North Carolina Court of Appeals
Legal Standards

The North Carolina Court of Appeals Legal Standards Database was adopted by the Court in conference and first published on 18 June 2012. This document is intended to provide illustrations of the wide variety of standards of review, legal tests, and general statements of law employed at the N.C. Court of Appeals; it is not meant to provide the definitive statement of law for every appeal. It is ***always*** necessary to do further research based on an individual case's facts and procedural posture. **Also, please be sure and cite check these cases as you would any other case that you cite in a brief or opinion**.

Contents

APPELLATE PROCESS

Statutory Authority

"There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the [appellate division]." *In re Halifax Paper Co.*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963).

"Our own Supreme Court has . . . held that the right to appeal in this state is purely statutory." *State v. Joseph*, 92 N.C. App. 203, 204, 374 S.E.2d 132, 133 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989).

Among the statutes expressly providing for an appeal of right under certain circumstances are the following: N.C. Gen. Stat. § 1-277 (appeal from superior or district court); N.C. Gen. Stat. § 7A-27 (appeals of right from courts of the trial divisions); N.C. Gen. Stat. § 7A-29 (appeals of right from certain administrative agencies); N.C. Gen. Stat. § 7B-1001 (appeals of right in juvenile abuse, neglect, dependency proceedings and termination of parental rights proceedings); N.C. Gen. Stat. § 7B-2602 (appeals of right in juvenile delinquency proceedings); N.C. Gen. Stat. § 15A-1444 (appeal by a defendant in a criminal case); N.C. Gen. Stat. §§ 15A-1432(e), -1445 (appeal by the State in a criminal case); and N.C. Gen. Stat. § 150B-52 (appeal in cases originating under the Administrative Procedure Act).

Effect of Precedent

"[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (quotation marks omitted).

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Presumption

Where "this Court is not bound by the findings or ruling of the lower court, there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578, 561 S.E.2d 276, 281–82 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 113 (2003).

Role of Appellate Court

"It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

"It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

Appellate Rule Violations

In General

"'[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930)). "Compliance with the rules, therefore, is mandatory." *Id.* at 194, 657 S.E.2d at 362.

"[N]oncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008).

"[D]efault under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008).

Waiver

"[W]aiver . . . arises out of a party's failure to properly preserve an issue for appellate review." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194-95, 657 S.E.2d 361, 363 (2008). "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Id.* at 195-96, 657 S.E.2d at 364.

However, "plain error review is available in criminal appeals, for challenges to jury instructions and evidentiary issues, . . . [but] only in truly exceptional cases when 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).

"Aside from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest.'" *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting N.C.R. App. P. 2).

Jurisdictional Default

"[A] default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court. It is axiomatic that courts of law must have their power properly invoked by an interested party." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008).

"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).

"[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2. . . . Accordingly, Rule 2 may not be used to reach the merits of an appeal in the event of a jurisdictional default." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008).

Non-Jurisdictional Default

"The final principal category of default involves a party's failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules. This comprehensive set of nonjurisdictional requirements is designed primarily to keep the appellate process flowing in an orderly manner." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (quotation marks omitted).

"Noncompliance with [nonjurisdictional requirements], while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of

jurisdiction. And, notably, the appellate court faced with a default of this nature possesses discretion in fashioning a remedy to encourage better compliance with the rules." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008).

"[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008).

"[W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008).

Who Can Appeal

"[O]nly a 'party aggrieved' may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000).

"Where a party is not aggrieved by the judicial order entered, . . . his appeal will be dismissed." *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam).

"[A] party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be." *Casado v. Melas Corp.*, 69 N.C. App. 630, 635, 318 S.E.2d 247, 250 (1984).

Mootness

"[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968).

"Before determining whether an appeal is moot when the defendant has completed his sentence, it is necessary to determine whether collateral legal consequences of an adverse nature may result. '[W]hen the terms of the

judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.'" *State v. Black*, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)).

Issues Not Raised in Trial Court

"[I]ssues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001).

"This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citations and quotation marks omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

Subject Matter Jurisdiction

Generally

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987).

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

"'It is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.'" *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956)), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L. Ed. 2d 96 (1962).

In Trial Courts

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

In Appellate Courts

"When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citation omitted).

"[I]t is [appellant's] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects [the] appeal to dismissal." *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002). "The superior court has no jurisdiction to try a defendant on a warrant for a misdemeanor charge unless he is first tried, convicted and sentenced in district court and then appeals that judgment for a trial *de novo* in superior court." *State v. Felmet*, 302 N.C. 173, 175, 273 S.E.2d 708, 710 (1981). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Id.* at 176, 273 S.E.2d at 711. "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.*

Interlocutory Appeals

Generally

"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); *see also State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986) ("There is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case."); *but see* N.C. Gen. Stat. § 15A-979(c), N.C. Gen. Stat. § 15A-1432(d) and (e), and N.C. Gen. Stat. § 15A-1445, which permit an appeal of right from interlocutory rulings in criminal cases in limited circumstances.

"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 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, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

"There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

Grounds for Appellate Review

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.'" *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

Exceptions

"[I]mmediate 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) (quotation marks omitted).

Substantial Right Exception

"It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

"The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009).

"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. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

"Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

Rule 54(b) Exception

"In addition to the appeals pursuant to N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d), Rule 54(b) provides that in an action with multiple parties or multiple claims, if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable." *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998).

"When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory. Nonetheless, the trial court may not, by certification, render its decree immediately appealable if '[it] is not a final judgment.'" *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation omitted) (quoting *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983)).

Personal Jurisdiction Exception (N.C. Gen. Stat. § 1-277(b))

"Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." N.C. Gen. Stat. § 1-277(b) (2011).

"[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2)." *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982).

"[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.

> On the other hand, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (citations omitted).

Questions of Law

"Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber,* 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

"'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. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)); *see also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (quotation marks omitted)).

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)

Constitutional Rights

"[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

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

Questions of Fact

Jury Trials

> "There was sufficient evidence, in law, to support the finding of the jury, and when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an

application to the trial judge to set aside the verdict for that reason." *Pender v. North State Life Ins. Co.*, 163 N.C. 98, 101, 79 S.E. 293, 294 (1913).

"We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict." *West v. Atlantic Coast Line R.R. Co.*, 174 N.C. 125, 130, 93 S.E. 479, 481 (1917).

Bench trials

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

Discretionary Rulings

"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).

"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); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("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 [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

CIVIL - PRETRIAL MATTERS

Discovery

Generally

"When reviewing a trial court's ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010).

Sanctions for Rule 37 Violations

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996).

"'[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions.'" *Global Furniture, Inc. v. Proctor*, 165 N.C. App. 229, 233, 598 S.E.2d 232, 235 (2004) (quoting *Hursey v. Homes by Design*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995)).

"[A]s Rule 37(a)(4) requires the award of expenses to be reasonable, the record must contain findings of fact to support the award of any expenses, including attorney's fees." *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988).

Preliminary Injunctions

Interlocutory Nature

"A preliminary injunction is interlocutory in nature. As a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment." *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (citation and quotation marks omitted).

Scope of Review

"The applicable standard of review utilized in an appeal from the denial of a request for a preliminary injunction is essentially *de novo*. An appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. However, a trial court's ruling . . . is presumed to be correct, and the party challenging the ruling bears

the burden of showing it was erroneous." *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 261, 704 S.E.2d 1, 2-3 (2010) (citations and quotation marks omitted).

"[A] refusal to dissolve a [preliminary] injunction is addressed to the discretion of the trial court and can only be set aside if there is an abuse of discretion." *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 598, 424 S.E.2d 226, 231 (1993).

Standard for Issuance

"[A preliminary injunction] will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

Amending Pleadings

"A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

Intervention of Parties (N.C.R. Civ. P. 24)

Intervention as a Matter of Right

"We review de novo the grant of intervention of right under Rule 24(a)." *Holly Ridge Assocs. v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 538, 648 S.E.2d 830, 835 (2007).

"The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999).

Permissive Intervention

"[P]ermissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 460, 515 S.E.2d 675, 683 (1999).

Motions to Continue

"The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873, *disc. review denied*, 354 N.C. 219, 557 S.E.2d 531 (2001).

Change of Venue

Review

"The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.'" *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (citations omitted).

"A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown." *Phillips v. Currie Mills, Inc.*, 24 N.C. App. 143, 144, 209 S.E.2d 886, 886 (1974).

Waiver

"However, since venue is not jurisdictional it may be waived by express or implied consent, and a defendant's failure to press his motion to remove has been found to be a waiver." *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (citations omitted).

Motion to Dismiss (N.C.R. Civ. P. 12(b)(6))

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Motion to Dismiss for Lack of Standing

"In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party."
Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

Motion in Limine

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (citing *Nunnery v. Baucom*, 135 N.C. App. 556, 566, 521 S.E.2d 479, 486 (1999)).

Summary Judgment (N.C.R. Civ. P. 56(c))

"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)).

CIVIL - TRIAL MATTERS

Declaratory Judgment

"[I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court's conclusions of law *de novo*." *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596-97, 632 S.E.2d 563, 571 (2006) (citations omitted), *disc. review denied*, 361 N.C. 350, 644 S.E.2d 5 (2007).

Directed Verdict (N.C.R. Civ. P. 50)

"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)).

"In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim

must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

Jury Instructions

In General

"It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety. Where 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) (citations omitted).

"[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are 'sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.'" *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (quoting *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967)).

"'[T]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.' 'Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law.'" *Henry v. Knudsen*, 203 N.C. App. 510, 519, 692 S.E.2d 878, 884 (citations omitted) (quoting *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984) and *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006)), *disc. review denied*, 364 N.C. 602, 703 S.E.2d 446 (2010).

"[W]here a party fails to object to jury instructions, 'it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error.'" *Madden v. Carolina Door Controls, Inc.*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (quoting *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985)).

"On appeal, this Court considers a jury charge contextually and in its

entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted).

Specific Instructions

"[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), *disc. review denied*, 363 N.C. 812, 693 S.E.2d 352 (2010).

"'[W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.'" *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335, 540 S.E.2d 57, 60 (2000) (quoting *Calhoun v. State Highway & Pub. Works Com.*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935)), *disc. review denied*, 353 N.C. 371, 547 S.E.2d 442 (2001).

"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).

"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, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)).

Bench Trials

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.'" *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

Specific Performance

"The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court, and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981).

New Trial (N.C.R. Civ. P. 59)

"[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 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).

"[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

"While an order for new trial pursuant to Rule 59 which satisfies the procedural requirements of the Rule may ordinarily be reversed on appeal only in the event of 'a manifest abuse of discretion,' when the trial court grants or denies a new trial 'due to some error of law,' then its decision is fully reviewable." *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995) (quoting *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921,

923 (1987)), *disc. review denied*, 343 N.C. 121, 468 S.E.2d 777 (1996). "Appellate courts thus must utilize the 'abuse of discretion' standard only in those instances where there is no question of 'law or legal inference.'" *Id.* (quoting *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981)).

Judgment Notwithstanding the Verdict (N.C.R. Civ. P. 50)

"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 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).

Relief from Judgment (N.C.R. Civ. P. 60(b))

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Relief from Default Judgment (N.C.R. Civ. P. 55(d))

"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).

Contempt

Standard of Review

"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) (citation omitted) (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *see also State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855, (applying a similar standard of review for review of criminal contempt proceedings), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).

Civil Contempt (N.C. Gen. Stat. § 5A-21)

"Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil

contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant's assets." *Watson v. Watson*, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

"The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court's conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt, and a contemnor cannot be required to pay compensatory damages." *Watson v. Watson*, 187 N.C. App. 55, 65, 652 S.E.2d 310, 317 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

Criminal Contempt (N.C. Gen. Stat. § 5A-11)

"Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly." *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (citation omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

Rule 11 Sanctions (N.C.R. Civ. P. 11)

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a)." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

"[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper because '[t]he rule's provision that the court "shall impose" sanctions for motions abuses . . . concentrates [the court's]

discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.'" *Turner v. Duke Univ.,* 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985)).

CIVIL - FAMILY LAW

Child Custody (N.C. Gen. Stat. § 50-13.1)

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254.

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006).

Child Support

Generally

"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).

Dismissal of Motion to Modify

"On appeal, dismissal of a motion to modify child support which is based on the insufficiency of its allegations as a matter of law without the weighing of facts is subject to *de novo* review. The allegations in the motion to modify are taken as true and reasonable inferences from the allegations are drawn in favor of the party seeking to modify child support." *Devaney v. Miller*, 191 N.C. App. 208, 213, 662 S.E.2d 672, 676 (2008) (citations omitted).

Divorce

Property Division (N.C. Gen. Stat. § 50-20)

In General

"Upon application of a party for an equitable distribution, the trial court 'shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20 (Cum. Supp. 1992)].' In so doing, the court must conduct a three-step analysis. First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner." *Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202-03 (1993) (citations omitted) (quoting N.C. Gen. Stat. § 50-20 (Cum. Supp. 1992)), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

Standard of Review

"Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Sanctions for Delay (N.C. Gen. Stat. § 50-21)

"[W]hether to impose sanctions and which sanctions to impose under G.S. § 50-21(e) are decisions vested in the trial court and reviewable on appeal for abuse of discretion. In applying an abuse of discretion standard, this Court will uphold a trial court's order of sanctions under section 50-21(e) unless it is 'manifestly unsupported by reason.'" *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Alimony (N.C. Gen. Stat. § 50-16.3A)

In General

"In determining the amount of alimony the trial judge must follow the requirements of the applicable statutes. Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. 'It is a question of fairness and justice to all parties.' Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)).

"A trial court's award of alimony is addressed in N.C. Gen. Stat. § 50-16.3A . . ., which provides in pertinent part that in 'determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors' including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses." *Hartsell v. Hartsell*, 189 N.C. App. 65, 69, 657 S.E.2d 724, 727 (2008) (quoting N.C. Gen. Stat. § 50-16.3A (2007)).

Standard of Review

"The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) (citing *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966)).

Modification/Changed Circumstances (N.C. Gen. Stat. § 50-16.9)

"[T]he trial court, on a modification hearing, does not retry the issues tried at the original hearing. What *is* properly considered at a modification hearing is whether there has been a material change in the parties' circumstances which justifies a modification or termination of the alimony order." *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997) (citations omitted).

"'To determine whether a change of circumstances under [N.C.]G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded . . . .' The reference to these circumstances or factors at the modification hearing is not to redetermine the statuses of dependent spouse and supporting spouse or to determine whether the original determination was proper. Rather, the reference to the circumstances or factors used in the original determination is for the purpose of comparing the present circumstances with the circumstances as they existed at the time of the original determination in order to ascertain whether a material change of circumstances has occurred." *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997) (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)).

"Where the original alimony order is pursuant to [statute], the trial judge will usually have made findings of fact and conclusions of law in reference to the circumstances or [statutory] factors . . . . Where, on the other hand, the alimony order originates from a private agreement between the parties, there may be few, if any, findings of fact as to these circumstances or factors set out in the court decree awarding alimony. In the latter case, determining whether there has been a material change in the parties' circumstances sufficient to justify a modification of the alimony order may require the trial court to make findings of fact as to what the original circumstances or factors were in addition to what the current circumstances or factors are." *Cunningham v. Cunningham*, 345 N.C. 430, 436, 480 S.E.2d 403, 406 (1997) (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)).

"Upon a showing of changed circumstances, the trial court must consider the current circumstances with regard to the [statutory] factors . . . and determine whether the original alimony order should be modified. 'As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay.' The power of the court to modify an alimony order is not power to grant a new trial or to retry the issues of the original hearing, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties." *Cunningham v. Cunningham*, 345 N.C. 430, 436, 480 S.E.2d 403, 406 (1997) (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)).

CIVIL – ZONING

Superior Court's Role

"In general, the superior court's task when reviewing the grant or denial by a county board of a special use permit includes: (1) Reviewing the record for errors in law, (2) Insuring that procedures specified by law in both statute and ordinance are followed, (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and (5) Insuring that decisions are not arbitrary and capricious." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (quotation marks omitted).

Standards of Review

Superior Court

"The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, [i]f a petitioner contends the [b]oard's decision was based on an error of law, de novo review is proper. Moreover, the trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Mann Media, Inc. v.*

Randolph Cnty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citations and quotation marks omitted).

De Novo Review

"Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011).

"[A]n appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (citation omitted), *rev'd for reasons stated in the dissent*, 355 N.C. 269, 559 S.E.2d 547 (2002).

Whole Record Test

"When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quotation marks omitted).

"The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Declaratory Judgment

"A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment." *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972).

Standing

"In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

CIVIL – ADMINISTRATIVE LAW

Standard of Review

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006).

Generally

"[I]n cases appealed from an administrative tribunal under [Article 3 of North Carolina's Administrative Procedure Act], it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b)." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

"When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. 'The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *N.C. Sav. & Loan League v. N.C. Credit Union Comm'n*, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (citations omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)).

CIVIL – INDUSTRIAL COMMISSION

Worker's Compensation

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008)

(citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Tort Claims

"The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act 'shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.'" *Simmons v. Columbus Cnty. Bd. of Educ.*, 171 N.C. App. 725, 727, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)).

CIVIL - ARBITRATION

Order Denying/Compelling Arbitration

"The standard governing our review of this case is that 'findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' . . . 'Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.'" *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (quoting *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) and *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

Confirming/Vacating Arbitration Award

"On appeal of a trial court's decision confirming an arbitration award, we accept the trial court's findings of fact that are not clearly erroneous and review its conclusions of law *de novo*." *First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005).

"The standard of review of the trial court's vacatur of the arbitration award is the same as for any other order in that we accept findings of fact that are not 'clearly erroneous' and review conclusions of law *de novo*." *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48, 131 L. E. 2d 985, 996 (1995)).

CRIMINAL - PRETRIAL MATTERS

Motion to Suppress

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Motion to Continue

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). "When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal." *Id.*

Motion in Limine

A motion *in limine* "can be made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial." *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980). "The decision of whether to grant [a motion *in limine*] rests in the sound discretion of the trial judge." *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995).

"[A] motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

Indictments

"An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*

Guilty Pleas

"[U]nder N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

Discovery & Related Sanctions

"'A trial court's order regarding matters of discovery are generally reviewed under an abuse of discretion standard.'" *State v. Hall*, 187 N.C. App. 308, 324, 653 S.E.2d 200, 211 (2007) (quoting *Morin v. Sharp*, 144 N.C. App. 369, 374, 549 S.E.2d 871, 874 (2001)), *appeal dismissed and disc. review denied,* 362 N.C. 366, 663 S.E.2d 431 (2008).

"The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988).

CRIMINAL - TRIAL MATTERS

Preservation of Issues at Trial

Failure to Object During Trial

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1).

"'When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial.'" *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (quoting *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000)), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

Jury Instructions

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C.R. App. P. 10(a)(2); *see*

also State v. McNeil, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 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).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Jury Instructions

In General

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

"[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). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

Lesser-Included Offenses

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the

lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

Erroneous Instruction

"Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29, *disc. review denied,* 364 N.C. 327, 700 S.E.2d 926 (2010). "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)).

Choice of Instruction

"As to the issue of jury instructions, we note that choice of 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, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002).

Deadlocked Juries (N.C. Gen. Stat. § 15A-1235)

"[I]t has long been the rule in this [s]tate that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985).

"In deciding whether the trial court coerced a verdict by the jury, the appellate court must look to the totality of the circumstances. Some of the factors considered are whether the trial court conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors that it would hold them until they reached a verdict." *State v. Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995) (citation omitted).

Jury matters

"[W]e must defer to the trial court's judgment as to whether the prospective juror could impartially follow the law." *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999).

Improper Closing Argument

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted).

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

CRIMINAL - SENTENCING ISSUES

Standard of Review

"[We review alleged sentencing errors for] 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)).

Generally

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2011).

"Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the [S]tate and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing

hearing must result." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

CRIMINAL - POST-CONVICTION ISSUES

Ineffective Assistance of Counsel

"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 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.' 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 defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

"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).

"Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003).

Motion for Appropriate Relief

"A trial 'court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari.'" *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (quoting N.C. Gen. Stat. § 15A-1422(c)(3) (1988)).

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

"Findings of fact 'made by the trial court pursuant to hearings on motions for appropriate relief' are binding on appeal if they are supported by competent evidence." *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

"'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.'" *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

CRIMINAL - PROBATION REVOCATION

Standard of Review

"A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted).

EVIDENTIARY MATTERS

Evidentiary Rulings, Generally

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*,

145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

Preliminary Questions (N.C.R. Evid. 104)

"Decisions made under Rule 104(a) are addressed to the sound discretion of the trial court." *State v. Shuford*, 337 N.C. 641, 649, 447 S.E.2d 742, 747 (1994).

Relevant Evidence (N.C.R. Evid. 401)

"Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

Exclusion of Relevant Evidence (N.C.R. Evid. 403)

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

Character Evidence (N.C.R. Evid. 404)

"Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989).

"Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of

review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

"To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

Methods of Proving Character (N.C.R. Evid. 405)

"[S]pecific instances of conduct are admissible to prove character or a trait of character only when the character or a trait of character of a person is an essential element of a charge, claim, or defense." *State v. Baymon*, 336 N.C. 748, 756, 446 S.E.2d 1, 5 (1994) (quotation marks omitted).

"A 'relevant' specific instance of conduct under Rule 405(a) would be any conduct that rebuts the earlier reputation or opinion testimony offered by the defendant. . . . That does not mean, however, that evidence of a past 'instance of conduct' can never be excluded because of its age or for another reason if the trial judge determines, under Rule 403, that the probative value of the rebuttal evidence 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' N.C.G.S. § 8C-1, Rule 403. This determination, whether evidence should be excluded under Rule 403, is a matter within the sound discretion of the trial judge." *State v. Cummings*, 332 N.C. 487, 507, 422 S.E.2d 692, 703 (1992).

Habit (N.C.R. Evid. 406)

"[H]abit evidence is a subcategory of the relevance inquiry. Evidence of habit is relevant to prove that 'the conduct of the person . . . on a particular occasion was in conformity' therewith." *State v. Fair*, 354 N.C. 131, 151, 557 S.E.2d 500, 515 (2001) (quoting N.C. Gen. Stat. 8C-1, Rule 406 (1999)), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

"In determining whether a practice constitutes habit, a court must weigh, on a case-by-case basis, the number of specific instances of the behavior, the regularity of the behavior, and the similarity of the behavior. To rise to the level of habit, the instances of specific conduct must be 'sufficiently numerous to warrant an inference of systematic conduct and to establish one's regular response to a repeated specific situation.' The trial court's ruling on the admissibility of habit evidence may be disturbed only for an abuse of discretion." *State v. Fair*, 354 N.C. 131, 151, 557 S.E.2d 500, 515-16 (2001) (citations omitted) (quoting *Crawford v. Fayez*, 112 N.C. App. 328, 335, 435 S.E.2d 545, 500 (1993), *disc. review denied*, 335 N.C. 553, 441 S.E.2d 113 (1994)), *cert. denied*, 535 U.S. 1114, 153 L. E. 2d 162 (2002).

Subsequent Remedial Measures (N.C.R. Evid. 407)

"Evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. However, Rule 407 does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment. Rule 407 is based on the policy that individuals should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers." *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 52, 524 S.E.2d 53, 60-61 (1999) (citations and quotation marks omitted).

Compromise and Offers to Compromise (N.C.R. Evid. 408)

"Rule 408 provides that evidence of conduct or statements made in compromise negotiations is inadmissible. This rule does not, however, require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations." *Renner v. Hawk*, 125 N.C. App. 483, 492-493, 481 S.E.2d 370, 375-76 (citation omitted), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

Inadmissibility of Pleas (N.C.R. Evid. 410)

"Rule 410 of the North Carolina Rules of Evidence provides that [a]ny statement made [by a defendant] in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn is inadmissible at trial. Plea bargaining implies an offer to plead guilty upon condition. Moreover, as the rule implies, [p]lea negotiations, in order to be inadmissible, must be made in negotiations with a *government attorney* or with that *attorney's express*

authority. In addition, conversations with government agents do not constitute plea discussions unless the defendant exhibits a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances." *State v. Haymond*, 203 N.C. App. 151, 165-66, 691 S.E.2d 108, 120-21 (citations and quotation marks omitted), *disc. review denied*, 364 N.C. 600, 704 S.E.2d 275 (2010).

Liability Insurance (N.C.R. Evid. 411)

"In deciding whether evidence of insurance should be received under Rule 411, a trial court should engage in the following analysis: (1) Is the insurance coverage offered for a purpose other than to show that a person acted negligently or otherwise wrongfully (Rule 411); (2) If so, is the evidence relevant to show that other purpose (Rule 401); and (3) If so, is the probative value of the relevant evidence substantially outweighed by the factors set forth in Rule 403." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439, *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

Prior Sexual Behavior (N.C.R. Evid. 412)

"Pursuant to Rule 412, evidence of the prior sexual history of the victim is irrelevant in most instances. However, upon a finding by the trial court that certain evidence is relevant because it falls into one of the exceptions under Rule 412, or if the evidence falls outside of the rule, a Rule 403 balancing of probative value versus unfair prejudice should be utilized in the court's discretion." *In re K.W.*, 192 N.C. App. 646, 649, 666 S.E.2d 490, 493 (2008).

"Rule 412 provides that evidence of sexual behavior of the complainant is irrelevant unless it falls within one of four categories listed in the rule." *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854, *disc. review denied*, 333 N.C. 793, 431 S.E.2d 28 (1993).

"The rape shield statute, codified in Rule 412 of our Rules of Evidence, is only concerned with the *sexual activity* of the complainant. Accordingly, the rule only excludes evidence of the actual sexual history of the complainant; it does not apply to false accusations or to language or conversations whose topic might be sexual behavior." *State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000) (citations omitted).

"When a defendant wishes to present evidence falling within the scope of Rule 412, he must first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The trial court is then required to conduct an *in camera* hearing . . . to consider the proponent's *offer of proof* and the argument of counsel . . . . The defendant bears the burden of establish[ing]

the basis of admissibility of such evidence." *State v. Cook*, 195 N.C. App. 230, 237, 672 S.E.2d 25, 30 (2009) (citations and quotation marks omitted).

Competency (N.C.R. Evid. 601)

"Determining the competency of a witness to testify is a matter which rests in the sound discretion of the trial court." *State v. Phillips*, 328 N.C. 1, 17, 399 S.E.2d 293, 301, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991).

"To test the competency of a witness, the trial judge must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts." *State v. Liles*, 324 N.C. 529, 533, 379 S.E.2d 821, 823 (1989).

"'Conflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony.'" *State v. Cooke*, 278 N.C. 288, 291, 179 S.E.2d 365, 368 (1971) (quoting 7 Strong's N.C. Index 2d, Witnesses § 2).

"There is no age below which one is incompetent as a matter of law to testify." *State v. Eason*, 328 N.C. 409, 426, 402 S.E.2d 809, 818 (1991).

"[P]reliminary questions concerning the qualification of a person to be a witness are determined by the trial court, which is not bound by the rules of evidence in making such a determination. In determining whether a person is competent to testify, the court may consider any relevant information which may come to its attention." *In re Faircloth*, 137 N.C. App. 311, 316, 527 S.E.2d 679, 682 (2000) (citation omitted).

Interested Persons (N.C.R. Evid. 601(c))

"[T]estimony of a witness is incompetent under the provisions of the Dead Man's Statute when it appears '(1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest.'" *In re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (quoting *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963)).

"[T]he standard of review for use in [reviewing a ruling under Rule 601(c)] is one that involves a *de novo* examination of the trial court's ruling, with considerable deference to be given to the decision made by

the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving application of Rule 601(c), including the provisions which result in 'opening the door' to the admission of otherwise prohibited testimony." *In re Will of Baitschora*, 207 N.C. App. 174, 181, 700 S.E.2d 50, 55-56 (2010).

Lack of Personal Knowledge (N.C.R. Evid. 602)

"The purpose of Rule 602 is to prevent a witness from testifying to a fact of which he has no direct personal knowledge." *State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001), *appeal dismissed and cert. denied*, 356 N.C. 169, 568 S.E.2d 619 (2002).

"'[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.'" *State v. Poag*, 159 N.C. App. 312, 323, 583 S.E.2d 661, 669 (quoting State v. Cole, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001)), *appeal dismissed and disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

Oath or Affirmation (N.C.R. Evid. 603)

"Rule 603 merely provides that a witness before testifying must either by oath or affirmation declare that he will testify truthfully." *State v. James*, 322 N.C. 320, 323, 367 S.E.2d 669, 671 (1988).

Competency of Juror as Witness (N.C.R. Evid. 606)

"Rule 606(b) reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to *extraneous influences* that may have affected the jury's decision." *Cummings v. Ortega*, 365 N.C. 262, 267, 716 S.E.2d 235, 238-39 (2011) (quotation marks omitted).

"[D]etermining whether jurors may present post-verdict testimony about alleged juror misconduct pursuant to Rule 606(b) depends on 'the nature of the allegation,' not when the misconduct allegedly occurred." *Cummings v. Ortega*, 365 N.C. 262, 270, 716 S.E.2d 235, 241 (2011).

"Rule 606(b) of the North Carolina Rules of Evidence bars jurors from testifying during consideration of post-verdict motions seeking relief from an order or judgment about alleged predeliberation misconduct by their colleagues." *Cummings v. Ortega*, 365 N.C. 262, 270, 716 S.E.2d 235, 240-41 (2011).

Who May Impeach (N.C.R. Evid. 607)

"[O]ur standard of review for rulings made by the trial court pursuant to Rule 607 of the North Carolina Rules of Evidence is abuse of discretion." *State v. Banks*, 210 N.C. App. 30, 37, 706 S.E.2d 807, 814 (2011).

"The credibility of a witness may be attacked by any party, including the party calling him. However, extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues. Such collateral matters have been held to include testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement." *State v. Williams*, 355 N.C. 501, 533, 565 S.E.2d 609, 628 (2002) (citation and quotation marks omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Character and Conduct of Witness (N.C.R. Evid. 608):

"Rule 608(b) addresses the admissibility of specific instances of conduct (as opposed to opinion or reputation evidence) only in the very narrow instance where (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question *did not result in a conviction*; and (4) the inquiry into the conduct *takes place during cross-examination*. If the proffered evidence meets these four enumerated prerequisites, before admitting the evidence the trial judge must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness. Even if the trial judge allows the inquiry on cross-examination, extrinsic evidence of the conduct is not admissible." *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986).

"Rule 608(b) generally bars evidence of specific instances of conduct of a witness for the purpose of attacking his credibility." *State v. Bell*, 338 N.C. 363, 385, 450 S.E.2d 710, 722 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995).

Impeachment Using Conviction of Crime (N.C.R. Evid. 609)

"The language of Rule 609(a) ('shall be admitted') is mandatory, leaving no room for the trial court's discretion. Moreover, while N.C. R. Evid. 609(b) requires a balancing test of the probative value and prejudicial effect of a conviction more than ten years old, this provision is explicitly absent from

609(a). Indeed, the official comments to Rule 609(a) reveal an unequivocal intention to diverge from the federal requirement of a balancing test." *State v. Brown*, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003), *cert. denied*, 540 U.S. 1194, 158 L. Ed. 2d 106 (2004).

"Rule 609 of the North Carolina Rules of Evidence allows, for purposes of impeachment, the cross-examination of witnesses, including defendant, with respect to prior convictions. [W]here, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination. [I]nquiry into prior convictions which exceeds [these] limitations . . . is reversible error." *State v. Bell*, 338 N.C. 363, 381, 450 S.E.2d 710, 720 (1994) (citations and quotation marks omitted), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995).

"[A]lthough Rule 609 may permit certain evidence of a defendant's prior conviction to be admitted if the defendant testifies, it is error to admit evidence of the defendant's prior conviction when the defendant does not testify." *State v. Badgett*, 361 N.C. 234, 247, 644 S.E.2d 206, 214 (citations omitted), *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007).

Religious Beliefs (N.C.R. Evid. 610)

"Rule 610 proscribes the admissibility of *evidence* of the religious beliefs or opinions of a witness for the purpose of attacking his credibility. Such evidence may be admitted to show interest or bias of the witness. This is a rule of evidence and does not affect jury arguments, except in support of the rule that counsel ordinarily may not argue matters not supported by the evidence." *State v. James*, 322 N.C. 320, 323-24, 367 S.E.2d 669, 671 (1988).

Witness Interrogation (N.C.R. Evid. 611)

"North Carolina Rules of Evidence, Rule 611 states that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. . . . [A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Larrimore*, 340 N.C. 119, 150, 456 S.E.2d 789, 805 (1995) (quotation marks omitted).

"On cross-examination, a party is not limited to asking questions about matters in evidence. N.C.G.S. § 8C-1, Rule 611(b) provides a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The questions asked of the witness were designed to elicit testimony relevant to issues in the case. We have said, in regard to cross-

examination, generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith. Questions asked on cross-examination will be considered proper unless the record shows they were asked in bad faith." *State v. Lovin*, 339 N.C. 695, 713, 454 S.E.2d 229, 239 (1995) (citations and quotation marks omitted).

"North Carolina Rule of Evidence 611(b) provides that [a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility. However, such evidence may nonetheless be excluded under Rule 403 if the trial court determines its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *State v. Whaley*, 362 N.C. 156, 159-160, 655 S.E.2d 388, 390 (2008) (citations and quotation marks omitted).

"'[The] North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. The largest possible scope should be given, and almost any question may be put to test the value of his testimony.'" *State v. Gregory*, 340 N.C. 365, 410, 459 S.E.2d 638, 663 (1995) (citation omitted) (quoting *State v. Bacon*, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994)), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

Refreshing Memory (N.C.R. Evid. 612)

"Rule 612 does not provide for the admission into evidence of writings used to refresh a witness' memory. Under Rule 612, defendant was only entitled to have such writings *produced* at trial. The *admissibility* of these writings is subject to the same rules of admissibility that apply to any evidence." *State v. Shuford*, 337 N.C. 641, 647, 447 S.E.2d 742, 746 (1994).

Prior Statements of Witnesses (N.C.R. Evid. 613)

"Under Rule 613 of the North Carolina Rules of Evidence, prior consistent statements by a witness are admissible to corroborate sworn trial testimony. Where a witness's prior statement contains facts that manifestly contradict his trial testimony, however, such evidence may not be admitted 'under the guise of corroborating his testimony.'" *State v. Alexander*, 152 N.C. App. 701, 703-04, 568 S.E.2d 317, 319 (2002) (citations omitted) (quoting *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997)).

Witness Interrogation by the Court (N.C.R. Evid. 614)

"A trial court's actions pursuant to Rule 614 are reviewed under an abuse of discretion standard." *In re L.B.*, 184 N.C. App. 442, 451, 646 S.E.2d 411, 416 (2007).

Sequestration of Witnesses (N.C.R. Evid. 615)

"'A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the [action] was so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Roache*, 358 N.C. 243, 276-77, 595 S.E.2d 381, 404 (2004) (quoting *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001)).

Lay Witness Testimony (N.C.R. Evid. 701)

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

Expert Witness Testimony (N.C.R. Evid. 702-705)

"It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. When making such determinations, trial courts are not bound by the rules of evidence. In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations and quotation marks omitted).

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard,* 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "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).

"Where the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008).

Hearsay and Exceptions (N.C.R. Evid. 801, 802, 803)

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011).

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682,692, 706 S.E.2d 790, 797 (2011).

Residual Hearsay Exception (N.C.R. Evid. 803(24))

"[A]missibility of hearsay statements pursuant to the 803(24) residual exception is within the sound discretion of the trial court . . . ." *State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 833, 847 (1985).

"To facilitate appellate review of the propriety of the admission of evidence under 803(24), this Court has prescribed a sequence of inquiries which the trial court must make before admitting or denying evidence under Rule 803(24). The trial court must determine in this order:

(A) Has proper notice been given?
(B) Is the hearsay not specifically covered elsewhere?
(C) Is the statement trustworthy?
(D) Is the statement material?
(E) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?
(F) Will the interests of justice be best served by admission?"

State v. Deanes, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988) (citing *State v. Smith*, 315 N.C. 76, 92-97, 337 S.E.2d 833, 844-47 (1985)), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989).

"Under either [Rule 803(24) or Rule 804(b)(5)], the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts,

and (6) whether the interests of justice will be best served by admission." *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003).

"When ruling on an issue involving the trustworthiness of a hearsay statement, a trial court must make findings of fact and conclusions of law on the record. . . . [A]dmitting evidence under the catchall hearsay exception set out in Rule 803(24) (Hearsay exceptions; availability of declarant immaterial) is error when the trial court fails to make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its discretion in making its ruling. If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception. If we conclude that the trial court erred in excluding [the challenged] hearsay statement, we consider whether defendant was prejudiced." *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196-97 (2011) (citations omitted).

"[I]n weighing the 'circumstantial guarantees of trustworthiness' of a hearsay statement for purposes of Rule 803(24), the trial judge must consider among other factors (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *State v. Triplett*, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986).

Unavailable Declarant Hearsay Exceptions (N.C.R. Evid. 804)

"Our Supreme Court has held that Rule 804(b)(3) requires a two-pronged analysis. First, the statement must be 'deemed to be against the declarant's penal interest.' Second, 'the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability.'" *State v. Wardrett*, 145 N.C. App. 409, 414, 551 S.E.2d 214, 218 (2001) (citations omitted) (quoting *State v. Wilson*, 322 N.C. 117, 134, 367 S.E.2d 589, 599 (1988)).

"Once a trial court establishes that a declarant is unavailable pursuant to Rule 804(a) of the North Carolina Rules of Evidence, there is a six-part inquiry to determine the admissibility of the hearsay evidence proffered under Rule 804(b)(5). . . . Under either [Rule 803(24) or Rule 804(b)(5)], the trial court must determine the following: (1) whether proper notice has been given, (2)

whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission." *State v. Valentine*, 357 N.C. 512, 517-18, 591 S.E.2d 846, 852 (2003).

"We are bound by the trial court's findings of fact as to admissibility of evidence under Rule 804(b)(5) where such findings are supported by competent evidence, despite the existence of evidence from which a different conclusion could have been reached." *State v. Carter*, 156 N.C. App. 446, 455, 577 S.E.2d 640, 645 (2003), *cert. denied*, 358 N.C. 547 (2004), *cert. denied*, 543 U.S. 1058, 160 L. Ed. 2d 784 (2005).

Double Hearsay (N.C.R. Evid. 805)

"Rule 805 precludes the admission of statements within admissible hearsay statements that do not qualify independently for admission into evidence. The Rule 805 exclusion requirement does not apply when the second layer of statements are not hearsay." *State v. Hurst*, 127 N.C. App. 54, 62, 487 S.E.2d 846, 852, *appeal dismissed and disc. review denied*, 347 N.C. 406, 494 S.E.2d 427 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998).

Credibility of Declarant (N.C.R. Evid. 806)

"Essentially, '[Rule 806] treats the out-of-court declarant the same as a live witness for purposes of impeachment.'" *State v. McConico*, 153 N.C. App. 723, 726, 570 S.E.2d 776, 779 (2002) (quoting *State v. Small*, 131 N.C. App. 488, 492, 508 S.E.2d 799, 802 (1998)), *appeal dismissed, cert. denied and disc. rev. denied*, 357 N.C. 168, 581 S.E.2d 439, 440 (2003).

JUVENILE PROCEEDINGS

Abuse, Neglect, and Dependency

Adjudications

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact[.]'" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the

trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

Dispositions

"All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

"The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child. . . . We review a dispositional order only for abuse of discretion." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (citing *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003).

Permanency Planning Orders

"[Appellate] review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted).

Cessation of Reunification Efforts

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.'" *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

"The trial court may 'only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.'" *In re N.G.*, 186 N.C. App. 1, 10, 650 S.E.2d 45, 51 (2007) (*quoting In re*

Weiler, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

Termination of Parental Rights

Adjudication Stage

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

Dispositional Stage

"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." 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).

Combined Adjudication and Disposition Standards

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (citation and quotation marks omitted), *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004).

Delinquency Proceedings

Delinquency Petition

"[T]he petition in a juvenile action serves as the pleading . . . and a petition alleging delinquency must 'contain a plain and concise statement . . . asserting facts supporting *every element* of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the *conduct which is the subject of the allegation*.'" *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004) (quoting N.C. Gen. Stat. § 7B-1802 (2003)).

Standard of Proof at Adjudication

"'[I]t is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt.'" *In re D.K.*, 200 N.C. App. 785, 788, 684 S.E.2d 522, 525 (2009) (quoting *In re B.E.*, 186 N.C. App. 656, 661, 652 S.E.2d 334, 347 (2007)).

Juvenile Admission

"The use of the mandatory word 'only' together with 'and' in N.C.G.S. § 7B-2407(a) undoubtedly means that all of these six specific steps are paramount and necessary in accepting a juvenile's admission as to guilt during an adjudicatory hearing." *In re T.E.F.*, 359 N.C. 570, 574, 614 S.E.2d 296, 298 (2005).

Motion to Dismiss

"We review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009). "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quotation marks omitted). "The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986).

Disposition

"Based upon the delinquency history level determined pursuant to G.S. § 7B-2507, and the offense classification for the current offense, N.C. Gen. Stat. § 7B-2508 then dictates the dispositional limits available." *In re Allison*, 143 N.C. App. 586, 597, 547 S.E.2d 169, 176 (2001).

"Although the trial court has discretion under N.C. Gen. Stat. § 7B-2506 [] in determining the proper disposition for a delinquent juvenile, the trial court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile . . . ." *In re Ferrell*, 162 N.C. App. 175, 176, 589 S.E.2d 894, 895 (2004) (citation and quotation marks omitted).

Custodial Interrogation/Suppression of Statements

Statutory Claims

"The rights protected by N.C.G.S. § 7B-2101 apply only to custodial interrogations. Thus, the threshold inquiry for a court

ruling on a suppression motion based on G.S. § 7B-2101, is whether the respondent was in custody when the statement was obtained." *In re T.R.B.*, 157 N.C. App. 609, 612, 582 S.E.2d 279, 282 (2003) (citation omitted). "This requires the trial court to apply an objective test as to whether a reasonable person in the position of the [juvenile] would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Id.* at 613, 582 S.E.2d at 282 (quotation marks omitted).

Constitutional Claims

"Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 180 L. Ed. 2d 310, 326 (2011).

Suppression of Physical Evidence

"'Our review of a trial court's denial of a motion to suppress is limited to a determination of whether its findings are supported by competent evidence, and if so, whether the findings support the trial court's conclusions of law.'" *In re I.R.T.*, 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007) (quoting *State v. McRae*, 154 N.C. App. 624, 627-28, 573 S.E.2d 214, 217 (2002)). "'The trial court's conclusions of law, however, are reviewable *de novo*.'" *In re D.L.D.*, 203 N.C. App. 434, 437, 694 S.E.2d 395, 399 (2010) (quoting *In re J.D.B.*, 196 N.C. App. 234, 237, 674 S.E.2d 795, 798 (2009)).

Probation Revocation

"If the trial court finds by the greater weight of the evidence that the juvenile has violated the conditions of probation then the trial court 'may continue the original conditions of probation, modify the conditions of probation, or, . . . order a new disposition at the next higher level on the disposition chart . . . .'" *In re V.A.L.*, 187 N.C. App. 302, 303, 652 S.E.2d 726, 727 (2007) (quoting N.C. Gen. Stat. § 7B-2510(e) (2005)).