific information supplied by the anonymous callers, much of which was verified by Agent Eason, we hold that, in the totality of the circumstances, the second anonymous tip had sufficient indicia of reliability. *See State v. Brown*, 199 N.C. App. 253, 258-59, 681 S.E.2d 460, 464 (2009) (holding that because the police independently corroborated "the substantial amount of information [the informant] provided with facts gathered throughout the investigation" the Court concluded that "[t]he substantial level of detail and the independent corroboration indicated the reliability of the information [the informant] provided to [the police officer] under a totality of circumstances analysis."); *State v. Bone*, 354 N.C. 1, 10-11, 550 S.E.2d 482, 488 (2001) (as police were able to independently corroborate "almost all of the information in the anonymous tip" with the particular facts about the crime uncovered during the investigation,

STATE v. OATES

[224 N.C. App. 634 (2012)]

this corroboration was an indication of reliability, and gave credibility to the anonymous tipster.), *cert. denied*, 535 U.S. 940, 152 L.Ed. 2d 231 (2002).

2. Sufficient Nexus to Defendant's Residence

The State next contends that the trial court erred in concluding that Agent Eason's affidavit did not contain a sufficient nexus between the objects sought and the place to be searched. Defendant contends that the trial court was correct in its conclusion that "no where in the application for the search warrant and affidavit to establish probable cause is stated a nexus for a probable cause for a search of the Defendant's residence at 451 McKoy Street, Clinton, NC 28328." As noted above, the affidavit in support of a search warrant "must establish a nexus between the objects sought and the place to be searched. Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357 (citations omitted). But when "[t]here is no firsthand evidence in the affidavits supporting this search warrant application that [contraband] had been observed . . . North Carolina case law supports the premise that firsthand information of contraband seen in one location will sustain a finding to search a second location." *Id.* at 576-77, 397 S.E.2d at 357. "However, evidence obtained in one location cannot provide probable cause for the search of another location when the evidence offered does not 'implicate the premises to be searched.'" *Washburn*, 201 N.C. App. at 101, 685 S.E.2d at 561 (quoting *State v. Goforth*, 65 N.C. App. 302, 308, 309 S.E.2d 488, 493 (1983)).

Here, the affidavit provided sufficient nexus between the contraband and defendant's residence at 451 McKoy Street in Clinton, North Carolina. The second anonymous caller gave firsthand observations and information regarding Mr. Keith's involvement in criminal activity in New York: the caller had seen Mr. Keith with drugs and had overheard Mr. Keith's wife asking him a question regarding a quantity of drugs; the caller had seen Mr. Keith wrapping up handguns in bubble-wrap and paper, even though he was on federal probation; Mr. Keith was leaving New York because he believed that he had sold drugs to an undercover officer; and Mr. Keith was traveling to North Carolina to sell drugs. The trial court seemed to place special emphasis in finding of fact No. 16 upon the fact that the anonymous caller did not state exactly where Mr. Keith was seen wrapping up the guns,

STATE v. OATES

[224 N.C. App. 634 (2012)]

but his location when he was wrapping the guns was not nearly as important as the information that he was travelling to a specific location—the home of “his parents, Jessica and Andrew Oates, located at 451 McKoy Street in Clinton, North Carolina”—apparently with the guns, for the purpose of selling drugs. Law enforcement officers observed Mr. Keith at this residence on 6 September 2007. Additionally, the first anonymous caller had also stated to police on 4 June 2007 that “451 McKoy Street was a drug house and something needed to be done about it.” Given the second informant’s firsthand observations of Mr. Keith’s involvement with illegal drugs and guns in New York, *see McCoy*, 100 N.C. App. at 576-77, 397 S.E.2d at 357; Mr. Keith’s plans to travel at a specific time to North Carolina to sell drugs and to stay in defendant’s residence; and the confirmation that Mr. Keith was actually staying at defendant’s residence during that specific time does “implicate the premises to be searched[.]” *see Washburn*, 201 N.C. App. at 101, 685 S.E.2d at 561, and, therefore, provided a sufficient nexus between the contraband and defendant’s residence. *See McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357.

It is true that only Mr. Keith, and not defendant, was personally implicated in ongoing criminal activity by the second anonymous caller, but the focus of the search warrant in question was not the person to be searched, but the place to be searched, as is proper under N.C. Gen. Stat. § 15A-244(2) (2007), which requires probable cause that items subject to seizure “may be found in or upon a *designated or described place*, vehicle, or person[.]” The nexus between defendant’s residence and contraband was established, and it was simply defendant’s misfortune that he allowed his stepson to stay at his home, thus leading the police to discover the guns as a result of their investigation of Mr. Keith’s activities at defendant’s residence.

3. Probable Cause to Search Defendant’s Residence

Lastly, we address the issue of whether the affidavit provided sufficient information to provide probable cause to search defendant’s residence. The State argues that “the information contained in the affidavit was sufficient under the totality of the circumstances test for the issuing judicial official to make a threshold determination that there was a ‘fair probability’ that guns and drugs would be at 451 McKoy Street, Clinton, and probable cause existed to search for them there.” Defendant counters that “[t]he trial court correctly concluded that the application in support of the search warrant did not provide probable cause to search [defendant’s] residence.” Defendant claims

STATE v. OATES

[224 N.C. App. 634 (2012)]

that the information provided by the two anonymous callers was too vague to support probable cause and that much of the information was “stale” as it related to past criminal activity by Mr. Keith and defendant.

As to vagueness, defendant argues that the first anonymous caller, in June, simply called the residence a “drug house” and provided no more specific information as to how the caller would have known this information, exactly what type of drugs were being sold, or who was selling them. But as we previously noted, the information from the first anonymous caller alone was not the basis of the affidavit or the finding of probable cause; it was the more specific information from the second anonymous caller. As to the second anonymous caller, defendant argues that the caller did not personally see the drugs and did not state specifically that Mr. Keith would be taking a “kilo” or the guns to defendant’s house. Yet as we previously discussed, the second caller did provide many facts which were independently confirmed by law enforcement and considering all of the information provided in its entirety, logical conclusion was that Mr. Keith was coming to stay at defendant’s house to sell illegal drugs and that he possessed several guns. As we have previously determined, this information created a nexus between defendant’s residence and the contraband which was the subject of the search warrant, and as such was not too vague to support the finding of probable cause.

Defendant also contends that some of the information was too old to support the issuance of the warrant. Mr. Keith’s criminal history was included as part of the affidavit in support of probable cause to search defendant’s residence. Defendant argues that the specific dates for Mr. Keith’s prior convictions were not provided. We have stated that “[w]hen evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale.” *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred. “Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best.” LaFave, *supra* § 3.7(a) at 78. “However, where the affi-

STATE v. OATES

[224 N.C. App. 634 (2012)]

davit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.” *U.S. v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale.

Id.

Defendant is correct that the affidavit does not state the dates of Mr. Keith’s previous drug and weapon charges in North Carolina. But Mr. Keith’s probation was transferred from North Carolina to New York in 2004, so it could be inferred that these offenses happened prior to 2004, while Mr. Keith was living in North Carolina. But even without an exact time period, these previous offenses coupled with the additional information in the “affidavit properly recite[] facts indicating activity of a protracted and continuous nature, a course of conduct[,]” *see id.*, as Mr. Keith was placed on federal probation as early as 2004 in North Carolina for drug-related charges. Even though Mr. Keith was still on federal probation in New York, he was observed wrapping and packaging handguns which he could not legally possess; Mr. Keith continued to sell drugs in New York; and, in late August 2007, Mr. Keith had plans to travel to North Carolina for the purpose of selling drugs. In fact, his trip to North Carolina itself would be a violation of his probation. Thus, this information shows a pattern of involvement with weapons and illegal drugs from before 2004 up until August 2007. Accordingly, “the passage of time becomes less significant[,]” and “evidence of previous criminal activity” by Mr. Keith was not stale. *See id.*

The district court in making its “practical, common sense decision” could have determined from Agent Eason’s affidavit that Mr. Keith, a person with a history of involvement in the illegal drug trade, had left New York for the purpose of selling drugs in North Carolina, and because he had a history of drug and gun offenses in North Carolina could have inferred that Mr. Keith would be in possession of drugs and/or guns at defendant’s residence as he would be residing there during his week-long visit to North Carolina. In addition, the district court judge made his decision regarding the issuance of the search warrant knowing that Agent Eason had only a short time to act on the anonymous informant’s tip. The second anonymous informant called on 6 September 2007 and reported that Mr. Keith had arrived on 1 September 2007 for a week-long stay, so that Agent Eason had

STATE v. OATES

[224 N.C. App. 634 (2012)]

only one or two days to corroborate the information and to act on the informants' tips. Despite the shortness of time, Agent Eason corroborated a great deal of the information provided by the second informant prior to applying for the search warrant. Therefore, in applying the totality of the circumstances test prescribed in *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58, and giving proper deference to the decision of the district court to issue the search warrant, see *McKinney*, 361 N.C. at 62, 637 S.E.2d at 875, we hold that the search warrant application provided a substantial basis for the district court judge to conclude there was probable cause to believe drugs and/or guns would be found in defendant's home.³ See *Brown*, 199 N.C. App. at 259-60, 681 S.E.2d at 464-65 (the informant's tip combined with the independent corroboration of that information during the subsequent police investigation provided sufficient "probable cause to arrest defendant"); *Bone*, 354 N.C. at 11, 550 S.E.2d at 488 (holding that the anonymous tip independently corroborated by police established probable cause for the warrantless arrest of defendant.). Therefore, as the warrant affidavit provided sufficient probable cause to permit the search of defendant's residence, the trial court erred in allowing defendant's motion to suppress. Accordingly, we reverse the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge BEASLEY concurred prior to 17 December 2012.

3. Even though defendant was not the main focus of the information supporting the search warrant, as both Mr. Keith and defendant were convicted felons, possession of firearms by either one of them would be a crime, even if illegal drugs were not found in the residence.

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

TD BANK, N.A., SUCCESSOR-IN-INTEREST TO CAROLINA FIRST BANK,
A SOUTH CAROLINA CORPORATION

v.

CROWN LEASING PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY;
MELVIN RUSSELL; AND TIMOTHY J. BLANCHAT

No. COA12-648

Filed 31 December 2012

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

Although defendants' appeal from the denial of their motion for change of venue was from an interlocutory order, it affected a substantial right and was immediately appealable.

2. Venue—plaintiff nonresident and defendant resident—proper in county defendant resides at commencement of action

The trial court erred by denying defendants' motion for change of venue from Buncombe County to Catawba County. In a civil action in this state where venue is not specifically designated by N.C.G.S. §§ 1-76 through 1-81, where the plaintiff is a nonresident and the defendants are residents, the proper venue for the action pursuant to N.C.G.S. § 1-82 is any county in which defendants reside at the commencement of the action. Defendants were residents of Catawba County at the commencement of this action.

Appeal by Defendants from order entered 18 February 2012 by Judge Sharon Tracey Barrett in Buncombe County Superior Court. Heard in the Court of Appeals 23 October 2012.

Moore & Van Allen PLLC, by Daniel G. Clodfelter, for Plaintiff.

Young, Morphis, Bach & Taylor, L.L.P., by Jimmy R. Summerlin, Jr., for Defendants.

THIGPEN, Judge.

Crown Leasing Partners, LLC, a North Carolina Limited Liability Company ("Defendant Crown Leasing"), Melvin Russell Shields ("Defendant Shields"), and Timothy J. Blanchat ("Defendant Blanchat") (together, "Defendants") appeal from an order entered denying their motion for change of venue from Buncombe County to Catawba County. We reverse and remand the order of the trial court.

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

The evidence of record tends to show the following: TD Bank, N.A., (“Plaintiff”) is a National Association organized and existing under the National Bank Act under the supervision of the Office of the Comptroller of Currency, and Plaintiff is the successor to Carolina First Bank, a corporation formerly organized and existing under the laws of the State of South Carolina and formerly authorized to conduct business in the State of North Carolina. On 6 October 2011, Plaintiff filed a complaint¹ in Buncombe County, North Carolina, against Defendants, all of whom are residents of Catawba County, North Carolina.

On 5 December 2011, Defendants filed a motion to dismiss for improper venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2011), or alternatively, a motion to change venue pursuant to N.C. Gen. Stat. §§ 1-83(1) and (2) (2011). As a third alternative, Defendants moved that the complaint should be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(5) (2011), due to insufficiency of service of process. However, Defendants withdrew their motions to dismiss pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 12(b)(3) and Rule 12(b)(5) at trial.

In Defendants’ motion to change venue pursuant to N.C. Gen. Stat. § 1-83(1) and (2), they argued that “Plaintiff is a National Association and is not a resident of the State of North Carolina and that Defendants are all residents of Catawba County, North Carolina.” Defendants also contended that “most, if not all, witnesses expected to be called herein are residents of Catawba and/or Burke Counties, North Carolina[,]” and “a foreclosure proceeding concerning the Deed of Trust alleged to secure the debt alleged in the Complaint is presently pending in Catawba County, North Carolina.”

At the hearing on their motion, Defendants stated the following:

Your Honor, venue in this action is controlled by General Statute 1-82 which provides that unless otherwise specifically designated, in Article 7 of the General

1. Plaintiff’s complaint contained two causes of action: (1) that Defendant Crown Leasing, breached the terms of a promissory note that Defendant Crown Leasing had executed to Plaintiff, as successor in interest to Carolina First Bank, on 30 January 2008 in the original principal amount of \$880,000.00, which was secured by a deed of trust in the Catawba County Registry; and (2) that Defendant Shields and Defendant Blanchat were personally liable for the amount owed by Defendant Crown Leasing on the promissory note, because Defendant Shields and Defendant Blanchat personally guaranteed, by execution of guaranty agreements on 30 January 2008, payment upon default by Defendant Crown Leasing.

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

Statutes the case must be tried in the county where the plaintiffs or the defendants or any of them reside. Your Honor, in this case all of the defendants reside in Catawba County, North Carolina, and TD Bank, the plaintiff, does not reside in the state of North Carolina. TD Bank is a national association incorporated under the laws of the National Bank Act. It has its executive offices in Maine and New Jersey. It's not been domesticated into North Carolina and is not subject to the North Carolina Business Corporations Act. It's not a registered entity with the North Carolina Secretary of State Corporations Division. Your Honor, based on that, the fact that TD Bank is a foreign entity not registered and domesticated into North Carolina, the defendants contend that proper venue in this county would be wherever the defendants reside, Catawba County, North Carolina.

On 18 February 2012, the trial court entered an order denying Defendants' motion for change of venue. In the trial court's order, it made the following findings of fact:

1. That the Plaintiff, TD Bank, N.A., is a National Association organized and existing under the National Bank Act under the supervision of the Office of the Comptroller of Currency.
2. That Plaintiff, as the surviving entity following merger, is successor to Carolina First Bank, a corporation formerly organized and existing under the laws of the State of South Carolina and formerly authorized to conduct business in the State of North Carolina.
3. That Plaintiff's principal offices are located in the States of Maine and New Jersey, with branches and has offices in Buncombe County, North Carolina.
4. That each of the Defendants resides in Catawba County, North Carolina.
5. That venue is proper under G.S. § 1-82 in Buncombe County, North Carolina.
6. That there was an insufficient showing by the Defendants as to why justice would not be served through the denial of a change in venue.

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

7. That the Defendants withdrew the Motion(s) to Dismiss.
8. That the Defendants shall have thirty (30) days from the date of this Order to file a responsive pleading.

Based on the foregoing findings of fact, the trial court ordered the following:

1. That the Defendants' Motion to Change Venue to Catawba County, North Carolina as a matter of right pursuant to G.S. § 1-82 and G.S. § 1-83 is DENIED;
2. That the Defendants' Motion to Change Venue to Catawba County, North Carolina for the convenience of the witnesses and promotion of the ends of justice pursuant to G.S. § 1-83 is DENIED;
3. That the Defendants' Motions to Dismiss pursuant to Rule 12(b)(3) and Rule 12(b)(5) were withdrawn and are DENIED; and
4. That the Defendants shall have to and including thirty (30) days from the date of this Order to file a responsive pleading.

From this order, Defendants appeal.

I. Interlocutory Appeal

[1] Preliminarily, we note that the trial court's order denying Defendants' motion for change of venue is interlocutory, as it is an order made during the pendency of the action, which did not dispose of the case. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (stating that "[a]n 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") (citation omitted); *see also Jenkins v. Hearn Vascular Surgery, P.A.*, ___ N.C. App. ___, ___, 719 S.E.2d 151, 153 (2011) (stating that a trial court's order denying a motion for change of venue is an interlocutory order).

"As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (quotation omitted). However, "immediate appeal of interlocutory orders and judgments is available in at least

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1).” *Id.* (citation and quotation marks omitted).

“[T]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper.” *Caldwell v. Smith*, 203 N.C. App. 725, 725, 692 S.E.2d 483, 484 (2010) (citations omitted); *see also Roberts v. Adventure Holdings, LLC*, ___ N.C. App. ___, ___, 703 S.E.2d 784, 786 (2010), *disc. review denied*, 365 N.C. 187, 707 S.E.2d 241 (2011) (stating that “the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable”) (internal citation and quotation marks omitted). Because Defendants have alleged the county indicated in the complaint is improper, we address the merits of Defendants’ appeal.

II. Venue

[2] Defendants’ sole argument on appeal is that the trial court erred by entering an order denying Defendants’ motion for change of venue pursuant to N.C. Gen. Stat. § 1-83(1).² Specifically, Defendants argue that venue is improper in Buncombe County because Plaintiff is not a domestic corporation in North Carolina, does not maintain a registered office in the State of North Carolina or Buncombe County, and was not formed under the laws of the State of North Carolina; therefore, Defendants contend, venue is proper in the county where Defendants reside, which is Catawba County. Defendant’s argument has merit.

In Defendants’ motion and on appeal, Defendants contend venue was improper pursuant to N.C. Gen. Stat. § 1-83(1), which provides that “[t]he court may change the place of trial . . . [w]hen the county designated for that purpose is not the proper one.” *Id.* “The provision in N.C.G.S. § 1-83 that the court ‘may change’ the place of trial when the county designated is not the proper one has been interpreted to

2. Defendants do not make an argument in their brief on appeal pertaining to N.C. Gen. Stat. § 1-83(2), which provides that “[t]he court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.” Therefore, any claims pertaining to N.C. Gen. Stat. § 1-83(2) are abandoned. *See* N.C.R. App. P. 28(b)(6) (2012); *Libertarian Party v. State*, 365 N.C. 41, 46, n.1, 707 S.E.2d 199, 203, n.1 (2011) (stating that “appellants abandoned . . . claims by failing to provide in their brief a ‘reason or argument’ ”) (citing N.C.R. App. P. 28(b)(6) (2008)).

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

mean ‘must change.’” *Roberts v. Adventure Holdings, LLC*, ___ N.C. App. ___, ___, 703 S.E.2d 784, 786 (2010), *disc. review denied*, 365 N.C. 187, 707 S.E.2d 241 (2011) (quotation omitted). “A determination of venue under N.C. Gen. Stat. § 1-83(1) is . . . a question of law that we review *de novo*.” *Stern v. Cinoman*, ___ N.C. App. ___, ___, 728 S.E.2d 373, 374, *disc. review denied*, ___ N.C. ___, 731 S.E.2d 145 (2012) (citations omitted).

N.C. Gen. Stat. § 1-82 (2011) provides, generally, that venue is proper “in the county in which the plaintiffs or the defendants, or any of them, reside at [the] commencement [of the case], or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside[.]” *Id.* N.C. Gen. Stat. § 1-83 provides an avenue of relief to a defendant against whom an action is brought in an improper venue, stating that “[i]f the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.” *Id.*

The specific question posed by Defendants in this appeal is whether Plaintiff—a National Association organized and existing under the National Bank Act with branches and offices in Buncombe County but having principal offices in Maine and New Jersey—was a “resid[ent][,]” pursuant to N.C. Gen. Stat. § 1-82, of Buncombe County.

Plaintiff cites *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.*, N. A., 281 N.C. 525, 189 S.E.2d 266 (1972), for the proposition that in cases involving national banking associations, 12 U.S.C. § 94, which is a portion of the National Bank Act governing the determination of proper venue in actions against national banks in receivership, applies to this action. *Id.* at 528, 189 S.E.2d at 268. We disagree and believe *Security Mills* is distinguishable from this case in three ways: (1) this is a suit brought by a national bank, not *against* a national bank; (2) 12 U.S.C. § 94 was amended subsequent to the Court’s opinion in *Security Mills*, and the language in the former legislation stating that “[a]ctions and proceedings against any association under this chapter may be had . . . in the county or city in which said association is located[.]” 12 U.S.C. § 94 (1972), was modified to provide that “[a]ny action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver . . . shall be brought in the

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

district or territorial court of the United States held within the district in which that association's principal place of business is located . . . [,]" 12 U.S.C. § 94 (2011); and (3) there is no evidence of record that Plaintiff is in receivership. For the foregoing reasons, we believe *Security Mills* does not control in this case, and 12 U.S.C. § 94 does not govern the determination of proper venue.

The proper venue in cases involving domestic corporations and foreign corporations has been designated by statute, specifically N.C. Gen. Stat. § 1-79(a) (2011) and N.C. Gen. Stat. § 1-80 (2011). With regard to a domestic corporation, N.C. Gen. Stat. § 1-79(a), provides the following:

For the purpose of suing and being sued the residence of a domestic corporation, limited partnership, limited liability company, or registered limited liability partnership is as follows:

- (1) Where the registered or principal office of the corporation, limited partnership, limited liability company, or registered limited liability partnership is located, or
- (2) Where the corporation, limited partnership, limited liability company, or registered limited liability partnership maintains a place of business, or
- (3) If no registered or principal office is in existence, and no place of business is currently maintained or can reasonably be found, the term "residence" shall include any place where the corporation, limited partnership, limited liability company, or registered limited liability partnership is regularly engaged in carrying on business.

Id. Furthermore, N.C. Gen. Stat. § 1-79(b) (2011), defines the term, "domestic" when applied to an entity[,]" as follows:

- (1) An entity formed under the laws of this State, or
- (2) An entity that (i) is formed under the laws of any jurisdiction other than this State, and (ii) maintains a registered office in this State pursuant to a certificate of authority from the Secretary of State.

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

Id. Plaintiff and Defendants agree that Plaintiff is not a domestic corporation as defined by N.C. Gen. Stat. § 1-79(b), because Plaintiff was not formed under the laws of North Carolina and does not maintain a registered office in North Carolina.³

With regard to a foreign corporation, N.C. Gen. Stat. § 1-80 (2011), provides the following:

An action against a corporation created by or under the law of any other state or government may be brought in the appropriate trial court division of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

- (1) By a resident of this State, for any cause of action.
- (2) By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.
- (3) By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State.

Id.

Defendants contend Plaintiff is a foreign corporation. N.C. Gen. Stat. § 1-80 supports this contention, because Plaintiff *is* “a corporation created by or under the law of any other . . . government.” *Id.* Furthermore, the definition of “foreign corporation[.]” as provided by the Business Corporation Act is the following: “[A] corporation for profit incorporated under a law other than the law of this State[.]” N.C. Gen. Stat. § 55-1-40(10) (2011).

Plaintiff, however, cites *Leggett v. Federal Land Bank*, 204 N.C. 151, 167 S.E. 557 (1933), in support of the proposition that Plaintiff is not, in fact, a foreign corporation.⁴ Specifically, Plaintiff cites *Leggett*

3. Plaintiff states in its brief that “[b]ecause [Plaintiff] is not organized under the laws of North Carolina, it is certainly correct to say that [Plaintiff] is not a ‘domestic corporation’ within the meaning of . . . N.C. Gen. Stat. § 1-79(b)(1).” Furthermore, Plaintiff does not argue or provide evidence that Plaintiff “maintains a registered office in this State pursuant to a certificate of authority from the Secretary of State[.]” N.C. Gen. Stat. § 1-79(b)(2).

4. Plaintiff argues in its brief that even though Plaintiff is not a domestic corporation, “it does not automatically follow from this proposition that [Plaintiff] is therefore a ‘foreign corporation’ for purposes of the issue at hand.” National Banks, Plaintiff contends, “operate . . . as creatures and instrumentalities of the paramount sovereign, the United States.”

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

and argues that, “[i]n the absence of a clear North Carolina statutory expression that instrumentalities of the federal government, such as national banks, are to be considered ‘foreign corporations’ for purposes of venue in the courts of this state, this Court should decline to find them to be such.” We find this logic unpersuasive.

In *Leggett*, in the context of service of process, our Supreme Court addressed the applicability of C. S., 1137⁵ to “a corporation created and organized under an act of the Congress of the United States[.]” *Id.* at 153, 167 S.E. at 557-58. The Court reasoned that the defendant was “organized under an act of the Congress of the United States, known as ‘The Federal Farm Loan Act[.]’” and therefore, “[t]he defendant was not only created and organized under and by virtue of said act of Congress; it derives its right to own property and to do business in this State, solely from said act.” *Id.* at 153, 167 S.E. at 558. Based on the foregoing, the Court concluded that the corporation was “not a foreign corporation, having property or doing business in this State, under a license, express or implied, from North Carolina[.]” and therefore, the summons provisions of C. S., 1137, which would have required the defendant—a Federal Land Bank—to have an officer or agent in North Carolina for purposes of receiving service of process, were “not applicable to the defendant.” *Id.*

National Banks are similar to Federal Land Banks⁶ in several respects. Both are created by and organized under acts of Congress in Title 12, Banks and Banking,⁷ and both have been considered agencies and instrumentalities of the federal government. *See* 1-30 Robinson on North Carolina Corporation Law § 30.01 (citing *Leggett*, 204 N.C. 151, 167 S.E. 557, and referring to a Federal Land Bank as an “agenc[y] of the federal government”); *see also* Michie on Banks and Banking, ch. XV § 1 (stating that “National banks are corporate enti-

5. C. S., 1137 required that “[e]very corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in this State upon whom process in all actions or proceedings against it can be served[.]” *Leggett*, 204 N.C. at 152, 167 S.E. at 557.

6. The Federal Land Bank referenced in *Leggett*, 204 N.C. 151, 167 S.E. 557, today exists in a different form, and would be classified as either a Farm Credit Bank or an Agricultural Credit Bank, under which also exist Agricultural Credit Associations and Federal Land Credit Associations.

7. *See, generally*, National Bank Act of 1863; *see also* National Bank Act, 12 U.S.C. Chapter 2 (2011); *see, generally*, Federal Farm Loan Act of 1916; Farm Credit Act of 1933; Farm Credit Act of 1971; Farm Credit Amendments Act of 1985; Agricultural Credit Act of 1987; *see also* Farm Credit Administration, *et al.*, 12 U.S.C. Chapters 7-10 (2011).

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

ties charged with duties to the public, and are more than mere private corporations for profit[;] [t]hey are referred to as agencies and instrumentalities of the United States[,] [and] [s]uch banks are instruments designed to be used to aid the government in the administration of the public service, created for a public and national purpose, and appropriate to that end”). The foregoing notwithstanding, we do not believe *Leggett* stands for the proposition that Plaintiff is not a foreign corporation. *Leggett* stated that the defendant in that case was “a corporation created and organized under an act of the Congress of the United States[,]” and as such it was not a “foreign corporation *having property or doing business in this state, under a license, express or implied, from North Carolina*”: It was therefore not required to have an officer or agent in North Carolina for purposes of receiving service of process. *Id.* at 151, 167 S.E. at 558. (emphasis added). We believe *Leggett* stands for the proposition that although the Federal Land Bank was a foreign corporation, it was not the type of foreign corporation required to maintain an agent to receive service of process because the Federal Land Bank was a foreign corporation created and organized under and by virtue of an act of Congress. We believe this holding is not controlling on the question of where venue is proper in cases involving corporations created by and organized under an act of Congress. Creation and organization of a corporation by an act of Congress does not preclude such corporation from being a “foreign corporation” as recognized by N.C. Gen. Stat. § 1-80, which expressly includes “a corporation created by or under the law of any other . . . government[.]” *Id.* Plaintiff is a corporation created by the National Bank Act, which was enacted by Congress, a branch of the Federal Government. Plaintiff is therefore a corporation “created by or under the law of any other . . . government[.]” N.C. Gen. Stat. § 1-80. We therefore believe N.C. Gen. Stat. § 1-80 requires that Plaintiff be considered a foreign corporation for purposes of determining proper venue. Ordinarily, our analysis would end here.

However, although we determine N.C. Gen. Stat. § 1-80 is pertinent to our analysis regarding whether Plaintiff is a foreign corporation, we further determine that N.C. Gen. Stat. § 1-80 is inapplicable to the outcome of this case for a different reason. N.C. Gen. Stat. § 1-80 expressly applies only to “action[s] against a [foreign] corporation.” Again, this is an action brought not against, but *by*, Plaintiff. Because Plaintiff is a foreign corporation, and because N.C. Gen. Stat. § 1-80 does not control in cases brought *by* a foreign corporation, we believe the following rule of law applies: “[I]n a civil action in this

TD BANK, N.A. v. CROWN LEASING PARTNERS, LLC

[224 N.C. App. 649 (2012)]

state where venue is not specifically designated by N.C. Gen. Stat. §§ 1-76 through 1-81, where the plaintiff is a nonresident and the defendants are residents, the proper venue for the action pursuant to N.C. Gen. Stat. § 1-82 is any county in which defendants reside at the commencement of the action.” *Stewart v. Southeastern Reg'l Med. Ctr.*, 142 N.C. App. 456, 460-61, 543 S.E.2d 517, 520, *disc. review denied*, 353 N.C. 733, 552 S.E.2d 169, (2001). Defendants were residents of Catawba County at the commencement of this action. Therefore, venue is proper in Catawba County.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 31 DECEMBER 2012

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| EVANS v. HENDRICK AUTO. GRP. No. 12-122 | Indus. Comm. (681555) | Affirmed |
| IN RE APPEAL OF NOVARTIS VACCINES & DIAGNOSTICS, INC. No. 11-1592 | Property Tax Comm. (10PTC434) (11PTC28) | Affirmed |
| STATE v. BROWN No. 12-469 | Moore (11CRS50906) | Dismissed |
| STATE v. GARVIN No. 11-1508 | Gaston (09CRS55298) (09CRS55577) | No Error |

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ACCOMPLICES AND ACCESSORIES
ADMINISTRATIVE LAW
ADOPTION
ADVERSE POSSESSION
APPEAL AND ERROR
ARBITRATION AND MEDIATION
ASSAULT

BURGLARY AND UNLAWFUL BREAKING
OR ENTERING

CHILD CUSTODY AND SUPPORT
CONSPIRACY
CONSTITUTIONAL LAW
CONTEMPT
CONTRACTS
CONVERSION
COSTS
CRIMINAL LAW

DAMAGES AND REMEDIES
DECLARATORY JUDGMENTS
DIVORCE

EMOTIONAL DISTRESS
ENFORCEMENT OF JUDGMENTS
ENVIRONMENTAL LAW
EVIDENCE

FIDUCIARY RELATIONSHIP
FIREARMS AND OTHER WEAPONS
FRAUD

HIGHWAYS AND STREETS

IDENTIFICATION OF DEFENDANTS
IMMUNITY
INDICTMENT AND INFORMATION

JUDGMENTS
JURISDICTION

LARCENY

MARRIAGE
MENTAL ILLNESS
MORTGAGES AND DEEDS OF TRUST
MOTOR VEHICLES

NEGLIGENCE

PLEADINGS
POLICE OFFICERS
PRETRIAL PROCEEDINGS
PROBATION AND PAROLE

RAPE

SATELLITE-BASED MONITORING
SEARCH AND SEIZURE
SENTENCING
SEXUAL OFFENDERS
SEXUAL OFFENSES
STATUTES OF LIMITATION
AND REPOSE

TERMINATION OF PARENTAL RIGHTS

UNFAIR TRADE PRACTICES

VENUE

WITNESSES
WORKERS' COMPENSATION

ZONING

ACCOMPLICES AND ACCESSORIES

Instruction not given—direct or constructive presence—The trial court erred by not instructing the jury on accessory before the fact to first-degree murder in a prosecution where the evidence indicated that defendant and others planned the killing of her father, she dropped off two men near his house, waited at a K-Mart, and picked them up at a Food Lion after the killing. There was no evidence that defendant was present when the crime was committed, no evidence of the distance from her father's house to the K-Mart or Wal-Mart, and none of the evidence mentioned by the State showed that defendant remained close enough to be able to render assistance if needed. **State v. Grainger, 623.**

Instruction not given—no jury determination of uncorroborated testimony—prejudicial—The trial court's failure to give an instruction on accessory before the fact in a first-degree murder prosecution was prejudicial because the proper instruction to the jury would have been accompanied by a question to the jury regarding the basis of its verdict, which in turn would have determined whether defendant should have been sentenced to a class A or class B felony. N.C.G.S. § 14-5.2 provides for sentencing for a Class B felony if an accessory before the fact is sentenced for a capital felony and is convicted upon the uncorroborated testimony of principals, coconspirators, or accessories. Defendant was not tried capitally, but first-degree murder is a capital crime because death is a potential punishment, and the language of the statute requires that the jury determine whether the conviction was based solely on the uncorroborated testimony of principals, coconspirators, or accessories. **State v. Grainger, 623.**

ADMINISTRATIVE LAW

Contested case hearing—mining permit—misrepresentation—not relevant—Evidence regarding alleged misrepresentations by defendant Harrison Construction to petitioners and a county manager during a prior mining permit action was not relevant to the Division of Land Resources' (DLR's) consideration of the permit denial criteria in this case and was properly excluded. **Stark v. N.C. Dep't of Env't & Natural Res., 491.**

Judicial review of agency decision—standard of review—Even though the trial court may have applied a *de novo* standard to an issue that should be reviewed under the whole record test, the trial court's review was not improper since *de novo* review was more beneficial for petitioners and the trial court still upheld respondent Environmental Management Commission's decision. **City of Rockingham v. N.C. Dep't of Env't & Natural Res., 228.**

Mining permit—findings—supported by evidence—not arbitrary—A Division of Land Resources (DLR) decision to issue a permit for the expansion of a quarry was supported by substantial, competent evidence and was not arbitrary or capricious. DLR found none of the seven statutory criteria for denial, found that any adverse effects would be mitigated by defendant Harrison Construction, and was required by statute to issue the permit. **Stark v. N.C. Dep't of Env't & Natural Res., 491.**

ADOPTION

Statutory requirements—consent of biological father required—The trial court did not err by concluding that respondent biological father's consent was required for the adoption of his minor child. Respondent satisfied the requirements of N.C.G.S. § 48-3-601, thereby necessitating his consent for the adoption of his son. **In re S.K.N., 41.**

ADVERSE POSSESSION

Jury instruction—harmless error—insufficient evidence as to hostility and duration—The trial court did not err in a real property case by denying defendant's request for an instruction on acquiring title to less than the entire tract. Any error in failing to so instruct the jury was harmless in light of the insufficiency of the evidence as to the hostility and duration of defendant's possession. **Minor v. Minor, 471.**

APPEAL AND ERROR

Affidavit stricken from record—no basis for appellate review—no prejudice—Plaintiff's argument that the trial court erred in a declaratory judgment action by striking an affidavit from the record was dismissed. Neither party requested that the trial court make findings of fact and conclusions of law in its order granting plaintiffs' motion to strike the affidavit so there was nothing upon which the Court of Appeals could review the trial court's discretionary order. Further, even if the record had been adequate to permit review, defendant failed to show it was prejudiced by the decision of the trial court. **Waterway Drive Prop. Owners' Ass'n Inc. v. Town of Cedar Point, 544.**

Appealability—untimely appeal—Rule 60 motions not a substitute—Although plaintiff appealed the dismissal of her appeal from small claims court to district court for trial *de novo* in an action arising from an automobile accident, the appeal was dismissed because plaintiff's first notice of appeal to the Court of Appeals was untimely filed. Plaintiff could not use N.C.G.S. § 1A-1, Rule 60 motions as a substitute for appeal. **Morehead v. Wall, 588.**

Argument not supported in brief—dismissed—Defendant's argument that the trial court erred in a declaratory judgment action by denying its cross-motion for partial summary judgment which would have determined the street in question to be public was dismissed as defendant failed to make a clear argument in the body of its brief. **Waterway Drive Prop. Owners' Ass'n Inc. v. Town of Cedar Point, 544.**

Interlocutory orders and appeals—arbitration—An order denying a motion to compel arbitration is immediately appealable. **Cornelius v. Lipscomb, 14.**

Interlocutory orders and appeals—substantial right—change of venue—Although defendants' appeal from the denial of their motion for change of venue was from an interlocutory order, it affected a substantial right and was immediately appealable. **TD Bank, N.A. v. Crown Leasing Partners, LLC, 649.**

Interlocutory orders and appeals—substantial right—unsealing of documents—Plaintiff's appeal from an interlocutory order in a divorce case was properly before the Court of Appeals because a substantial right was affected by the trial court's order unsealing documents. **France v. France, 570.**

Interlocutory orders and appeals—substantial right—State's right to enforce criminal laws—The trial court's memorandum of decision and judgment of 24 October 2011 was an appealable interlocutory order. The State has a substantial right to enforce the criminal laws of North Carolina, and this right was affected by a ruling declaring a statute, The North Carolina Felony Firearms Act, to be unconstitutional. **Johnston v. State of N.C., 282.**

Mootness—collateral consequences—Respondent's appeal from an involuntary commitment was properly before the Court of Appeals, notwithstanding the fact that the period of commitment had ended, because of collateral legal consequences. **In re Whatley, 267.**

APPEAL AND ERROR—Continued

Preservation of issues—argument abandoned—Appeal from a summary judgment for defendant Homefocus Services, LLC (later Landsafe Services, LLC) was abandoned where the entirety of plaintiffs' brief was dedicated to allegations against defendant Bank of America. **Dallaire v. Bank of Am.**, 248.

Preservation of issues—argument not sufficient—Plaintiffs abandoned an argument concerning the Mortgage Lending Act (MLA), N.C.G.S. § 53-243.01 to -543.18 (2001) (repealed 2009), the predecessor to the current statute, by not arguing what the statutory standard was or how it was violated. **Dallaire v. Bank of Am.**, 248.

Preservation of issues—brief—incorporation of arguments by reference—dismissed—Petitioners' attempt to "incorporate by reference" a multitude of arguments and challenges to findings was dismissed. The Court of Appeals' scope of review is limited to those issues for which argument and authority are presented within the appellate brief. **Stark v. N.C. Dep't of Env't & Natural Res.**, 491.

Preservation of issues—failure to include transcript—Although defendant contended the trial court acted improperly when it granted default judgment where there were no allegations of damages made in the complaint and where defendant was denied the opportunity to be heard at the hearing on damages, the Court of Appeals was not able to properly review this claim because defendant failed to include a transcript of the hearing in the record. **Lewis v. Hope**, 322.

Preservation of issues—failure to set aside default judgment—motion on other grounds—Defendant's argument on appeal that plaintiff did not state a claim and that the trial court erred by entering a default judgment against her was dismissed where her motion in the trial court was on other grounds. Defendant moved in the trial court to set aside the default judgment on the grounds that service of process was improper rather than any argument that plaintiffs' complaint failed to state a claim against her. **Grier v. Guy**, 256.

Preservation of issues—indictment variance—failure to argue—failure to renew motion to dismiss—waiver—Although defendant contended in a felonious larceny case that a variance existed between the facts alleged in his indictment and the evidence produced at trial, this argument was dismissed. Defendant made a general motion to dismiss at the close of the State's evidence, but did not specifically raise the question of a variance. Further, defendant also failed to renew his motion to dismiss at the close of all evidence. **State v. Hester**, 353.

Preservation of issues—issue not raised at trial—By failing to raise the issue at trial, defendant waived his right to appeal the issue of a variance between an indictment for injury to personal property and the evidence at trial concerning the amount of damage. **State v. Redman**, 363.

Preservation of issues—no motion to suppress filed—constitutional issue not raised at trial—Defendant's argument that the trial court committed plain error in a possession of a firearm by a convicted felon and carrying a concealed handgun case by admitting evidence resulting from a traffic stop was dismissed as defendant did not file a motion to suppress nor did he argue his Fourth Amendment claim to the trial court. **State v. Canty**, 514.

Preservation of issues—no objection at trial—violation of statutory mandate—The right to appeal is preserved notwithstanding defendant's failure to object at trial when the trial court acts contrary to statutory mandates and defendant is prejudiced. This defendant's appeal from orders directing him to register as a sex

APPEAL AND ERROR—Continued

offender and to enroll in lifetime satellite-based monitoring was heard for that reason. **State v. Boyett, 102**

Preservation of issues—no plain error review—not instructional or evidentiary error—Although defendant contended the trial court erred in a trafficking in cocaine by possession case by denying defendant's motion for disclosure of information about the confidential informants, this argument was not preserved at trial. Since it did not involve instructional or evidentiary error, it was not reviewed for plain error on appeal. **State v. Reid, 181.**

Preservation of issues—no ruling on objection—The issue in a workers' compensation case of whether a witness could testify as an expert was not preserved for appellate review where defendants did not obtain a ruling on their objection. **Boylan v. Verizon Wireless, 436.**

Preservation of issues—plain error—failure to show prejudicial impact—Although defendant contended in a felonious larceny case that it was plain error for the trial court to allow three witnesses to testify about what they saw on the original surveillance video, this argument was dismissed. By failing to provide the Court of Appeals with any analysis of the prejudicial impact of the challenged testimony, defendant waived appellate review of this issue. **State v. Hester, 353.**

Preservation of issues—untimely appeal—failure to include order or transcript in record—Although plaintiff contended that the trial court erred by failing to hear several of his motions, the Court of Appeals was without jurisdiction to review these claims. Plaintiff did not meet the required timeline with respect to appealing the 18 April 2011 order. Further, plaintiff failed to include either the 10 March 2011 order or the transcript from that proceeding in the record. **Young v. Young, 388.**

Writ of certiorari—untimely appeal—The Court of Appeals granted defendant's petition for a writ of *certiorari* under N.C. R. App. P. 21(a) and considered the issues presented in his brief as defendant lost his right to appeal by failure to take timely action. **State v. Franklin, 337.**

ARBITRATION AND MEDIATION

Denial of motion to compel arbitration—failure to make findings of fact—The trial court erred in a fraud, breach of loyalty, breach of fiduciary duty, unfair trade practices, and violation of North Carolina securities statutes case by denying defendants' motion to compel arbitration. The trial court failed to make findings of fact to support its order, and thus, the case was reversed and remanded. In the event the trial court finds that the parties did enter into an arbitration agreement, the court must also address whether the Federal Arbitration Act or the North Carolina Revised Uniform Arbitration Act applies. **Cornelius v. Lipscomb, 14.**

ARSON

Sufficiency of evidence—maliciously and willfully set fire—The trial court did not err in a first-degree arson case by denying defendant's motion to dismiss for insufficient evidence. The State's evidence established more than a suspicion of defendant's guilt, including that defendant maliciously and willfully set fire to the house. **State v. Burton, 120.**

ASSAULT

Deadly weapon—chair—attained character of deadly weapon—The trial court did not err in an assault with a deadly weapon case by denying defendant's motion to dismiss for insufficient evidence. There was sufficient evidence to determine that the chair defendant wielded attained the character of a deadly weapon based upon the manner of its use. **State v. James, 164.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Sufficient evidence—defendant as perpetrator—fingerprints—in-court identification—The trial court did not err in a first-degree burglary case by denying defendant's motion to dismiss the charge. A witness's in-court identification of defendant as the intruder constituted some evidence other than defendant's fingerprints identifying him as the perpetrator. Thus, the State presented substantial evidence identifying defendant as the perpetrator of the charged crime. **State v. Hoff, 155.**

CHILD CUSTODY AND SUPPORT

Findings—supported by evidence—Findings in a child custody and support action were supported by the evidence and were binding on appeal even though defendant presented some contradictory evidence. Defendant did not argue that the trial court abused its discretion by awarding primary custody to plaintiff. **Reams v. Riggins, 78.**

Motion for modification—failure to show substantial change in circumstance—The trial court did not err by granting defendant's motion for directed verdict on plaintiff's motion for modification of child support. Plaintiff failed to meet his burden of showing a substantial change in circumstance. Plaintiff failed to prove either that his sustained unemployment was involuntary, given his lack of proof with regard to his job search effort and his self-imposed restrictions on his search, or that, even if voluntary, it was in good faith. **Young v. Young, 388.**

Support—calculation of amount—error not properly argued—No error was found in the trial court's calculation of the amount of child support defendant was ordered to pay where the court multiplied defendant's weekly income by 4.3. Although the record was unclear concerning exactly how the trial court reached its determinations, the defendant made no argument that the record was deficient, that the trial court failed to make sufficient findings of fact, that the trial court improperly calculated either party's monthly income, or that the trial court applied different formulas in calculating the parties' gross monthly incomes. Defendant did not argue that the matter should be remanded for additional evidence or findings. **Reams v. Riggins, 78.**

Support—health insurance—not employment based—A child custody and support order did not vary from the North Carolina Child Support Guidelines merely because the trial court ordered defendant to purchase health insurance when defendant did not have access to employment related health insurance. Because there was no variance, there was no violation in not making findings. Defendant did not properly argue that the trial court's findings supporting its ruling were insufficient. **Reams v. Riggins, 78.**

CONSPIRACY

Civil conspiracy—injunctive relief—The trial court did not err by granting summary judgment in favor of defendants with respect to its civil conspiracy claim and its request for injunctive relief. Having already considered and rejected the arguments upon which plaintiff based these claims, plaintiff's argument was meritless. **Austin Maint. & Constr., Inc. v. Crowder Constr. Co., 401.**

CONSTITUTIONAL LAW

Effective assistance of counsel—Defendant did not receive ineffective assistance of counsel in a first-degree arson case. Defendant failed to establish that 1) there was a reasonable probability of a different outcome had his attorney made a motion for mistrial; 2) his counsel's preparation of the alibi defense amounted to ineffective assistance of counsel; and 3) he was prejudiced by his counsel's assurance to the jury that he would establish an alibi defense. **State v. Burton, 120.**

Effective assistance of counsel—burglary—fingerprint evidence—Defendant did not receive ineffective assistance of counsel in a first-degree burglary case when his trial counsel did not move to exclude fingerprint evidence against him or cross-examine the State's fingerprint expert on the reliability of his methodology. There was no reasonable probability that the outcome of the trial would have been different had counsel objected to the admission of the fingerprint evidence or cross-examined the expert on the reliability of his methodology. **State v. Hoff, 155.**

Effective assistance of counsel—dismissal without prejudice—Defendant's claim for ineffective assistance of counsel in a felonious larceny case was dismissed without prejudice to defendant's right to file a motion for appropriate relief in the superior court. **State v. Hester, 353.**

Effective assistance of counsel—failure to move to dismiss—no prejudice—Defendant received effective assistance of counsel in a prosecution for possession of a firearm by a felon where his trial counsel did not move for a dismissal at the close of all the evidence. The firearm was found in a purse in the glovebox of the car defendant was driving rather than in defendant's actual possession, but there was evidence that defendant controlled the vehicle and that he was aware of its contents. Defendant did not meet his burden of showing prejudice. **State v. Mitchell, 171.**

Effective assistance of counsel—record not sufficient—motion for appropriate relief—Defendant's contention that he received ineffective assistance of counsel based on advice to reject a favorable plea offer was dismissed without prejudice where the record was not sufficient to determine that counsel's performance was deficient and prejudicial. Defendant may file a motion for appropriate relief at the trial level, enabling the trial court to conduct an evidentiary hearing. **State v. Redman, 363.**

Effective assistance of counsel—search and seizure—no reasonable suspicion to initiate traffic stop—Defendant received ineffective assistance of counsel in a possession of a firearm by a convicted felon and carrying a concealed handgun case because his attorney did not file a motion to suppress evidence seized as a result of a traffic stop. Based on the totality of the circumstances, the officers lacked reasonable suspicion to initiate the traffic stop and a motion to suppress would likely have succeeded. **State v. Canty, 514.**

CONSTITUTIONAL LAW—Continued

North Carolina—right to bear arms—substantive due process—North Carolina Felony Firearms Act—The portion of the trial court's order concluding that the North Carolina Felony Firearms Act, as applied to plaintiff, violated substantive due process rights guaranteed by the North Carolina Constitution was reversed and remanded for the trial court to take evidence and make additional findings. **Johnston v. State of N.C., 282.**

Public trial—closure of trial during victim's testimony—findings sufficient—The trial court did not err by closing the courtroom during the testimony of the victim where the court's findings showed that the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure. Even in the absence of the findings challenged by defendant, the remaining, detailed findings were sufficient to uphold the trial court's order. **State v. Comeaux, 595.**

Right to bear arms—procedural due process—North Carolina Felony Firearms Act—The portion of the trial court's order concluding that the North Carolina Felony Firearms Act, on its face, violated procedural due process rights guaranteed by the State and federal Constitutions was reversed. **Johnston v. State of N.C., 283.**

Right to counsel—private counsel—appointed counsel—The trial court did not err in a trafficking in cocaine by possession case by allegedly failing to advise defendant of his right to private counsel. The trial court informed defendant of his right to be represented by counsel, including appointed counsel. Additionally, the trial court made thorough inquiry into defendant's concerns with his appointed counsel and appointed counsel's preparedness for trial. After this inquiry, the trial court appropriately determined appointed counsel was "reasonably competent" to represent defendant. **State v. Reid, 181.**

Right to court-appointed counsel—failure to prove indigence—The trial court did not err by denying plaintiff's motion for court-appointed counsel in defendant's motion for contempt and attorney fees. Plaintiff failed to meet his burden of proving his indigence. Further, the court stated that it provided plaintiff with several continuances so that he might speak with counsel. **Young v. Young, 388.**

Statute unconstitutionally void—as applied—The trial court did not err by entering an order declaring N.C.G.S. § 14-208.18(a)(3) unconstitutional as the statute is unconstitutionally vague as applied to defendant upon the facts surrounding incidents involving defendant on 6 and 7 May 2009. **State v. Daniels, 608.**

Unanimous verdict—multiple charges—instructions and verdict sheets—Defendant's contention that he was deprived of his right to a unanimous jury verdict in a prosecution for five indecent liberties charges was overruled where the trial court's instructions explicitly distinguished among the five charges, directed the jurors to find defendant guilty on each count only if they determined that defendant had committed the requisite acts within the designated time period, each verdict sheet was paired with a particular indictment, and it was evident that the jury was able to distinguish among the indictments and verdict sheets, as it convicted defendant on only four of the five counts. **State v. Comeaux, 595.**

United States—right to bear arms—substantive due process—North Carolina Felony Firearms Act—The portion of the trial court's order concluding

CONSTITUTIONAL LAW—Continued

that the North Carolina Felony Firearms Act, as applied to plaintiff, violated substantive due process rights guaranteed by the United States Constitution was reversed. As to the federal substantive due process issue, the case was remanded to the trial court to give the State an opportunity to present evidence and argument on this question and for plaintiff to respond. **Johnston v. State of N.C.**, 282.

CONTEMPT

Civil—violation of separation agreement—The trial court did not err by finding plaintiff in contempt of court for a violation of the separation agreement that was allegedly not incorporated into a court order. However, plaintiff overlooked that it was incorporated into the 18 April 2011 order. **Young v. Young**, 388.

CONTRACTS

Breach of contract—bankruptcy filing—statute of limitations not tolled—statute of limitations expired—The trial court did not err in a breach of contract and attorney fees case by dismissing plaintiff's amended complaint. Plaintiff's bankruptcy filing did not toll the statute of limitations on its breach of contract claim and plaintiff failed to file the claim prior to the expiration of the statute of limitations. **Coderre v. Futrell**, 454.

Tortious interference with contract—existence of valid contract—The trial court did not err by granting summary judgment in favor of defendants with respect to plaintiff's tortious interference with contract claim. Plaintiff failed to forecast evidence tending to show the existence of a valid contract between plaintiff and a third person which conferred upon plaintiff a contractual right against a third person, the first element required to establish a tortious interference with contract claim. **Austin Maint. & Constr., Inc. v. Crowder Constr. Co.**, 401.

CONVERSION

Defense—bona fide purchaser for value—good faith—directed verdict denied—The trial court did not err in a conversion action by denying defendant's motions for directed verdict and JNOV. Assuming that a *bona fide* purchaser for value defense to conversion exists in North Carolina, the stories the co-defendants told defendant about their titles to the coins at issue were weak. **King v. Brooks**, 315.

Instructions—bona fide purchase for value—requested instruction incorrect—The trial court properly refused to give the jury an instruction on the *bona fide* purchaser for value defense in a conversion action. Defendant's requested instruction to the jury was an incorrect statement of law in that it required the jury to make an irrelevant finding. **King v. Brooks**, 315.

COSTS

Breach of contract—cost calculation—attorney fees—The trial court did not err in a breach of contract case by awarding damages and attorney fees to plaintiff. The 18 November 2008 invoice and the accompanying itemized accounting of all of plaintiff's actual costs incurred after 1 July 2007 were evidence that a reasonable mind could accept as adequate to support the trial court's finding that plaintiff's cost calculation was correct. Further, the award of attorney fees was permissible pursuant to N.C.G.S. § 44A-35. **S. Seeding Serv., Inc. v. W.C. English, Inc.**, 90.

CRIMINAL LAW

Flight—after commission of crime—evidence insufficient—The trial court committed harmless error in a prosecution for perpetrating a hoax on law enforcement officers by use of a false bomb or other device by giving an instruction on flight when there was no evidence that defendant fled after the commission of the crime. There was no prejudice because there was no reasonable possibility that the jury would have found defendant not guilty in the absence of the flight instruction. **State v. Golden, 136.**

Jury instruction—entrapment—The trial court did not err in a trafficking in cocaine by possession case by failing to instruct the jury concerning entrapment. The entrapment defense was not a material aspect of the case because defendant pointed to no credible evidence that: (1) he would not have committed the crime except for law enforcement's persuasion, trickery or fraud, or (2) that the crime was the creative production of law enforcement authorities. **State v. Reid, 181.**

Motion for appropriate relief—general allegations—juror misconduct—The trial court did not abuse its discretion in a common law robbery and misdemeanor assault inflicting serious injury case by failing to hold an evidentiary hearing pursuant to defendant's motion for appropriate relief. There was insufficient evidence to determine whether juror misconduct occurred as defendant's motion and the affidavit merely contained general allegations and speculation. **State v. Rollins, 197.**

DAMAGES AND REMEDIES

Compromise verdict—allegation not supported by evidence—The trial court did not abuse its discretion by denying defendant's motion for a new trial based on the allegation that the jury returned a "compromise" verdict. The precedent relied upon by defendant concerned damages for pain and suffering, unlike this case, where the jury simply awarded plaintiff his full recovery from defendant and then allowed defendant to recover from his co-defendants. There was no evidence that the jury returned a compromise verdict or blatantly ignored the judge's instructions. **King v. Brooks, 315.**

DECLARATORY JUDGMENTS

Subject matter jurisdiction—felon's right to possess firearms—The trial court had subject matter jurisdiction over plaintiff's declaratory judgment action. This was not the first case in which a convicted felon sought a declaration from the courts that he has a right to possess firearms. **Johnston v. State of N.C., 282.**

DIVORCE

Unsealing documents—change in circumstance—open courtroom proceedings—The trial court did not abuse its discretion in a divorce case by entering the 12 October 2011 order unsealing the documents in this action and overruling Judge Owens' 18 December 2008 order. The fourth finding of change in circumstance, ordering that the case proceed in an open courtroom, was sufficient alone to warrant a reconsideration of whether Judge Owens' order sealing documents in the actions was still proper. **France v. France, 570.**

EMOTIONAL DISTRESS

Negligent infliction of emotional distress—intentional infliction of emotional distress—punitive damages—Plaintiff's remaining arguments that the trial

EMOTIONAL DISTRESS—Continued

court erred in granting summary judgment with respect to his claims of negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages necessarily failed based on the resolution of the prior issues. **Pittman v. Hyatt Coin & Gun, Inc.**, 326.

ENFORCEMENT OF JUDGMENTS

Foreign-country money judgment—burden of proof—ground for nonrecognition—The trial court erred in an action to recognize a foreign-country money judgment by not requiring defendant to carry the burden of proving the existence of a ground for nonrecognition. Further, defendant did not appeal from the default judgment entered by the English court, the mechanism for correcting the purported error defendant now alleged. **Jenner v. Ecoplus, Inc.**, 275.

Motion to recognize—North Carolina Uniform Foreign-Country Money Judgments Recognition Act—Plaintiffs' motion to recognize a foreign-country money judgment was properly before the trial court. The North Carolina Uniform Foreign-Country Money Judgments Recognition Act (Act) does not require that a defendant be given an opportunity to file an answer before a trial court may hold a hearing in the matter. Defendant received "a court proceeding" in which it had the opportunity to oppose recognition as required by the Act. **Jenner v. Ecoplus, Inc.**, 275.

ENVIRONMENTAL LAW

Hydroelectric power-generating facility—biological integrity—The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by affirming the final agency decision of respondent Environmental Management Commission because the whole record showed that the ALJ considered the biological integrity of the aquatic life and properly concluded that the certified flow rate would maintain and not degrade the aquatic life. **City of Rockingham v. N.C. Dep't of Env't & Natural Res.**, 228.

Hydroelectric power-generating facility—exemption from mitigation requirements—Clean Water Act—The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by concluding that a discharge of water was not regulated by the Clean Water Act and that this project was exempt from mitigation requirements because existing uses would not be removed or degraded by the Clean Water Act Section 401 certification. **City of Rockingham v. N.C. Dep't of Env't & Natural Res.**, 228.

Hydroelectric power-generating facility—land preservation as mitigation—mootness—Although petitioners argued in the alternative that the trial court erred by not evaluating whether the land preservation plan was sufficient mitigation and that respondent Environmental Management Commission (EMC) erred in upholding a land preservation plan that did not comply with EMC's rules, this argument was moot given the Court of Appeals' interpretation that mitigation was unnecessary. **City of Rockingham v. N.C. Dep't of Env't & Natural Res.**, 228.

Hydroelectric power-generating facility—minimizing adverse impacts—Clean Water Act—The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by affirming the final agency decision of respondent Environmental Management Commission because there was substantial evidence that aquatic life would not be adversely impacted by the Section 401 certification under the Clean Water Act. **City of Rockingham v. N.C. Dep't of Env't & Natural Res.**, 228.

ENVIRONMENTAL LAW—Continued

Hydroelectric power-generating facility—no practical alternatives—The trial court did not err in a case concerning the operation of a hydroelectric power-generating facility by affirming the final agency decision of respondent Environmental Management Commission because there was substantial evidence that no practical alternatives were available when retrofitting was offered as a hypothetical by an expert who had never visited the dam and would provide relatively little additional improvement in biological integrity. **City of Rockingham v. N.C. Dep’t of Env’t & Natural Res.**, 228.

EVIDENCE

Defendant’s oral and written statements—admissible—no plain error—Defendant was not entitled to a new trial in a second-degree sexual offense case because evidence “of and about” a written instrument prepared by a police investigator was not improperly admitted at trial. Defendant’s oral statements made to the investigator were admissible, and assuming but in no way deciding that it was error for the trial court to allow the State to characterize the written instrument as defendant’s “statement,” a different result would not have been reached at trial absent such characterization. **State v. Randolph**, 521.

Officer’s identification of marijuana—visual and olfactory—The trial court did not err in a felonious possession of marijuana prosecution by admitting an officer’s visual and olfactory identification of the marijuana. Marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification. **State v. Mitchell**, 171.

Opinion testimony—weight of chair—sufficient support—helpful—province of jury not invaded—The trial court did not err in an assault with a deadly weapon case by overruling defendant’s objection to the opinion testimony of Deputy Causey as to the weight of the chair alleged to be a deadly weapon. Deputy Causey’s observation of the wooden kitchen table chairs and of defendant throwing one chair in an overhand motion, “like a baseball,” was sufficient to support Deputy Causey’s opinion that the chair weighed approximately ten pounds. The testimony was likely helpful and did not impermissibly intrude upon the province of the jury. **State v. James**, 164.

Prior crimes or bad acts—admissible—The trial court did not err in a prosecution for perpetrating a hoax on law enforcement officers by use of a false bomb or other device by admitting evidence of defendant’s prior acts against his estranged wife. The prior incidents were properly admitted to show defendant’s intent to perpetrate a hoax by use of a false bomb and because those incidents were part of the chain of events leading up to the crime. Similarity of the acts was not pertinent to the purpose for which the incidents were admitted. **State v. Golden**, 136.

Prior crimes or bad acts—admission of prior convictions—not plain error—There was no plain error in a prosecution for felonious possession of marijuana, possession of a firearm by a felon, and other offenses where the prosecutor was allowed to ask defendant’s witnesses about defendant’s prior misdemeanor assault convictions. Defendant’s prior conviction for armed robbery, a felony, had already been properly admitted into evidence; it is highly improbable that mention of his prior misdemeanor assaults changed the jury’s verdict. **State v. Mitchell**, 171.

Prior crimes or bad acts—not more prejudicial than probative—Evidence of prior bad acts against defendant’s estranged wife was not more prejudicial than

EVIDENCE—Continued

probative in a prosecution for perpetrating a hoax on law enforcement officers by use of a false bomb or other device found in his truck at his estranged wife's house. **State v. Golden, 136.**

Second-degree sexual offense—opinion evidence—narrative of investigation—The trial court did not err in a second-degree sexual offense case by admitting the State's opinion evidence that defendant had in fact sexually abused the victim. The police investigator's testimony was merely a narrative of his investigation and was not being offered as expert or lay testimony probative on the issue of defendant's guilt. **State v. Randolph, 521.**

Second-degree sexual offense—testimony—other crimes—invited error—not prejudicial—The trial court did not commit plain error in a second-degree sexual offense case by admitting via testimony evidence regarding other crimes. The admission of some of the evidence was invited error and the introduction of the remaining evidence was not so prejudicial as to have tilted the scales and caused the jury to reach its verdict. **State v. Randolph, 521.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—employer-employee relationship—no exercise of dominion—The trial court did not err by granting summary judgment in favor of defendant Lanier with respect to plaintiff's breach of fiduciary duty claim. There was no genuine issue of material fact regarding whether defendant Lanier owed a fiduciary duty to plaintiff as a result of their employer-employee relationship as defendant Lanier's status as the foreman of a four-person crew did not "uniquely position" him to exercise dominion over plaintiff. **Austin Maint. & Constr., Inc. v. Crowder Constr. Co., 401.**

Lender and borrower—interaction prior to loan—summary judgment not proper—Summary judgment should not have been granted for defendant Bank of America in an action arising from a refinanced home mortgage where plaintiffs alleged breach of fiduciary duty. While uncommon, North Carolina law does leave room for the recognition of a fiduciary relationship between lender and borrower. In this case, plaintiffs did not receive outside advice and, when the facts are viewed in the light most favorable to plaintiffs, there is a question of fact as to whether the circumstances of the parties' interaction prior to signing the loan gave rise to a fiduciary relationship. **Dallaire v. Bank of Am., 248.**

FIREARMS AND OTHER WEAPONS

Negligence—summary judgment—stolen gun—reasonable firearms merchant—The trial court did not err in a case arising out of the sale of a firearm by granting summary judgment in favor of defendants on the allegation of negligence even though plaintiff contended that defendants had a duty to ensure the gun was not stolen. The record established that defendants acted in accordance with what a reasonable firearms merchant would do. **Pittman v. Hyatt Coin & Gun, Inc., 326.**

Unfair trade practices—legal title to sell—The trial court did not err in a case arising out of the sale of a firearm by granting summary judgment in favor of defendants on the issue of unfair trade practices. The facts showed that defendants' practice did not cause a negative impact on the marketplace and displayed no inequitable assertion of power, as the firearm sold to plaintiff was one which defendants had legal title to sell. **Pittman v. Hyatt Coin & Gun, Inc., 326.**

FRAUD

Negligent misrepresentation—home refinancing—summary judgment— Summary judgment should not have been granted for defendant Bank of America on the issue of whether defendant negligently misrepresented the priority a home refinancing loan would receive. **Dallaire v. Bank of Am., 248.**

HIGHWAYS AND STREETS

Private road—dedication—no acceptance—no withdrawal—The trial court did not err in a declaratory judgment action by finding the road at issue to be a private road and thus granting summary judgment to plaintiffs. Although there was a dedication of the road, there was no evidence of acceptance of the dedication, either express or implied, including no evidence of official acts following the inclusion of the road on an official map. Defendant's argument that withdrawal was ineffective because the dedication had been accepted necessarily failed because there was no such acceptance. Finally, defendant's argument on the basis of necessary ingress and egress to any lots or parcels sold along it also failed. **Waterway Drive Prop. Owners' Ass'n Inc. v. Town of Cedar Point, 544.**

Private road—prescriptive easement—permissive use presumed—The trial court did not err in a declaratory judgment action by finding the road at issue to be a private road and thus granting summary judgment to plaintiffs. Defendant failed to meet its burden to establish an easement by prescription and thus permissive use was presumed. **Waterway Drive Prop. Owners' Ass'n Inc. v. Town of Cedar Point, 544.**

IDENTIFICATION OF DEFENDANTS

Driver of speeding vehicle—motion to suppress—reasonable suspicion— The trial court did not err in a feloniously carrying a concealed weapon case by denying defendant's motion to suppress based on alleged insufficient evidence identifying defendant as the driver of a speeding vehicle. Although the officer lost sight of defendant, the amount of time was minimal, approximately thirty seconds, and when the officer saw the vehicle again, he recognized both the car and the same driver immediately. **State v. Royster, 374.**

IMMUNITY

Governmental immunity—proprietary function—The trial court did not err in a breach of contract, negligence, and indemnity and contribution case by denying third-party defendant town's motion to dismiss the negligence claim based on governmental immunity. Defendant town was involved in a proprietary function while handling its business relationship with third-party plaintiff and thus was not entitled to immunity. **Town of Sandy Creek v. E. Coast Contr'g, Inc., 537.**

Public official—assistant jailers—Assistant jailers are public officials entitled to immunity because they exercise the power of the State and carry out a statutory duty delegated by one whose position is constitutionally created, use discretion in doing so, and take an oath of office. **Baker v. Smith, 423.**

Public official—assistant jailer—no allegation of corrupt activities—Plaintiff did not overcome defendant assistant jailer's immunity, and the assistant jailer was entitled to summary judgment, where plaintiff did not allege that the actions of which plaintiff complained were malicious, corrupt, or outside the scope of her duties. **Baker v. Smith, 423.**

INDICTMENT AND INFORMATION

Multiple charges—defendant sufficiently informed—Indictments for indecent liberties sufficiently informed defendant of the conduct for which he was charged where each of the indictments was couched in the language of the statute, and each indictment alleged that defendant committed the offense within a specific, non-overlapping six-month period between July 2005 and December 2007. **State v. Comeaux, 595.**

JUDGMENTS

Default judgment—failure to plead—appearance irrelevant—The trial court did not abuse its discretion in an unfair and deceptive trade practices case by failing to set aside the entry of default. Defendant's default was based on his failure to plead. As such, his appearance was not relevant because the clerk could enter default on these grounds. **Lewis v. Hope, 322.**

Refusal to set aside default judgment—no excusable neglect—service of process—The trial court did not abuse its discretion by denying defendant Robin Jenkin's (defendant's) motion to set aside a default judgment under Rule 60(b) on the ground of excusable neglect. The complaint and summons were hand delivered to Guy, defendant's mother, with a copy for defendant, at the home in which they both lived. Though Guy informed defendant that she believed the papers were intended for defendant's stepfather (Leroy Jenkins), defendant was on notice that the sheriff had brought legal papers to the home. Ignorance of the judicial process or confusion about the nature of the action is not excusable neglect under Rule 60(b). **Grier v. Guy, 256.**

Refusal to set aside default judgment for all parties—judgment not illogical or unjust—The trial court did not err by not setting aside a default judgment against defendant when it set aside a default judgment against a co-defendant, Leroy Jenkins. Defendant and Jenkins were jointly and severally liable, not jointly liable, and the eventual summary judgment in favor of Jenkins did not necessarily render judgment against defendant illogical or unjust. Even assuming *arguendo* the *Frow* principle, *Frow v. De La Vega*, 82 U.S. 552, 554 (1872), could apply on these facts, defendant failed to show any error. **Grier v. Guy, 256.**

JURISDICTION

Standing—constitutional challenge—facial challenge—as-applied challenge—The trial court did not err by declaring N.C.G.S. § 14-208.18(a)(3) unconstitutional based on defendant's lack of standing. Although defendant lacked standing to raise a facial challenge to the statute, defendant had standing to bring an as-applied challenge. **State v. Daniels, 608.**

Subject matter—constitutional challenge—statute divisible and separable—defendant not indicted under statute—The trial court lacked subject matter jurisdiction to rule that N.C.G.S. § 14-208.18(a)(2) was unconstitutional. N.C.G.S. § 14-208.18(a)(2) and (a)(3) are divisible, separable, and constitute separate crimes and defendant was only indicted on charges of violating N.C.G.S. § 14-208.18(a)(3). **State v. Daniels, 608.**

Subject matter—written order not materially different from oral ruling—The trial court had subject matter jurisdiction to enter its written order in a trafficking in drugs, possession with intent to sell or deliver a controlled substance,

JURISDICTION—Continued

and conspiracy to traffic in drugs case because it did not differ materially from the court's oral ruling. The written order merely reduced the oral ruling to writing. **State v. Franklin, 337.**

LARCENY

Chose in action—blank check—evidence not sufficient—The theft of a blank check does not support a claim for larceny of a chose in action and there was no evidence that defendant committed larceny of a chose in action when she took a check from the victim's checkbook and cashed it for \$465.00. There was no evidence that the check evidenced any debt or obligation prior to the taking. **State v. Grier, 150.**

Chose in action—forgery—not mutually exclusive offenses—valid instrument not required—There was no plain error in a prosecution for larceny of a chose in action, forgery, and uttering a forged paper or instrument where the trial court failed to instruct the jury that larceny of a chose in action required a valid instrument or that the crimes were mutually exclusive. **State v. Grier, 150.**

Felonious—value of vehicle taken—testimony of owner—reference to loan—The trial court did not err by denying defendant's motion to dismiss the charge of felony larceny because there was insufficient evidence that the vehicle taken was valued at more than one-thousand dollars. An owner's testimony as to the value of his property is competent evidence to be considered by the jury; although the owner in this case referred to the loan on the vehicle, his answer was nonetheless evidence of the vehicle's value. **State v. Redman, 363.**

MARRIAGE

Common law marriage—under Texas law—no agreement between the parties—The trial court did not err by concluding that there was no common law marriage between plaintiff and defendant under Texas law and denying plaintiff's claim for absolute divorce. Plaintiff failed to prove beyond a preponderance of the evidence that there was an agreement between the parties to enter into an informal marriage. **Garrett v. Burris, 32.**

MENTAL ILLNESS

Involuntary commitment—dangerous to herself—findings not sufficient—Respondent's involuntary commitment on the basis that respondent was dangerous to herself was not upheld where the trial court's findings reflected respondent's mental illness, but did not indicate that respondent's illness or any of her symptoms would persist and endanger her within the near future. **In re Whatley, 267.**

Involuntary commitment—dangerous to others—findings not sufficient—Respondent's involuntary commitment on the basis that she was dangerous to others was not upheld where the findings pertained only to respondent's past conduct and drew no nexus between that conduct and future danger to others. **In re Whatley, 267.**

Involuntary commitment—insufficient findings—remedy—An involuntary commitment order that lacked sufficient findings was remanded for further findings, if any could be made. **In re Whatley, 267.**

MORTGAGES AND DEEDS OF TRUST

Home refinancing—statute not retroactive—The trial court properly granted summary judgment for Bank of America (defendant) on a claim that defendant violated the Secure and Fair Enforcement Mortgage Licensing Act, N.C.G.S. § 53-244.110 (2011), where plaintiffs' claims arose from negotiations and a contract executed prior to the enactment of the statute. The legislature expressed a clear intent that the statute be applied prospectively. **Dallaire v. Bank of Am., 248.**

Refinanced home mortgage—first priority loan—duty of borrower and lender—The trial court did not err by granting summary judgment for Bank of America (defendant) where there was no genuine issue of fact as to whether defendant owed plaintiffs a contractual duty to provide a first mortgage loan. The terms of the contract designated to plaintiffs the affirmative duty to assure that the lien had and maintained first priority and plaintiffs could establish no affirmative duty on the part of defendant to inform plaintiffs that the lien held second priority status. **Dallaire v. Bank of Am., 248.**

MOTOR VEHICLES

Death by motor vehicle and manslaughter—prosecuted for both—sentenced for one—The trial court did not err in a prosecution for death by motor vehicle and manslaughter arising from driving while impaired by denying defendant's pretrial motion to dismiss. Although N.C.G.S. § 20-141.4(c) states that no person charged with death by vehicle may be prosecuted for manslaughter arising out of the same death, the General Assembly's intent was to abrogate a judicial holding such that a defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising out of the same death. **State v. Elmore, 331.**

NEGLIGENCE

Summary judgment—material issues of fact—contributory negligence—The trial court erred by granting defendant's motion for summary judgment because there were issues of material fact both as to whether defendant was negligent and as to whether plaintiff was contributorily negligent. **Cone v. Watson, 241.**

PLEADINGS

Amended complaint—no standing—original complaint invalid—no relation back—The trial court did not err in a breach of contract and attorney fees case by dismissing plaintiff's amended complaint. Since plaintiff lacked standing to file the initial complaint, it was a nullity. Without standing to bring the initial complaint, there was no valid complaint to which the amended complaint could relate back. **Coderre v. Futrell, 454.**

POLICE OFFICERS

Perpetrating a hoax on law enforcement with false bomb—evidence sufficient—There was sufficient evidence of perpetrating a hoax on law enforcement officers by use of a false bomb or other device. Regarding the disputed first and fourth elements of the offense, and viewing the evidence in the light most favorable to the State, a jury could reasonably have found that defendant himself placed the device in his truck and that defendant intended to trick the officers. **State v. Golden, 136.**

PRETRIAL PROCEEDINGS

Motion for sanctions—improper purpose—The trial court did not err in an action relating to the Retaliatory Employee Discrimination Act and wrongful termination by granting sanctions against plaintiff pursuant to Rule 11(a). There was sufficient evidence to support the trial court's determination that plaintiff's motion for sanctions was filed for an improper purpose. **Fatta v. M & M Props., 18.**

Motion to continue—reasonable opportunity to prepare defense—no prejudice—The trial court did not err in a first-degree arson case by denying defendant's motion to continue his case because his alibi witnesses failed to appear. Defendant was given a reasonable time and opportunity to prepare his defense. Furthermore, even if it was error for the trial court to deny defendant's motion, defendant was not prejudiced by the error. **State v. Burton, 120.**

Motion to strike—motion for sanctions—The trial court did not err in an action relating to the Retaliatory Employee Discrimination Act and wrongful termination by granting defendant's motion to strike and motion for sanctions against plaintiff. The trial court entered detailed and thorough findings of fact regarding the allegations made by plaintiff against defendant and against the trial judge, the facts as entered by the trial court were supported by the record, and the conclusions of law were fully supported by the findings of fact. **Fatta v. M & M Props., 18.**

Rule 11 sanction—gatekeeper provision—no abuse of discretion—The trial court did not abuse its discretion in an action relating to the Retaliatory Employee Discrimination Act and wrongful termination by entering the Rule 11 sanction of a "gatekeeper" provision against plaintiff. The trial court's order explained the court's reasons for entering the sanctions against plaintiff, the gatekeeper provision was narrowly tailored and limited in scope, and plaintiff was provided an opportunity to be heard and had notice that the trial court intended to impose a gatekeeper provision. **Fatta v. M & M Props., 18.**

PROBATION AND PAROLE

Confinement credit—post-release supervision revoked—mootness—time constraints of appeal—The trial court erred in a probation violation case by vacating its previous award of eight days of confinement credit toward the remaining nine months of defendant's sentence after his post-release supervision was revoked. Although the issue concerning the award of confinement credit to defendant became moot once defendant completed his sentence, it was in the public's interest to have this issue resolved because all felons seeking confinement credit following revocation of post-release supervision would face similar time constraints when appealing a denial of confinement credit, which effectively prevented the issue regarding the trial judge's discretion from being resolved. **State v. Corkum, 129.**

RAPE

Attempted second-degree—penetration—conflicting evidence—The trial court committed plain error by failing to instruct the jury on attempted second-degree rape and attempted incest where the victim's testimony could support both the proposition that the defendant penetrated her and that he did not. This holding has no bearing on defendant's second-degree sexual offense convictions, which do not require penetration. **State v. Boyett, 102.**

SATELLITE-BASED MONITORING

Aggravated offense—penetration—second-degree sexual offense—The trial court erred by entering an order requiring that defendant enroll in satellite-based monitoring on the basis that his second-degree sexual offense conviction constituted an aggravated offense. Without a review of the underlying factual scenario giving rise to the second-degree sexual offense conviction, the trial court could not have determined whether defendant's second-degree sexual offense involved penetration, as required for an aggravated offense. **State v. Boyett, 102.**

SEARCH AND SEIZURE

Denial of motion to suppress—cocaine—warrantless stop and frisk—probable cause—plain feel doctrine—The trial court did not commit plain error in a trafficking in cocaine by possession case by denying defendant's motion to suppress cocaine. An officer had reasonable suspicion to conduct a warrantless stop and frisk of defendant after he received information from two reliable informants who provided information about defendant's criminal activity, location, and appearance. Further, the officer's search of defendant created probable cause for seizure of the cocaine under the "plain feel" doctrine. **State v. Reid, 181.**

Motion to suppress—passenger in car—probable cause—scope and duration of search—The trial court did not err in a trafficking in drugs, possession with intent to sell or deliver a controlled substance, and conspiracy to traffic in drugs case by denying defendant's motion to suppress. Defendant did not have standing to challenge the search of the car since he was a passenger. Further, defendant did not contest that the officer acted with probable cause to believe that defendant committed a traffic infraction in failing to wear a seatbelt. Finally, the scope and duration of the stop were not overly extended. **State v. Franklin, 337.**

Search and seizure—search warrant—probable cause—anonymous tip—nexus—warrant affidavit—The trial court erred in a possession of a firearm by a convicted felon case by granting defendant's motion to suppress evidence seized as a result of a search of defendant's residence. Under the totality of the circumstances, a second anonymous tip had sufficient indicia of reliability, there was a sufficient nexus between the contraband and defendant's residence, and the warrant affidavit provided sufficient probable cause to permit the search of defendant's residence. **State v. Oates, 634.**

Search of automobile—probable cause—passenger's marijuana—The discovery of marijuana on a passenger in a vehicle supported the belief that the automobile could contain contraband and supplied probable cause for a search of the vehicle. The trial court's conclusion that the officers' search of the rental car after a traffic stop did not violate defendant's Fourth Amendment rights was correct. **State v. Mitchell, 171.**

Vehicle stop—motion to suppress—reasonable articulable suspicion—speeding—The trial court did not err in a feloniously carrying a concealed weapon case by denying defendant's motion to suppress evidence arising from a vehicle stop based on an officer's alleged lack of reasonable articulable suspicion. Since there was a reasonable suspicion that defendant was speeding, any evidence resulting from the stop need not have been suppressed. **State v. Royster, 374.**

SENTENCING

Habitual felon status—habitual misdemeanor assault not a prior underlying felony—The trial court erred in a misdemeanor possession of stolen property and an uttering a forged instrument case by sentencing defendant as an habitual felon. The clear intent of the habitual misdemeanor assault statute prevented it from being used as a prior underlying felony to achieve habitual felon status. The judgment entered against defendant was vacated and remanded to the superior court for resentencing. **State v. Shaw, 209.**

SEXUAL OFFENDERS

Lifetime registration—aggravated offense—reportable offense—The trial court erred by finding that defendant's conviction for second-degree sexual offense was an aggravated offense and then ordering registration as a sex offender for life where that determination could not have been made without reviewing the underlying facts. However, defendant's second-degree sexual offense conviction constituted a reportable offense, and, on remand, the trial court may require defendant to register as a sex offender for a period of 30 years. **State v. Boyett, 102.**

SEXUAL OFFENSES

Instructions—use of “victim”—Any error was harmless in a prosecution for multiple sex offenses where the trial court used the victim's name when referring to the elements of the crime but used the term “victim,” as found in the pattern jury instructions, when describing the generic definition of the crime. The trial court was not intimating any opinion by using the word “victim.” **State v. Boyett, 102.**

Jury instructions—use of defendant's comments—within trial court's discretion—The trial court did not err in a second-degree sexual offense case by failing to give a limiting instruction during the jury charge regarding the State's use of defendant's Miranda-inadmissible comments on cross-examination. This argument was subject to plain error review as defendant did not object to the jury instruction at trial and the instruction on the State's use of the evidence in question that the trial court elected to give was within its discretion. **State v. Randolph, 521.**

Sufficient evidence—sexual act—The trial court did not err by denying defendant's motion to dismiss a second-degree sexual offense charge because the State presented insufficient evidence of a requisite “sexual act” on the part of defendant. **State v. Randolph, 521.**

STATUTES OF LIMITATION AND REPOSE

Failure of subdivision road—statute of repose—last act or omission—purpose of road—Planned Community Act—The trial court did not err by granting summary judgment for defendant developers based on the statute of repose in an action arising from the failure of a farm road that was eventually paved where plaintiff property owners association contended that the action was within the statute of repose based on the paving. Plaintiff presented no evidence that paving the road was necessary for the road's undisputed intended purpose (to allow vehicular traffic access); failed to present evidence connecting the erosion of a bank to the paving; did not meet its burden of showing that the paving was the last specific act or omission giving rise to its claims; and N.C.G.S. § 47F-3-111, by its plain language, indicates that it only applies to toll statutes of limitation. Statutes of repose are fundamentally distinct from statutes of limitation. **Glens of Ironduff Prop. Owners Ass'n, Inc. v. Daly, 217.**

TERMINATION OF PARENTAL RIGHTS

Best interests of child—written findings required—A termination of parental rights order was remanded for further findings concerning the best interests of the child where the trial court did not make the written findings required by N.C.G.S. § 7B-1110 (2011). As amended, the statute explicitly requires written findings and the prior cases approving evident consideration of the factors without findings are no longer relevant. In this case the issues of whether termination would aid in the accomplishment of the permanent plan and the quality of the bond between the child and respondent were raised during the termination hearing, but the trial court did not make written findings. **In re J.L.H., 52.**

Role of guardian ad litem—diminished capacity—incompetence—assistance—substitution—The trial court erred in a termination of parental rights (TPR) proceeding by failing to determine whether respondent mother was incompetent or had diminished capacity and by failing to determine the role of respondent's appointed guardian *ad litem* (GAL). Rule 17(e) of the Rules of Civil Procedure, which addresses the duties of a GAL for an incompetent person, should apply if the parent is incompetent and the role of the GAL should be one of substitution. If, however, the parent has diminished capacity, N.C.G.S. § 7B-1101.1(e) should apply and the role of the GAL should be one of assistance. The trial court's TPR order was vacated and remanded. **In re P.D.R., 460.**

Willfully leaving child in foster care—lack of reasonable progress—The trial court properly terminated respondent's parental rights on the basis of willfully leaving her child in foster care for more than twelve months without showing reasonable progress. The trial court's findings demonstrated that, although respondent had participated in some services, her failure to participate with her own mental health treatment and her inconsistency in participating in the child's therapy was not reasonable progress under the circumstances. **In re J.L.H., 52.**

UNFAIR TRADE PRACTICES

Workforce not surreptitiously raided—arguments meritless—The trial court did not err by granting summary judgment in favor of defendants with respect to its unfair or deceptive trade practices claim. The record failed to support plaintiff's assertion that defendants "surreptitiously raided" plaintiff's workforce and plaintiff's remaining arguments were meritless. **Austin Maint. & Constr., Inc. v. Crowder Constr. Co., 401.**

VENUE

Plaintiff nonresident and defendant resident—proper county defendant resides at commencement of action—The trial court erred by denying defendants' motion for change of venue from Buncombe County to Catawba County. In a civil action in this state where venue is not specifically designated by N.C.G.S. §§ 1-76 through 1-81, where the plaintiff is a nonresident and the defendants are residents, the proper venue for the action pursuant to N.C.G.S. § 1-82 is any county in which defendants reside at the commencement of the action. Defendants were residents of Catawba County at the commencement of this action. **TD Bank, N.A. v. Crown Leasing Partners, LLC, 649.**

WITNESSES

Expert—not licensed—The fact that a witness (Straw) at an administrative hearing concerning a mining dispute was neither a licensed engineer nor a licensed geologist did not render his expert testimony either “illegal” or inadmissible. In light of Straw’s demonstrated expertise in the study of ground vibration and its effect on structures, his expert testimony was properly admitted. **Stark v. N.C. Dep’t of Env’t & Natural Res.**, 491.

WORKERS’ COMPENSATION

Attendant care—choice of provider—The Industrial Commission did not err in a workers’ compensation case by not allowing defendants to choose plaintiff’s attendant care provider. Assuming that the selection of a surgeon (as in a prior case) is sufficiently similar to the selection of an attendant care provider, there was absolutely no evidence that defendants directed plaintiff to their chosen attendant care provider in a prompt and adequate manner, as they were required to do. Furthermore, all of plaintiff’s attendant care providers were approved by the Commission. **Boylan v. Verizon Wireless**, 436.

Attendant care—payment rate for family member—Evidence in a workers’ compensation case concerning the rate paid for professional attendant care supported an award of a lesser amount to an unskilled family member. **Boylan v. Verizon Wireless**, 436.

Evidence—authentication-based objection—challenged in Form 44—Plaintiff in a Workers’ Compensation case was not prevented from raising an authentication-based objection to defendants’ video surveillance exhibits before the Commission. Plaintiff challenged the admissibility of Defendants’ exhibits in his Industrial Commission Form 44. **Bowman v. Cox Toyota Scion**, 1.

Evidence—video surveillance exhibits—sufficient authentication—The Industrial Commission erred in a Workers’ Compensation case by excluding defendants’ video surveillance exhibits from the evidentiary record. Defendants sufficiently authenticated the videos. **Bowman v. Cox Toyota Scion**, 1.

Exclusivity—temporary staffing—expressly not an employee—no implied contract—Plaintiff’s negligence claims were not barred by the exclusivity provisions of the Workers’ Compensation Act where plaintiff’s decedent, who worked for a temporary employment agency, was not a County employee under the express language of the agreement between the agency and the County. Because the County chose not to establish an employment relationship with decedent, it eschewed both the liabilities and protections of the Workers’ Compensation Act. **Gregory v. Pearson**, 580.

Findings—attendant care—Competent evidence supported the Industrial Commission’s finding in a workers’ compensation case that plaintiff would medically benefit from attendant care and the finding justified the Commission’s conclusion awarding plaintiff the costs of attendant care. Determining the credibility and weight of conflicting testimony is solely the responsibility of the Commission, not the appellate court. **Boylan v. Verizon Wireless**, 436.

Findings—attendant care—spinal cord stimulator—The Industrial Commission in a workers’ compensation case made the findings necessary to support its conclusions concerning attendant care even if it did not make specific findings about the effectiveness of treatment with a spinal cord stimulator. **Boylan v. Verizon Wireless**, 436.

WORKERS' COMPENSATION—Continued

Findings—contrary evidence—conclusive on appeal—Despite evidence to the contrary, competent evidence in a workers' compensation case supported the Industrial Commission's finding that eight hours of attendant care would be medically beneficial to plaintiff. That finding was conclusive on appeal and supported the award. **Boylan v. Verizon Wireless, 436.**

Findings—wheelchair ramps—The evidence in a workers' compensation case was competent and supported the Industrial Commission's findings that plaintiff's wheelchair ramps should be replaced and the front ramp extended. Those findings justified the Commission's conclusion ordering defendants to pay for the work. Defendants' arguments concerning contrary medical opinions were unavailing. **Boylan v. Verizon Wireless, 436.**

Insurance coverage—actions of insurance carrier—quasi-estoppel applicable—The Industrial Commission's unchallenged findings of fact in a workers' compensation case supported its conclusion that New York State Insurance Fund's (NYSIF) actions were sufficient to induce defendant employer DenRoss into believing NYSIF insured DenRoss employees working outside of New York State and that NYSIF's conduct gave rise to the application of the doctrine of quasi-estoppel. **Smith v. DenRoss Contr'g, U.S., Inc., 479.**

Insurance coverage—compensable injuries—estoppel from denial of coverage—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's injury was subject to coverage by the insurance policy between New York State Insurance Fund (NYSIF) and employer DenRoss. NYSIF was estopped from denying coverage of plaintiff's compensable injuries because its representations to DenRoss were sufficient for DenRoss to believe it had coverage from NYSIF for employees working outside of New York State. **Smith v. DenRoss Contr'g, U.S., Inc., 479.**

Interest—prior award—no out-of-pocket expenses—The Industrial Commission erred in a worker's compensation case by concluding that plaintiff was not entitled to interest on a prior award for attendant care benefits. The legitimate legislative purposes of preventing unjust enrichment to defendant and promoting settlement are advanced by the award of interest, even where the worker has not shown out-of-pocket expenses during the appeal. **Boylan v. Verizon Wireless, 436.**

Jurisdiction—insurance company—separate from the State of New York—no sovereign immunity—The Industrial Commission did not err in a workers' compensation case by concluding that New York State Insurance Fund (NYSIF) was subject to the jurisdiction of the Commission. NYSIF acted as an insurance company separate from the State of New York and was not entitled to sovereign immunity in North Carolina courts. **Smith v. DenRoss Contr'g, U.S., Inc., 479.**

Late payment penalty—response to notice of claim timely—The Industrial Commission erred in a workers' compensation case by assessing a late payment penalty against New York State Insurance Fund (NYSIF) pursuant to N.C.G.S. § 97-18(j). NYSIF responded to the notice of the claim of a compensable injury within thirty days of notice from the Commission, thus complying with the requirements of N.C.G.S. § 97-18(j). **Smith v. DenRoss Contr'g, U.S., Inc., 479.**

Unreasonable defense of claim—attorney fees—The Industrial Commission erred in a workers' compensation case by concluding that New York State Insurance Fund (NYSIF) unreasonably defended this claim and awarding attorney fees pursuant

WORKERS' COMPENSATION—Continued

to N.C.G.S. § 97-88.1 where NYSIF's denial of plaintiff's claim was not unreasonable. **Smith v. DenRoss Contr'g, U.S., Inc., 479.**

ZONING

Contract zoning—no reciprocal agreement—The trial court did not err in a rezoning case by granting summary judgment in favor of defendant County because the Board of Commissioners did not engage in illegal contract zoning when it approved the rezoning of the subject property. There was no evidence that the Board obligated itself to, or entered into a reciprocal agreement with, the landowners or Sanderson Farms in exchange for approval of the rezoning application. **Morgan v. Nash Cnty., 60.**

Duty to consider permissible uses of property fulfilled—The trial court did not err in a rezoning case by granting summary judgment in favor of defendants because the evidence established that the Board of Commissioners fulfilled its duty to consider all permissible uses of the property proposed to be rezoned. **Morgan v. Nash Cnty., 60.**

Rule 60(b) motion—no new evidence—attorney fees—no jurisdiction—The trial court did not abuse its discretion in a rezoning case by reaching its conclusion that it would deny plaintiffs' Rule 60(b) motion had it been before the court because plaintiffs offered no new information to support their motion. However, the trial court erred in awarding attorney fees and expenses to defendant County in responding to plaintiffs' motion because the trial court did not have jurisdiction to do so. **Morgan v. Nash Cnty., 60.**

Standing—injury not redressed by decision—injury conjectural—city not directly affected—property too remote—The trial court did not err in a rezoning case by concluding that plaintiff City did not have standing to challenge defendant County's rezoning of the subject property. The City could not establish that it was likely the alleged injury would have been redressed by a favorable decision. Further, the alleged injury was conjectural or hypothetical, the contested zoning amendment did not "directly" affect the City, and the City's property was located three and a half miles from the rezoned property and thus was too remote to support the City's claim of standing. **Morgan v. Nash Cnty., 60.**

Statement of reasonableness—contemporaneous with adoption of amendment—sufficient—The trial court did not err in a rezoning case by granting summary judgment in favor of defendant County on plaintiffs' claim that the Board of Commissioners failed to comply with the requirements of N.C.G.S. § 153A-341. The Board's adoption of a statement of reasonableness contemporaneously with the adoption of the zoning amendment was sufficient to comply with the statute. **Morgan v. Nash Cnty., 60.**