NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 115

7 JUNE 1994

2 AUGUST 1994

RALEIGH
1995

CITE THIS VOLUME
115 N.C. APP.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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GERALD ARNOLD

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RALPH A. WALKER[2]
LINDA M. McGEE[3]

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R. A. HEDRICK

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ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

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1. Elected and sworn in 16 December 1994.
2. Elected and sworn in 30 December 1994.
3. Appointed by Governor James B. Hunt, Jr. and sworn in 3 February 1995.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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DISTRICT	JUDGES	ADDRESS
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	George L. Wainwright, Jr.[2]	Morehead City
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19B	RUSSELL G. WALKER, JR.	Asheboro
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	WILLIAM Z. WOOD, JR.	Winston-Salem
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23	JULIUS A. ROUSSEAU, JR.	North Wilkesboro

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27B	JOHN MULL GARDNER	Shelby
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D. MARSH MCLELLAND	Burlington

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E. MAURICE BRASWELL	Fayetteville
DONALD L. SMITH	Raleigh

1. Elected and sworn in 16 December 1994.
2. Elected and sworn in 3 January 1995.
3. Elected and sworn in 3 January 1995.
4. Elected and sworn in 1 January 1995.
5. Elected and sworn in 3 January 1995.
6. Elected and sworn in 20 January 1995.
7. Elected and sworn in 19 December 1994.
8. Elected and sworn in 27 January 1995.
9. Elected and Sworn in 1 January 1995.
10. Elected and sworn in 1 January 1995.
11. Elected and sworn in 3 January 1995.
12. Elected and sworn in 3 January 1995.
13. Elected and sworn in 16 December 1994.
14. Appointed by Governor James B. Hunt and sworn in 1 February 1995.

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	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville

1. Appointed and sworn in 27 January 1995 to replace George L. Wainwright, Jr. who was elected to the Superior Court.
2. Appointed and sworn in 26 January 1995.
3. Elected and sworn in 5 December 1994.
4. Appointed Chief Judge 7 February 1995 to replace Donald R. Huffman who was elected to the Superior Court.
5. Appointed and sworn in 31 January 1995.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

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23	Randy Lyon	Wilkesboro
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28	Ronald L. Moore	Asheville
29	Jeff Hunt	Rutherfordton
30	Charles W. Hipps	Waynesville

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3A	Robert L. Shoffner, Jr.	Greenville
3B	Henry C. Boshamer	Beaufort
12	Paul F. Herzog	Fayetteville
14	Robert Brown, Jr.	Durham
15B	James E. Williams, Jr.	Carrboro
16A	J. Graham King	Laurinburg
16B	Angus B. Thompson	Lumberton
18	Wallace C. Harrelson	Greensboro
26	Isabel S. Day	Charlotte
27A	Kellum Morris	Gastonia
28	J. Robert Hufstader	Asheville

G.S.	
1A-1	See Rules of Civil Procedure, infra
1-17(a)	Leonard v. England, 103
1-53(1)	Colombo v. Dorrity, 81
1-277(b)	Colombo v. Dorrity, 81
1-440.16(a)	Main Street Shops, Inc. v. Esquire Collections, Ltd., 510
6-19.1	Employment Security Comm. v. Peace, 486
6-21(2)	Brantley v. Watson, 393
6-21.1	Davis v. Sellers, 1
	Mishoe v. Sikes, 697
7A-305(d)	Sealey v. Grine, 343
8C-1	See Rules of Evidence, infra
14-55	State v. Robinson, 358
14-72.1(c)	Burwell v. Giant Genie Corp., 680
14-306	Ford v. State of North Carolina, 556
15A-903	State v. Swann, 92
15A-910	State v. Swann, 92
15A-926(a)	State v. Floyd, 412
15A-1022(a)(6)	State v. Bozeman, 658
15A-1335	State v. Harris, 42
15A-1340.4(a)(1)k	State v. Robertson, 249
15A-1340.4(a)(1)l	State v. Bozeman, 658
15A-1340.4(a)(2)e	State v. Robertson, 249
15A-1415(b)(3)	State v. Harris, 42
15A-1420(d)	State v. Harris, 42
20-4.01(23)	Nationwide Mutual Ins. Co. v. Mabe, 193
20-16.2(a)	Nicholson v. Killens, 552
20-138.5	State v. Priddy, 547
20-279.21(b)	McLeod v. Nationwide Mutual Ins. Co., 283
20-279.21(b)(3)	Bray v. N.C. Farm Bureau Mut. Ins. Co., 438
	Hussey v. State Farm Mut. Auto. Ins. Co., 464
20-279.21(b)(3)(b)	N.C. Ins. Guaranty Assn. v. State Farm Mut. Auto. Ins. Co., 666

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20-279.21(b)(4)	State Farm Mut. Auto. Ins. Co. v. Young, 65
	Nationwide Mutual Ins. Co. v. Mabe, 193
	Hussey v. State Farm Mut. Auto. Ins. Co., 464
24-5(b)	Custom Molders, Inc. v. American Yard Products, Inc., 156
25-6-104	Dublin v. UCR, Inc., 209
25-6-109	Dublin v. UCR, Inc., 209
28A-15-6	Brantley v. Watson, 393
28A-15-9	Brantley v. Watson, 393
31-41	Morrison v. Grandy, 170
34-21.16(a)	McArdle Corp. v. Patterson, 528
35A-1101(7)	Leonard v. England, 103
44A-12	Metropolitan Life Insurance Co. v. Rowell, 152
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49-16	Smith v. Bumgarner, 149
50-13.7(a)	Lawrence v. Nantz, 478
50-13.11(e)	Lawrence v. Nantz, 478
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58-40-10(1)	Nationwide Mutual Ins. Co. v. Mabe, 193
58-48-5	N.C. Insurance Guaranty Assn. v. Century Indemnity Co., 175
58-48-20(4)	N.C. Insurance Guaranty Assn. v. Century Indemnity Co., 175
59-36	Wike v. Wike, 139
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75-1.1	Davis v. Sellers, 1
	Ace Chemical Corp. v. DSI Transports, Inc., 237
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RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARTHA PAMELA DAVIS, PLAINTIFF v. JOHN HENRY SELLERS AND SUE P. SELLERS, DEFENDANTS.

No. 9326SC496

(Filed 7 June 1994)

1. Unfair Competition or Trade Practices § 11 (NCI4th)— unfair and deceptive practices— homeowner exemption

Private homeowners selling their private residences are not subject to unfair and deceptive practice liability; therefore, the trial court properly granted defendants' motion for directed verdict on plaintiff's unfair and deceptive practices claim where plaintiff introduced evidence from defendant wife's deposition that she held a real estate broker's license, but both parties agreed at that time that defendant wife had never engaged in the business of selling real estate.

Am Jur 2d, Consumer and Borrower Protection § 290.

2. Unfair Competition or Trade Practices § 11 (NCI4th)— homeowner with real estate broker's license—referral fee paid to homeowner—homeowner engaged in commerce

Defendant wife indirectly engaged in the business of selling real estate when she used her real estate broker's license to obtain a referral fee for the sale of her home, and defendant wife's receipt of the referral fee brought her transaction within the scope of N.C.G.S. § 75-1.1.

Am Jur 2d, Consumer and Borrower Protection § 290.

3. Costs § 31 (NCI4th)— attorney's fees—statute inapplicable

Since plaintiff's recovery of damages was in excess of $10,000, N.C.G.S. § 6-21.1 did not apply, and the trial court did not err in denying plaintiff's motion for attorney's fees.

Am Jur 2d, Costs §§ 72-86.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR4th 12.

4. Fraud, Deceit, and Misrepresentation § 20 (NCI4th)— buyer's reliance on home seller's statement—reasonableness of reliance jury question

The reasonableness of plaintiff buyer's reliance on the female defendant homeowner's statement that defendants' house had had no water problems since defendants had owned it was an issue for the jury to decide, and the trial court therefore did not err in denying defendants' motion for directed verdict as to plaintiff's fraud claim.

Am Jur 2d, Fraud and Deceit §§ 247 et seq.

5. Fraud, Deceit, and Misrepresentation § 4 (NCI4th)— sale of home—wife as agent for husband—sufficiency of evidence

There was sufficient evidence from which the jury could infer that defendant wife acted as the agent of defendant husband in selling their home and in making a fraudulent statement, and the trial court therefore did not err in refusing to charge the jury with regard to each defendant separately.

Am Jur 2d, Fraud and Deceit §§ 311 et seq.

Appeal by plaintiff from judgment signed 26 October 1992 by Judge Hollis M. Owens, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 February 1994.

On 31 May 1991, plaintiff, a first time homebuyer, purchased a house located at 5429 Gwynne Avenue in Charlotte, North Carolina. Defendants owned the house and listed it for sale with Wanda Smith Realty. Plaintiff's purchase contract provided that "there shall be no unusual drainage conditions or evidence of excessive moisture adversely affecting the structure(s)." Under the contract, plaintiff

was entitled to have the property inspected by a reputable inspector or contractor.

On 8 May 1991, inspections were conducted on the property while plaintiff, her real estate agent Geoff Campbell, and defendant Sue Sellers (hereinafter defendant wife) were present. One inspector told both plaintiff and Campbell that he had observed water marks in the crawl space under the house that "might have indicated flooding at some time in the past." Plaintiff testified that:

> Right after the inspectors had told us about the water mark, that prompted my realtor, Geoff Campbell, to ask [defendant wife] as she was standing right there in front of the inspectors if there had been any water problems that had happened in the past since they had owned the home and she responded no. I took her at her word.

A few days after plaintiff purchased the house, plaintiff received a letter in her mailbox from the Charlotte City Engineering Department. The letter was addressed to defendant and stated that "On February 25th, 1991, you [defendant wife] wrote a letter addressed to Henry Underhill, City Attorney, concerning your storm drainage problem at 5429 Gwynne Avenue." The letter indicated that plaintiff's property had severe storm water drainage problems and that it would cost approximately half a million dollars to repair the drainage system. The letter also stated that plaintiff and the other homeowners in the neighborhood affected by the drainage problem would be responsible for paying 20% or approximately $70,000 of the cost to repair the drainage system.

Plaintiff telephoned the Charlotte City Engineering Department and spoke with Mr. Al Rich. Mr. Rich told plaintiff that he was familiar with the problems at her property and that he had been working with defendants for about five years on the problem.

On 2 October 1991, plaintiff filed suit against defendants alleging fraud and unfair and deceptive practices, a violation of G.S. 75-1.1. At the close of plaintiff's evidence at trial, defendants moved for directed verdict as to both of plaintiff's claims. The trial court granted defendants' motion as to plaintiff's unfair and deceptive practices claim but denied the motion as to plaintiff's fraud claim. The case went to the jury on the issue of fraud.

On 9 September 1992, the jury returned a verdict in favor of plaintiff and awarded plaintiff compensatory damages of $9,200. On 11

September 1992, plaintiff filed a motion for attorney's fees pursuant to G.S. 6-21.1. On 29 October 1992, the trial court entered judgment for plaintiff on the jury verdict but denied plaintiff's motion for attorney's fees. Plaintiff filed notice of appeal on 18 November 1992 and defendants cross appealed on 24 November 1992.

On 9 March 1993, while this case was pending on appeal, plaintiff filed a motion with the trial court pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to overturn its order granting defendants' motion for directed verdict on plaintiff's unfair and deceptive practices claim. The relevant portions of the motion are as follows:

> 2. At the close of Plaintiff's evidence, this Court granted Defendants' motion for directed verdict with respect to Plaintiff's claim for unfair and deceptive trade practices. The sole basis for the motion was the so-called "private homeowners exception" to N.C.G.S. § 75-1.1. The Court felt constrained by applicable precedent in the North Carolina Court of Appeals to the effect that a homeowner not in the realty business was excepted from unfair and deceptive trade practices liability.
>
> 3. Defendant Sue Sellers admitted at the time of trial that she was a licensed realtor. Both at the trial and at her deposition, however, Mrs. Sellers denied that she had ever engaged in the realty business, including in connection with the sale of her own home. . . .
>
> 4. Several months following the trial of this case, Plaintiff's counsel learned from Geoff Campbell, a witness at the trial, that he believed Mrs. Sellers may have received a "referral fee" in connection with the sale of her residence. Applicable real estate regulations make it clear that only a person engaged in the business of being a realtor can receive such a fee. . . .
>
> 5. Promptly after receiving this information, Plaintiff's counsel followed up with Wanda Smith & Associates to determine if such consideration was paid to Mrs. Sellers. Wanda Smith's office confirmed that a 20% referral fee, in the amount of $395.00, was paid to Mrs. Sellers, who received such fee upon furnishing Wanda Smith her realty license number. *See* Affidavit of Linda Morrow.
>
> 6. No documentation of this fee was revealed to Plaintiff at the closing or at any other time. Defendant Sue Sellers did not produce any check copies, deposit receipts or other documentary evidence regarding the same. She denied under oath that she had ever pur-

sued "at all" the realty business. Had she testified fully and forthrightly and provided all documents in her possession with respect to this matter, evidence of such referral fee would have been submitted by Plaintiff at the trial.

7. This evidence establishes as a matter of law that Mrs. Sellers was engaged in the business of being a realtor when she sold her home to the Plaintiff. Under these circumstances, the "private home owners exception" to N.C.G.S. § 75-1.1 is not available. *Compare Rucker v. Huffman*, 99 N.C. App. 137 (1990). . . .

8. The jury in this case properly found fraud. Under North Carolina law, a finding of fraud automatically results in unfair and deceptive trade practices liability. *Bhatti v. Buckland*, 328 N.C. 240 (1991).

. . . .

WHEREFORE, Plaintiff prays that this Court make an appropriate entry in the record indicating its disposition to grant Plaintiff's Rule 60(b) motion and therewith to enter judgment for Plaintiff in the amount of $27,600, plus costs and reasonable attorney's fees, together with such other and further relief as this Court deems just and proper.

The trial court entered the following order regarding plaintiff's Rule 60(b) motion:

ORDER

This matter came on before hearing before the undersigned Superior Court Judge on March 17, 1993, pursuant to the motion filed by Plaintiff under Rule 60(b) of the North Carolina Rules of Civil Procedure. Plaintiff had requested that this Court indicate its disposition on the record regarding how the Court would rule on this motion were an appeal not pending. Plaintiff contended that the newly discovered evidence that Defendant Sue P. Sellers had been paid a broker's referral fee of $369.00 in connection with the sale of 5429 Gwynne Avenue indicated that this Court's entry of directed verdict with respect to Plaintiff's claim under N.C.G.S. § 75-1.1 should be overturned.

Having considered the matters of record and the arguments of counsel, the Court, pursuant to *Bell v. Martin*, 43 N.C. App. 134 (1979), indicates as a matter of record that it would be inclined to

DENY Plaintiff's motion. The Court would find as a fact that the newly discovered evidence proffered by Plaintiff could not have been discovered through the exercise of due diligence. The Court would also conclude, however, that the evidence that Defendant used her real estate brokerage license to earn a referral fee of $369.00 is insufficient as a matter of law to bring this transaction into "commerce" as required by N.C.G.S. § 75-1.1.

Plaintiff appeals. Defendants cross appeal.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III, for plaintiff-appellant.

Robert E. McCarter for defendant-appellee.

EAGLES, Judge.

Plaintiff contends in her appeal that the trial court erred in 1) granting defendants' motion for directed verdict on plaintiff's unfair and deceptive practices claim, 2) denying plaintiff's Rule 60(b) motion for relief from the trial court's order granting defendants' motion for directed verdict and 3) denying plaintiff's motion for attorney's fees pursuant to G.S. 6-21.1. Defendants contend in their cross appeal that the trial court erred in 1) denying defendants' motion for directed verdict on plaintiff's fraud claim and 2) refusing to charge each defendant separately. After careful review of the record and briefs, we conclude that while the trial court correctly granted defendants' motion for directed verdict on plaintiff's unfair and deceptive practices claim at the close of plaintiff's evidence, the trial court erred and abused its discretion in denying plaintiff's Rule 60(b) motion for relief. We conclude that plaintiff's newly discovered evidence subjects defendants to liability for unfair and deceptive practices under G.S. 75-1.1. Since we conclude that defendants are subject to liability for Chapter 75 unfair and deceptive practices and the jury has already found defendants liable for fraud, we further conclude that plaintiff is entitled to have the damages awarded on the jury verdict trebled. Accordingly, we remand to the trial court for entry of judgment trebling plaintiff's damages on the jury verdict.

I. PLAINTIFF'S APPEAL

A.

[1] Plaintiff first contends that the trial court erred in granting defendants' motion for directed verdict at the close of plaintiff's evidence on plaintiff's unfair and deceptive practices claim. We disagree.

G.S. 75-1.1 declares unlawful "unfair and deceptive acts or practices in or affecting commerce." Except for certain limited exemptions set forth in the statute, commerce includes "all business activities, however denominated." G.S. 75-1.1(b). This court has stated that, "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Virginia Bank v. Air-Lift Associates,* 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986). This court has also held, however, that private homeowners selling their private residences are not subject to unfair and deceptive practice liability. *Robertson v. Boyd,* 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins,* 42 N.C. App. 449, 257 S.E.2d 63 (1979). Plaintiff argues that the private homeowner's exemption created by this court in *Robertson* and *Rosenthal, supra,* was questioned by our Supreme Court in *Bhatti v. Buckland,* 328 N.C. 240, 400 S.E.2d 440 (1991). Plaintiff contends that the Court's ruling in *Bhatti, supra,* severely eroded the foundation of the private homeowners exemption and that this court should no longer apply the exemption. We note, however, that the Court in *Bhatti* assumed *arguendo* that the private homeowner's exemption existed. *Id.* at 245, 400 S.E.2d at 443. Accordingly, we conclude that the private homeowner's exemption continues to exist.

At the close of plaintiff's evidence, plaintiff had introduced no evidence that defendants were anything other than private homeowners selling their home. Although plaintiff introduced evidence from defendant wife's deposition that she held a real estate broker's license, both parties agreed at that time that defendant wife had never engaged in the business of selling real estate. Accordingly, the trial court properly granted defendants' motion for directed verdict on plaintiff's unfair and deceptive practices claim based upon our holdings in *Boyd* and *Perkins, supra.*

B.

[2] Plaintiff next contends that the trial court erred in denying its Rule 60(b) motion for relief from the trial court's order granting defendants' motion for directed verdict on plaintiff's unfair and deceptive practices claim. We agree.

Several months after trial, plaintiff's counsel discovered that defendant wife received a 20% referral fee of $369 from Wanda Smith & Associates, the listing agent of defendants' house. In order to receive the referral fee, defendant wife gave Wanda Smith & Associates her

social security number and her North Carolina real estate broker number. Plaintiff argued in her Rule 60(b) motion that defendant wife's receipt of the referral fee "establishe[d] as a matter of law that [defendant wife] was engaged in the business of being a realtor when she sold her home to the Plaintiff." In its order denying plaintiff's Rule 60(b) motion, the trial court stated that "the evidence that [defendant wife] used her real estate brokerage license to earn a referral fee of $369.00 is insufficient as a matter of law to bring this transaction into 'commerce' as required by N.C.G.S. § 75-1.1." We disagree.

G.S. 93A-1 provides that it is unlawful for any person to act as a real estate broker or real estate salesperson or to directly or indirectly engage in the business of being a real estate broker or real estate salesperson without a license issued by the North Carolina Real Estate Commission. Under G.S. 93A-6(a)(9) a real estate broker may not pay a commission or valuable consideration to any person for acts or services performed in violation of Chapter 93A. In *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982), this court held that a contract to pay an unlicensed party a "finder's fee" for finding, introducing and bringing together parties to a real estate transaction but leaving the ultimate consummation of the transaction to the broker, violated G.S. 93A-1. The *Gower* court stated:

> [T]hough the finder or originator does not assist in the ultimate negotiations of sale, the real estate licensing statutes would become meaningless if unlicensed parties were able to carry on traditional brokerage activities under a finder's fee contract.

Id. at 605, 289 S.E.2d at 882. One who conducts activities pursuant to a finder's fee contract is engaged indirectly in the business of being a real estate broker or salesperson. A person engaged either directly or indirectly in the sale of real estate is engaged in commerce within the meaning of G.S. 75-1.1. *See, Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979).

Here, defendant wife used her real estate broker's license to receive a $369 referral fee from Wanda Smith & Associates for the sale of her own home. We conclude that defendant wife indirectly engaged in the business of selling real estate when she used her real estate broker's license to obtain a referral fee for the sale of her home. Although persons selling their own private residence are exempt from Chapter 75 liability, *Rosenthal, supra*, defendant wife's receipt of the referral fee brings defendants' transaction within the scope of G.S. 75-1.1.

A plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred in violation of G.S. 75-1.1. *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) (proof of fraud necessarily constitutes an unfair and deceptive act). Once a violation of Chapter 75 is found, treble damages must be awarded. *Bhatti* at 243, 440 S.E.2d at 442. Since the jury found in favor of plaintiff on her fraud claim, plaintiff is entitled to treble damages. Accordingly, we remand to the trial court to enter judgment trebling plaintiff's damages on the jury verdict.

C.

[3] Plaintiff contends that the trial court abused its discretion in failing to award reasonable attorney's fees. We disagree.

At the end of trial, plaintiff moved for attorney's fees pursuant to G.S. 6-21.1. G.S. 6-21.1 provides in relevant part:

> In any . . . property damage suit . . ., where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant . . . .

Since we are remanding this case to the trial court to enter judgment trebling plaintiff's damages, plaintiff's recovery for damages will be in excess of $10,000. Accordingly, G.S. 6-21.1 will not apply. We note, however, that upon remand, the trial court may in its discretion award plaintiff a reasonable attorney's fee pursuant to G.S. 75-16.1. Accordingly, this assignment of error is overruled.

II. DEFENDANTS' CROSS APPEAL

A.

[4] Defendants first contend in their cross appeal that the trial court erred in denying defendants' motion for directed verdict as to plaintiff's fraud claim. We disagree.

In reviewing the denial of defendants' motion for directed verdict, we consider the evidence in the light most favorable to plaintiff and resolve all conflicts in the evidence in plaintiff's favor. *Blanchfield v. Soden*, 95 N.C. App. 191, 194, 381 S.E.2d 863, 864 (1989). A motion for directed verdict should be denied "if there is more than a scintilla of evidence supporting each element of the nonmovant's case." *Freese v. Smith*, 110 N.C. App. 28, 33-34, 428 S.E.2d 841, 845-46 (1993).

To establish a claim for fraud, plaintiff must present evidence on each of these six elements:

> (1) [T]hat defendants made a representation of a material past or existing fact, (2) that the representation was false, (3) that defendants knew the representation was false or made it recklessly without regard to its truth or falsity, (4) that the representation was made with the intention that it would be relied upon, (5) that plaintiff[] did rely on it and that their reliance was reasonable, and (6) that plaintiff[] suffered damages because of their reliance.

Blanchfield v. Soden, 95 N.C. App. 191, 194, 381 S.E.2d 863, 864 (1989). Defendants contend that plaintiff's reliance on defendant wife's statement that the house had no water problems was unreasonable as a matter of law.

Plaintiff's inspectors inspected the house and informed plaintiff that there were water marks in the crawl space under the house that "might have indicated flooding at some time in the past." When plaintiff's inspector told plaintiff about the water marks under the house, plaintiff's real estate agent asked defendant wife, "Do you have any water problems?" Defendant wife answered, "No." Defendants contend that plaintiff's failure to make further inquiries after the inspector told plaintiff about the water marks made plaintiff's reliance upon defendant wife's statement unreasonable as a matter of law. We disagree.

In considering the issue of reasonable reliance, our Supreme Court has stated:

> Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine. . . . In close cases, however, we think that a seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, "You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you." Courts should be very loath to deny an actually defrauded plaintiff relief on this ground.

Johnson v. Owens, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965). In *Blanchfield v. Soden*, 95 N.C. App. 191, 381 S.E.2d 863 (1989), this court held that plaintiffs did not unreasonably rely as a matter of law

on the Soden's affirmative statement that the house plaintiffs were purchasing had a new roof even though plaintiffs had knowledge that the roof leaked. There, plaintiffs' inspectors had informed plaintiffs that the roof was cracked and that it leaked. Plaintiffs contended that they relied on defendants' representations that the roof was new and that the problem was minor. In holding that the question of plaintiffs' reasonable reliance was a question for the jury, this court stated:

> While plaintiffs knew that the roof leaked, their failure to inspect it further was not unreasonable as a matter of law. Mr. Soden assured plaintiffs that the roof would be *repaired.* He failed to inform plaintiffs, however, that the roof repairman had recommended that the roof be *replaced.* Since he had previously told plaintiffs that the roof was new and that the leak would be repaired, plaintiffs had no reason to doubt Mr. Soden's word. Whether plaintiff's testimony was credible—that he thought the leaks were due to a bad seal or "a glitch" in the "new" roof—was an issue for the jury.

Id. at 195, 381 S.E.2d at 865.

Here, plaintiff's inspector informed her that there were water marks under the house that "might have indicated flooding at some time in the past." Plaintiff testified that she took defendant wife at her word when defendant wife stated that the house had no water problems since defendants had owned the house. Although plaintiff had notice of the water marks under the house, plaintiff was fraudulently induced to forego further inquiry which she otherwise would have made. *See Bolick v. Townsend Co.*, 94 N.C. App. 650, 381 S.E.2d 175 (1989); *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E.2d 578 (1987). Accordingly, we conclude that on these facts, the reasonableness of plaintiff's reliance was an issue for the jury to decide.

B.

[5] Finally, defendants contend that the trial court erred in refusing to charge each defendant separately. Defendants argue that defendant John Henry Sellers (hereinafter defendant husband) was not present during the negotiations for the sale of the house and that he did not engage in any discussions with plaintiff. Accordingly, defendants contend that there was no evidence that defendant husband participated in any fraud upon plaintiff. We disagree.

In *Douglas v. Doub*, 95 N.C. App. 505, 383 S.E.2d 423 (1989), defendants husband and wife were found liable for fraud in selling a condominium. There, defendant husband fraudulently represented to plaintiff that the condominium had undergone recent repairs because of a "bursted [sic] water pipe" when in fact the condominium had been repaired because portions of the foundation had sunk into the ground on two previous occasions. Defendant wife claimed that she was entitled to a directed verdict on the fraud claim because no evidence showed that she made any representations to plaintiff. This court held that although the defendant wife personally did not make any fraudulent representations to plaintiff regarding the sale of the condominium, defendant wife could still be held liable for defendant husband's fraud if defendant husband was acting as defendant wife's agent when he made the fraudulent representations. In concluding that the evidence was sufficient to establish an agency relationship, this court stated:

> [A]gency of the husband for his wife may be "shown by evidence of facts and circumstances which authorize a reasonable inference that he was authorized to act for her." "The wife's retention of benefits from a contract negotiated by the husband is a factual circumstance giving rise to such an inference." The fact that the "principal did not know or authorize the commission of the fraudulent acts" is immaterial.
>
> The plaintiff argues, and we agree that defendant wife received a benefit when plaintiff assumed the note and deed of trust which defendants had executed to the Pfefferkorn Company. The assumption of the loan by the plaintiff relieved the defendant wife from a $39,950 obligation. While there is no evidence defendant wife ever received any money from the sale of the condominium to the plaintiff, the evidence relating to the loan assumption is a factual circumstance from which a jury could infer that defendant husband was authorized to act for defendant wife.

Douglas v. Doub, 95 N.C. App. 505, 513-14, 383 S.E.2d 423, 427-28 (1989) (citations omitted).

Here, there is ample evidence to create a reasonable inference that defendant wife was acting on behalf of defendant husband in selling defendants' house. Defendant husband participated with his wife in listing the property for sale with Wanda Smith & Associates. Although defendant husband was out of town during the time his

wife represented to plaintiff that the house had no water problems, he testified that he knew what took place during those negotiations because he was in contact with his wife every day. Finally, defendant husband received a benefit from the sale of his home because as a co-owner of the property, he was entitled to receive half of the proceeds from the sale of the house. Accordingly, we conclude that there was sufficient evidence from which the jury could infer that defendant wife acted as the agent of defendant husband in selling the property. This cross assignment of error is overruled.

III.

In sum, we conclude that the trial court erred and abused its discretion in denying plaintiff's Rule 60(b) motion for relief. Defendants do not come within the private homeowner's exemption in *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988) and *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979), and are subject to liability for Chapter 75 unfair and deceptive practices because defendant wife engaged in the business of being a real estate broker when she used her real estate broker's license to obtain a $369 referral fee. Since the jury found defendants liable for fraud and a finding of fraud necessarily constitutes an unfair and deceptive practice in violation of G.S. 75-1.1, we remand to the trial court to enter judgment trebling plaintiff's damages on the jury verdict. We find no abuse of discretion in the trial court's disallowance of attorney's fees but note that upon remand to the trial court, plaintiff may move for attorney's fees pursuant to G.S. 75-16.1. Defendants cross assignments of error are overruled. Accordingly, we remand to the trial court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges JOHNSON and LEWIS concur.

APPLIANCE SALES & SERVICE, INC., PLAINTIFF v. COMMAND ELECTRONICS CORPORATION AND ISSAC SHEPHARD FUNDERBURK, III (AND ALL OTHER OFFICERS, DIRECTORS AND STOCKHOLDERS OF COMMAND ELECTRONICS CORPORATION, DEFENDANTS

No. 939SC551

(Filed 7 June 1994)

1. Appeal and Error § 471 (NCI4th)— enforceability of forum selection clauses—abuse of discretion as appropriate standard of review

The abuse of discretion standard is the appropriate standard of appellate review for orders assessing the enforceability of forum selection clauses.

Am Jur 2d, Appeal and Error §§ 772 et seq.

2. Venue § 7 (NCI4th)— refusal to enforce forum selection clause—no abuse of discretion

The trial court did not abuse its discretion in refusing to enforce the terms of the forum selection clause in the parties' contract, since defendants had made at least two prior representations to the effect that if plaintiff sought a remedy, plaintiff could sue defendants in the courts of North Carolina, and defendants are estopped from asserting the forum selection clause as a defense to the filing of the action in North Carolina.

Am Jur 2d, Venue §§ 7, 8.

Validity of contractual provision limiting place or court which action may be brought. 31 ALR4th 404.

Appeal by defendants from order entered 8 February 1993 by Judge Anthony M. Brannon in Vance County Superior Court. Heard in the Court of Appeals 3 March 1994.

This case involves a "forum selection clause" in a commercial contract. Plaintiff is a North Carolina corporation with its principal place of business in Henderson, North Carolina. Defendant Command Electronics Corporation is a South Carolina corporation and its registered office is located in Mount Pleasant, South Carolina. Defendant Command Electronics Corporation does business in North Carolina but has never received a Certificate of Authority from the North Carolina Secretary of State to transact business in North Carolina.

On 11 July 1991, plaintiff, a North Carolina corporation, filed a complaint in Vance County District Court against defendants. Plaintiff sought to recover damages for breach of contract, fraud, and unfair and deceptive trade practices in connection with a contract under which plaintiff was to become a vendee of alarm systems known as "Med Command Systems" for defendant Command Electronics Corporation.

The underlying facts of this case are described in an affidavit filed by Andrew Thomas, plaintiff's Chairman of the Board, which provides in pertinent part as follows:

> That pursuant to an advertisement of solicitation received by us at our Henderson, North Carolina business, a sales representative of Command Electronics Corporation contacted my son, David Thomas, and me about our becoming a dealer/vendee for the sale of Med Command Systems for Command Electronics Corporation.
>
> On March 14, 1991, a sales representative of Command Electronics Corporation met in Henderson, North Carolina with officers of Appliance Sales & Service, Inc. proposing that we become the "Vendee" for Command Electronics Corporation of Med Command Systems, with Granville, Person, Durham, Wake, Franklin, Vance, and Warren Counties in North Carolina and Mecklenburg, Halifax, Brunswick, and Pittsylvania Counties in Virginia as our "area." A contract was written up and signed at that time between Command Electronics Corporation with Appliance Sales & Service, Inc. for those counties, the contract stating that Command Electronics Corporation "will not appoint another vendee in the above listed county/counties during the term of this agreement or its renewal in writing by the vendee." The contract had a term through December 31, 1991 "and may thereafter be renewed at the option of the vendee, in writing, each year at no cost or purchase required."
>
> Appliance Sales & Service, Inc. paid to Command Electronics Corporation the sum of $7,493.00 (one-half of the total contract price) on March 14, 1991 with the contract providing that the remaining $7,493.00 balance would be payable at a later date (all of which $14,986.00 was paid by us to Command Electronics Corporation).
>
> Thereafter a representative of Command Electronics Corporation again contacted us at Appliance Sales & Service, Inc. and

advised us that Command Electronics Corporation had made a mistake in its prior contract with Appliance Sales & Service, Inc. in that:

> 1. Command Electronics Corporation was not licensed in the State of Virginia and therefore could not give any areas in Virginia to Appliance Sales & Service, Inc. or to anyone else, and,
>
> 2. Command Electronics Corporation had made a demographic study which indicated that there was insufficient response (or demand) for Command Electronics Corporation to attempt to sell Med Command Systems or for it to have a vendee in Granville, Person or Durham Counties (in which it was not going to put vendees) for said systems.

For the above reasons, Command Electronics Corporation requested Appliance Sales & Service, Inc., to switch areas so as to exclude these counties.

On March 25, 1991, I received a letter from Issac Shephard Funderburk, III forwarding me a proposed new contract and requesting me to send the old contract back to Command Electronics Corporation (with the proposed new contract excluding Granville, Person, Durham and other counties which were in my original contract).

I thereafter personally called Issac Shephard Funderburk, III and told him that Appliance Sales & Service was particularly interested in Durham and Granville Counties (and was not interested in the additional counties suggested by Command Electronics Corporation), but Issac Shephard Funderburk, III personally emphasized to me that Command Electronics Corporation's demographic studies had indicated that it was not profitable to place any vendee in Granville and Durham (and other) Counties and that Command Electronics Corporation was not going to place any vendees in Granville or Durham Counties, and Issac Shephard Funderburk, III personally promised me further that Appliance Sales & Service, Inc. would be given a right of first refusal relative to Granville, Durham, and Person Counties in North Carolina and Pittsylvania and Halifax Counties in Virginia if Command Electronics Corporation decided to open up these territories or have vendees in any of them.

. . . .

Specifically relying upon these specific representations and assurances . . . Appliance Sales & Service, Inc. through me agreed to switch areas (excluding the aforesaid counties) by rewording the areas in the original contract through another contract document (which "Shep" Funderburk had prepared and back-dated to March 14, 1991, the date of the original contract), switching the counties of Granville, Person, and Durham and the Virginia Counties in the original contract for other counties of a lesser nature in North Carolina.

On May 8, 1991, the sales representative of Command Electronics Corporation picked up the new contract document signed by Appliance Sales & Service, Inc. (back-dated March 14, 1991) and further gave to Appliance Sales & Service, Inc. two addendums to the same.

. . . .

At the time . . . I and the other officers of Appliance Sales & Service, Inc. did not know that Command Electronics Corporation had already entered into a vendee contract with Adcock's Business Machines, Inc. relative to Person, Granville, and Durham Counties in North Carolina and Pittsylvania and Halifax Counties in Virginia.

Appliance Sales & Service, Inc. relied upon said statements, affirmations, representations, and assurances in agreeing to give up its rights as a vendee in Person, Durham and Granville Counties in North Carolina and Pittsylvania and Halifax Counties in Virginia and in signing a new contract document substituting lesser counties for them.

The first knowledge by personnel of Appliance Sales & Service, Inc. of said misrepresentations occurred on Monday, June 3, 1991, (when they were contacted by Ken Adcock); that within 72 hours thereafter, we had our attorney write to Command Electronics Corporation (attention: "Shep" Funderburk) and gave formal notice and demands that the alleged contract between Command Electronics Corporation and Appliance Sales & Service, Inc. be voided immediately and that Appliance Sales & Service, Inc. be refunded the $14,986.00 previously paid (said refund to be on or before June 20, 1991) and advised Command Electronics Corporation that the one Med Command System sales kit in the

possession of Appliance Sales & Service, Inc. could be picked up by Command Electronics Corporation at any reasonable time. Command Electronics Corporation has never refunded (or tendered a refund) of any part of said $14,986.00 to us.

The affidavit of Ken Adcock, President of Adcock's Business Machines, Inc., provided as follows:

That on March 15, 1991 I signed a "Vendee" or "Purchase Order Contract" with Command Electronics Corporation indicating that Adcock's Business Machines, Inc. would become the "vendee" for Command Electronics Corporation of Med Command Systems with Person, Granville, Durham and other Counties in North Carolina, and Pittsylvania and Halifax and other Counties in Virginia as its "area"; that said Contract specified that Command Electronics Corporation "will not appoint another vendee in the above listed County/Counties during the term of this agreement or its renewal in writing by the vendee." . . . Adcock's Business Machines, Inc. is located in Oxford (Granville County) North Carolina and paid Command Electronics Corporation $14,986.00 for said Contract.

At the time said Contract was signed, the representative of Command Electronics Corporation showed me a check in his pocket (dated March 14, 1991) from Appliance Sales & Service, Inc. to Command Electronics Corporation in the sum of $7,493.00. I was then advised by Command Electronics Corporation's personnel that they had given Appliance Sales & Service, Inc. a Contract the day before but preferred to give the Contract to me and that if I signed for Adcock's Business Machines, Inc. the Contract with Command Electronics Corporation (set forth in the above paragraph), they would advise Appliance Sales & Service, Inc. that it could not be a "vendee" and would send Appliance Sales & Service, Inc. back its check.

I had wanted to become a vendee for other Counties in North Carolina including especially Vance County, North Carolina. I was advised by Command Electronics Corporation that I was the only vendee in the State of North Carolina except for a small area around Wilmington, North Carolina which was in the area of a South Carolina vendee, and that Command Electronics Corporation would not place another vendee in North Carolina without giving me the right of first refusal to become a vendee in that area.

Shortly after I signed my Contract of March 15, 1991, I received a demographic study (which Command Electronics Corporation had promised me). It contained a list of places 4 pages long for Durham County where I could find potential business outlets and an additional 1-1/4 pages for Granville County.

I had a telephone conversation at that time with Issac Shephard Funderburk, III concerning the demographic studies and he personally discussed with me my being the vendee in Granville County, Durham County and some of the other counties indicated in my contract. He further personally emphasized to me that there were no other vendees in North Carolina (except for the Wilmington area) and that I would have a right of first refusal if they put a vendee in any other area.

On June 3, 1991 I first discovered that Appliance Sales & Service, Inc. had been made a vendee in North Carolina, and that it had been persuaded by Command Electronics Corporation to modify rather than terminate its Contract with Command Electronics Corporation and that its check to Command Electronics Corporation had never been returned.

On 4 November 1991, defendants filed an answer, alleging *inter alia* that a forum selection clause barred the action from being heard in North Carolina. Through the consent of the parties, the case was transferred to Superior Court by order filed 17 November 1992. On 7 January 1993, defendants' filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b). On 5 February 1993, plaintiff filed the two affidavits discussed *supra*. On 8 February 1993, the trial court denied defendants' motion to dismiss, stating that "[a]fter hearing arguments of counsel and reviewing the court files, the Court finds, from the totality of the circumstances reflected in the court files and from arguments of counsel, that this Court has jurisdiction over the subject matter and the parties, and that the enforcement of the forum selection clause in the alleged contract would be unfair and unreasonable." Defendants appeal.

Zollicoffer & Long, by John H. Zollicoffer, Jr., for plaintiff-appellee.

Bobby W. Rogers for defendant-appellants.

EAGLES, Judge.

Defendants argue that the trial court erred in denying their motion to dismiss "pursuant to the forum selection clause of the contract." We disagree.

I.

In *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 141, 423 S.E.2d 780, 781 (1992), our Supreme Court upheld the validity of a forum selection clause contained in a commercial contract to purchase software entered into between a North Carolina certified public accountant and a California-based software company. In *Perkins*, our Supreme Court stated:

> Recognizing the validity and enforceability of forum selection clauses in North Carolina is consistent with the North Carolina rule that recognizes the validity and enforceability of choice of law and consent to jurisdiction provisions. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30. For the foregoing reasons, we embrace the modern view and hold that forum selection clauses are valid in North Carolina. A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable. The dissent argues that this Court's decision in this case "place[s] tens of thousands of our citizens at the mercy of those who will take advantage of them by the use of forum selection clauses." We disagree. Under our decision, the trial court retains the authority to hear the case when it determines that the forum selection clause was the product of fraud or unequal bargaining power or that the clause would be unfair or unreasonable.

333 N.C. at 146, 423 S.E.2d at 784. After *Perkins*, in *Bell Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Serv.*, 113 N.C. App. 476, 439 S.E.2d 221 (1994), this Court analyzed a consent to jurisdiction clause in a standardized lease agreement purporting to bind a North Carolina corporation to litigate in a New Jersey trial court. *Id.* at 479, 439 S.E.2d at 224. There, in determining whether the agreement was unfair or unreasonable, this Court examined the "circumstances surrounding the defendant's signing of the lease agreement" and stated:

> When he [the North Carolina corporation's president] signed the lease agreement, defendant was a 79-year-old man who ran a small family business. There was no bargaining over the terms of the contract between the parties, who were far from equal in bargaining power. The lease agreement itself was a one page preprinted form with type on the front and back. The forum selection and consent to jurisdiction provisions were on the back side of the paper, where there was no place for defendant to sign or initial. The provisions were in fine print under a paragraph labeled "Miscellaneous," and were never called to defendant's attention or explained to him. Plaintiff made no showing whatsoever that defendant was actually aware or made aware of the significance of the consent to jurisdiction clause.
>
> Considering all of these factors, we find that defendant did not knowingly and intelligently consent to the jurisdiction of the New Jersey courts. Therefore, enforcement of this provision would be both unfair and unreasonable.

Id. at 480-81, 439 S.E.2d at 224-25.

[1] Here, the trial court, after reviewing "the totality of the circumstances reflected in the court files," found that the enforcement of the forum selection clause "would be unfair and unreasonable." Neither Perkins, nor any subsequent reported decision of the North Carolina appellate courts that we have discovered, has explicitly stated the standard of appellate review for orders assessing the enforceability of forum selection clauses. We note that the federal circuits are divided between the abuse of discretion standard, *see Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 280 n.4 (9th Cir. 1984); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 n.3 (8th Cir. 1986); and the *de novo* standard of review, *see Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993); *Lambert v. Kysar*, 983 F.2d 1110, 1112 (1st Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir.), *cert. denied*, — U.S. —, 121 L.Ed.2d 584 (1992); *Instrumentation Assocs., Inc. v. Madsen Electronics (Canada) Ltd.*, 859 F.2d 4, 5 (3d Cir. 1988). Given that the disposition of each case is highly fact-specific, we conclude that the abuse of discretion standard is the more appropriate standard. *See State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) ("The abuse of discretion standard of review is applied to situations, such as this, which require the exercise of judgment on the part of the trial court. The test for abuse

of discretion requires the reviewing court to determine whether a decision 'is manifestly unsupported by reason,' or 'so arbitrary that it could not have been the result of a reasoned decision.' *Little v. Penn Ventilator, Inc.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986)"); *Greenwood v. Tillamook Country Smoker, Inc.*, 857 S.W.2d 654, 656 (Tex.App. 1993); *Personalized Marketing Service, Inc. v. Stotler & Co.*, 447 N.W.2d 447, 450 (Minn.App. 1989), *review denied* (12 January 1990). *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7, 32 L.Ed.2d 513, 519 (1972) (abuse of discretion standard applicable to forum *non conveniens* determination). However, we note that the trial court's order here would also be affirmed under the *de novo* standard of review.

II.

We now address whether the trial court abused its discretion by declining to enforce the contract's forum selection clause which provided:

> 9. Place of Execution: The parties hereto agree that this Agreement shall be deemed to have been executed in the State of South Carolina, and that the laws of said State shall govern any interpretation or construction of this Agreement. In the event of a disagreement between the parties, the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue and the Company shall be entitled to reasonable attorney fees and collection costs.

In *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 92-93, 414 S.E.2d 30, 33 (1992), our Supreme Court stated:

> Historically, parties have endeavored to avoid potential litigation concerning judicial jurisdiction and the governing law by including in their contracts provisions concerning these matters. Although the language used may differ from one contract to another, one or more of three types of provisions (choice of law, consent to jurisdiction, and forum selection), which have very distinct purposes, may often be found in the boilerplate language of a contract. The first type, the choice of law provision, names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated. The second type, the consent to jurisdiction provision, concerns

the submission of a party or parties to a named court or state for the exercise of personal jurisdiction over the party or parties consenting thereto. By consenting to the jurisdiction of a particular court or state, the contracting party authorizes that court or state to act against him. A third type, a true forum selection provision, goes one step further than a consent to jurisdiction provision. A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship. . . .

Due to the varying language used by parties drafting these clauses and the tendency to combine such clauses in one contractual provision, the courts have often confused the different types of clauses. One commentator recognizing this confusion has offered the following guidance:

> A typical forum-selection clause might read: "[B]oth parties agree that only the New York Courts shall have jurisdiction over this contract and any controversies arising out of this contract." . . .
>
> A . . . "consent to jurisdiction" clause[] merely specifies a court empowered to hear the litigation, in effect waiving any objection to personal jurisdiction or venue. Such a clause might provide: "[T]he parties submit to the jurisdiction of the courts of New York." Such a clause is "permissive" since it allows the parties to air any dispute in that court, without requiring them to do so.
>
> . . . A typical choice-of-law provision provides: "This agreement shall be governed by, and construed in accordance with, the law of the State of New York."

(Citations omitted.)

Reviewing the contractual provisions at issue here, the language, "[t]he parties hereto agree that this Agreement shall be deemed to have been executed in the State of South Carolina, and that the laws of said State shall govern any interpretation or construction of this Agreement," is a choice of law provision. *Id.* The second sentence, "[i]n the event of a disagreement between the parties, the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue . . ." is a forum selection clause. *Id.*

III.

[2] Here, we cannot say that the trial court's refusal to enforce the forum selection clause is without a rational basis in the facts. The evidence shows that defendants made at least two prior representations to the effect that if plaintiff sought a remedy, plaintiff could sue defendants in the courts of North Carolina. In response to plaintiff's second set of interrogatories, defendants admitted that a "complaint or accusation" had been made against them to the North Carolina Attorney General. One representation was made to the Office of the Attorney General, as noted in John H. Zollicoffer, Jr.'s (plaintiff's counsel's) uncontradicted affidavit which provides in pertinent part as follows:

> That the matters raised in the complaint were brought to the attention of the Consumer Protection Division of the Office of the Attorney General of the State of North Carolina. That in its attempt to keep the Attorney General of the State of North Carolina from taking any action on the same, [defendant] Shep Funderburk (Issac Shephard Funderburk, III) wrote a letter on behalf of Command Electronics Corporation dated July 9, 1991 to John H. Zollicoffer, Jr., Attorney for Plaintiff, and further wrote another letter dated July 9, 1991 to the Office of the Attorney General, Consumer Protection Division.
>
> That in the letter to John H. Zollicoffer, Jr., Shep Funderburk stated that:
>
> > ". . . . indeed you have available a civil court system in the great [S]tate of North Carolina to your client if indeed your client feels that they were injured in their dealings with Command Electronics Corporation."
>
> In the letter to the North Carolina Attorney General on the same day, Shep Funderburk stated on behalf of Command Electronics Corporation:
>
> > "If Appliance Sales & Service and Command Electronics Corporation can't work out their differences, then their attorney has the civil court of North Carolina available to him to file suit."

(Emphasis in original.) Given defendants' prior inconsistent conduct in their communications with plaintiff and the Attorney General, we conclude that the trial court could have found *inter alia* that de-

fendants are estopped from asserting the forum selection clause as a defense to the filing of the action in North Carolina. We conclude that plaintiff has met its "heavy burden." *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784. From the record, it is clear that the trial court did not abuse its discretion in refusing to enforce the terms of the forum selection clause.

IV.

For the reasons stated, the trial court's 8 February 1993 order is affirmed.

Affirmed.

Judges MARTIN and McCRODDEN concur.

STATE OF NORTH CAROLINA v. JOHN CARL LANE, JR.

No. 938SC459

(Filed 7 June 1994)

1. Homicide § 216 (NCI4th)— assault as cause of death—sufficiency of evidence

There was sufficient evidence in a prosecution for involuntary manslaughter from which a reasonable jury could find that defendant's punch was the actual cause of a blunt force injury to decedent's head, leading directly to his death.

Am Jur 2d, Homicide §§ 432 et seq., 455.

2. Homicide § 216 (NCI4th)— assault as proximate cause of death—sufficiency of evidence

A jury could reasonably infer that defendant's assault started a series of events culminating in decedent's death, and the assault therefore constituted a proximate cause of the death; furthermore, defendant could not be excused from responsibility because of decedent's pre-existing condition, alcoholism, which rendered him less able to withstand the assault.

Am Jur 2d, Homicide §§ 432 et seq., 455.

3. Homicide § 396 (NCI4th)— requested instruction—no supporting evidence—denial proper

The trial court did not err in refusing to give defendant's requested instruction that defendant's assault caused decedent to fall and strike his head on the pavement, since such instruction was not supported by the evidence.

Am Jur 2d, Homicide §§ 496, 497.

4. Homicide § 424 (NCI4th)— intentional infliction of wound—foreseeability omitted from proximate cause instruction—no error

Because defendant admitted intentionally inflicting a wound upon decedent, who was highly intoxicated, by hitting him in the head, the trial judge properly omitted the element of foreseeability in his proximate cause instruction.

Am Jur 2d, Homicide § 506.

Appeal by defendant from judgment entered 26 June 1992 by Judge Paul M. Wright in Wayne County Superior Court. Heard in the Court of Appeals 1 March 1994.

On the evening of 17 September 1990, nineteen-year-old defendant and his two cousins, Steve Coor and Rodney Coor, left defendant's home in Goldsboro, North Carolina and walked around the corner to a Jet Service Station to purchase some beer. On their way home, defendant and Steve Coor turned around to observe Rodney walking with and talking to a highly intoxicated white male, who was staggering along Grantham Street, a four-lane highway otherwise known as Business Route 70.

Steve Coor testified that he told the man with Rodney to be careful in the street. The man responded by swearing and making gestures. Steve and Rodney saw defendant swing at the man, and saw the man fall on the cement on the edge of Grantham Street. Defendant, Rodney and Steve continued to walk home.

At 9:48 p.m., Sergeant M.A. Cruthirds of the Goldsboro Police Department responded to a call regarding a white male lying in the road at one corner of Grantham Street. Sergeant Cruthirds discovered Gregory Linton lying in the road, three feet from the curb. Two women were kneeling on either side of Linton. One of the women told Cruthirds that Linton's signs were good. Rescue personnel

arrived at the scene. Cruthirds applied pressure behind Linton's ear to which Linton responded by trying to remove Cruthirds' hand. After determining that there was no sign of injury, and that Linton was only intoxicated, the rescue team left, and Sergeant Cruthirds took Linton into custody and placed him in the Wayne County jail for public drunkenness.

Linton was taken to the hospital the following day, 18 September 1990, around 4:30 p.m. He was unconscious. He had a blood alcohol concentration level of .34 percent on the breathalyzer scale at the approximate time of his arrival at the hospital. Linton died at 6:30 p.m. on 20 September 1990. An autopsy revealed no external injuries, but did reveal a subdural hematoma on the right side of the brain, a swollen brain, brain contusions or bruises, pneumonia on the lungs, and fatty change of the liver, which is most commonly caused by alcohol abuse. In the medical examiner's opinion, Linton died as a result of blunt force injury to the head.

Defendant was indicted and tried for involuntary manslaughter. The jury returned a verdict of guilty. After finding the aggravating factors outweighed the mitigating factors, defendant received the maximum sentence of ten years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Daniel F. McLawhorn, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine M. Crawley, for defendant appellant.

ARNOLD, Chief Judge.

I

Defendant's first assignment of error raises the question of whether the State's evidence was sufficient to show that defendant's act of hitting Gregory Linton was both the actual and legal cause of his death.

In considering a motion to dismiss, the trial court must determine whether substantial evidence of each element of the offense exists. *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). "Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion." *State v. Ginyard*, 334 N.C. 155, 158, 431 S.E.2d 11, 13 (1993). The trial court must consider the evidence in the light most favorable to the State, thereby giving the State the benefit of every reasonable inference that might

be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985) (quoting *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *overruled on other grounds*, *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). The State must prove that defendant's action was both the cause-in-fact (actual cause) and the proximate cause (legal cause) of the victim's death to satisfy the causation element. *See, e.g.*, *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979), *overruled on other grounds*, *State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981). Defendant contends that the State failed to prove the causation element.

CAUSE-IN-FACT

[1] First, defendant contends that the State failed to present substantial evidence that his punch was the cause-in-fact of Linton's death because (1) the State's theory was that as a result of defendant's punch Linton banged his head on the pavement, yet the evidence showed that Linton did not fall on his head, or bang it against the pavement as a result of being hit by defendant, and (2) it is impossible to prove beyond a reasonable doubt that the trauma which triggered the decedent's brain hemorrhage was defendant's punch, and not some other factor which could have occurred either before or after the incident.

There is evidence in the record, contrary to defendant's contentions, from which a reasonable jury could find that defendant's punch was the actual cause of the blunt force injury to the head, leading directly to Linton's death. First, it should be noted that the State's theory at the time of defendant's motion to dismiss was not limited to whether the decedent's head struck the pavement. Therefore, while it appears from the record that Linton's head did not strike the pavement, it can be reasonably inferred that defendant's punch was the cause-in-fact of decedent's death. Steve Coor testified that he saw defendant swing at Linton "around the head." The medical examiner testified that the decedent's swollen brain could have been a response to either a blow to the head or a response to the head striking some object. This is reasonable evidence to support the conclusion that defendant's punch to the head was a cause-in-fact of

decedent's death. Furthermore, defendant's second contention that decedent *could* have suffered trauma to the head in a manner other than defendant's assault is speculative. There is no evidence in the record to substantiate defendant's suggestion that decedent *may* have lost his balance sometime before he encountered defendant, that he *may* have fallen again sometime after he was hit, or that he *may* have fallen in his jail cell.

PROXIMATE CAUSE

[2] Defendant next contends that his action was not a proximate or legal cause of decedent's death because (1) primary responsibility for Linton's death lies in the superseding act of the police taking Linton into custody without seeking timely medical attention, and (2) the events following defendant's assault upon decedent were unforeseeable. Both of defendant's contentions are contrary to the law of this state and are therefore unpersuasive.

Even if the decedent's death resulted from any negligent treatment or failure to seek medical attention by the police, defendant cannot rely on such negligence as a defense. "Neither negligent treatment nor neglect of an injury will excuse a wrongdoer unless the treatment or neglect was the sole cause of death." *State v. Jones*, 290 N.C. 292, 299, 225 S.E.2d 549, 552 (1976) (drug used to treat victim of gunshot wound caused him to die from an allergic reaction that induced heart failure). No evidence exists here to show that any action taken by the police was the sole cause of decedent's death. There can be more than one proximate cause, but criminal responsibility arises as long as the act complained of caused or directly contributed to the death. *State v. Cummings*, 301 N.C. 374, 271 S.E.2d 277 (1980). A jury could reasonably infer from the evidence in the case at bar that defendant's assault started a series of events culminating in Linton's death, and therefore, constituted a proximate cause of his death.

Defendant's other contention, that he was not the proximate cause of decedent's death due to the unforeseeable consequences of defendant's assault, is likewise erroneous under the law of this state. Responsibility cannot be avoided due to a pre-existing condition of a decedent which renders him less able to withstand an assault.

> The rule is well settled that the consequences of an assault which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the

> pre-existing physical condition which made the person killed unable to withstand the shock of the assault and without which predisposed condition the blow would not have been fatal.

State v. Luther, 285 N.C. 570, 575, 206 S.E.2d 238, 241-42 (1974); *see also State v. Thompson*, 43 N.C. App. 380, 258 S.E.2d 800 (1979) (holding no error where defendant struck victim in face knocking him to the ground and victim died two days later from brain hemorrhage). Linton's pre-existing condition, chronic alcoholism, was evidenced by the testimony of the medical examiner. The examiner explained that alcoholics are more susceptible to brain swelling and subdural hematomas than nondrinkers. Defendant's argument that the rule regarding pre-existing conditions is far less compelling where the decedent's condition is self-induced is not convincing. Testimony of the medical examiner, coupled with additional testimony regarding decedent's blood alcohol concentration and history of drinking, was sufficient for the State's case to withstand defendant's motion to dismiss.

Additionally, in his first assignment of error, defendant asks this Court to abandon the common law doctrine of misdemeanor manslaughter. Whatever the merits of defendant's argument, this Court is foreclosed from making such a determination. It is the province of our legislature to change the accepted common law in this state. N.C. Gen. Stat. § 4-1 (1986); *see also State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961).

II

[3] Defendant's second assignment of error is that the trial court erroneously failed to give defendant's requested instruction on an element of assault, and instead instructed the jury on a theory that was not supported by the evidence. At the beginning of the charge conference, the attorneys were asked for suggestions as to how to charge the jury on the "unlawful act" element of involuntary manslaughter. Defendant requested the following instruction:

> That the defendant acted unlawfully and without legal excuse by assaulting *Gregory Linton causing him to fall and strike his head on the pavement.*

The trial court denied defendant's requested instruction and instead gave the following instruction to the jury:

> [That the] defendant . . . assaulted, without lawful excuse, the decedent Gregory Linton by *hitting him and thereby proximately causing* the death of the victim Gregory Linton . . . .

We find that the evidence does not support defendant's requested instruction, however, the evidence does support the instruction given; therefore, there is no prejudicial error.

Where a party requests an instruction that is supported by the evidence, it is error for the trial court not to instruct in substantial conformity with the requested instruction. *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). The crucial issue, therefore, is whether the evidence supports defendant's requested instruction that defendant caused Linton to fall and hit his head on the pavement.

While the medical examiner testified that Linton died as a result of a blunt force injury to the head, which *could* have been caused by striking his head on the pavement, the record is devoid of any evidence that indicates decedent indeed struck his head on the pavement. In fact, defendant contradicts himself by conceding in his first assignment of error that the evidence does not support a finding that Linton fell on his head, or banged it against the pavement as a result of being hit by defendant. Defendant relies on the State's acknowledgment at the charge conference that its theory was that Linton died as a result of hitting his head on the pavement, and not as a direct result of defendant's punch. The State's acknowledgment, however, is immaterial because the trial judge, not counsel for either party, is responsible for presenting the issues arising from the evidence to the jury. *State v. Harris*, 306 N.C. 724, 295 S.E.2d 391 (1982). Refusal to give defendant's requested instruction was therefore not error.

III

[4] Defendant's next assignment of error is that the trial court erred by failing to instruct on foreseeability as a necessary component of proximate cause. He contends that the trial court's proximate cause instruction did not explain that defendant's unlawful conduct could not be considered a proximate cause of the decedent's death, unless death was a reasonably foreseeable consequence of that conduct. As a result of the court's failure to instruct on the foreseeability component, defendant argues that he has been prejudiced, and therefore, must be awarded a new trial. Defendant's assignment of error is without merit.

We note initially that defendant failed to preserve his assignment of error for review by this Court by either submitting a request for an instruction on foreseeability or objecting to the instruction at trial as required under Rule 10(b)(2). Admitting his failure to object, defendant nevertheless urges the Court to review this case under the plain error rule. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Upon review of the record as a whole, we find no "plain error" that would require a new trial where the facts as well as the law of this state did not justify an instruction on foreseeability.

At trial, the court gave the following instruction on proximate cause:

> The second element the State must prove is what is called proximate cause. It is a legal term. The State must prove that the defendant's act proximately caused the victim's death.
>
> What is a proximate cause? It is a real cause, a cause without which the victim's death would not have occurred.
>
> Now the defendant's act need not have been the only cause nor the last cause or the nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which in combination with it caused the death of the victim Gregory Linton.

Defendant relies on two cases from this Court which have held that where the trial court failed to give an instruction on the foreseeability component of proximate cause, the defendant was entitled to a new trial. *State v. Hall*, 60 N.C. App. 450, 299 S.E.2d 680 (1983); *State v. Mizelle*, 13 N.C. App. 206, 185 S.E.2d 317 (1971). In *Hall*, the defendant was convicted of involuntary manslaughter for shooting a man while the two men were hunting deer. After determining that there was sufficient evidence to support the defendant's culpable negligence, and hence a conviction for involuntary manslaughter, the Court turned to the issue of whether the trial court's failure to generally define "proximate cause" and to specifically instruct that foreseeability is a requisite of proximate cause constituted prejudicial error. Relying on *Mizelle*, in which the defendant was convicted of involuntary manslaughter for hitting a man with his car while driving intoxicated, this Court concluded that failure to define proximate cause and state that foreseeability was a requisite of proximate cause entitled defendant to a new trial. *Hall*, 60 N.C. App. 450, 299 S.E.2d 680. As stated in *Mizelle*,

> Foreseeability is a requisite of proximate cause. We have previously pointed this out and ordered a new trial where a proper definition of proximate cause was not given in a civil action. [Citation omitted.] It is all the more imperative that all of the necessary elements including a correct definition of proximate cause . . . be given in a criminal case.

Mizelle, 13 N.C. at 208, 185 S.E.2d at 318-19. Defendant in the case at bar likewise maintains that although the trial court defined proximate cause, it erred by failing to include an instruction on foreseeability.

The State contends, however, that *Hall* and *Mizelle* are distinguishable. The State insists that the law is different where the wound is *intentionally* inflicted. The State relies on *State v. Woods*, 278 N.C. 210, 179 S.E.2d 358 (1971), *overruled on other grounds*, *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992) in which the defendant shot and killed her husband and was convicted of voluntary manslaughter. The defendant maintained that she only intended to scare her husband by shooting past him. The trial court instructed the jury twice to return a verdict of involuntary manslaughter if it was satisfied beyond a reasonable doubt that the husband's death " 'was the natural and probable result' of a wound intentionally inflicted by defendant." *Id.* at 219, 179 S.E.2d at 363. The Court concluded the trial court erred in this instruction because the crucial question was "whether a wound inflicted by an unlawful assault *proximately caused* the death—not whether death was a natural and probable result of such a wound and should have been foreseen." *Id.* at 219, 179 S.E.2d at 363-64. The Court further stated that "[f]oreseeability is not an element of proximate cause in a homicide case where an intentionally inflicted wound caused the victim's death." *Id.* at 219, 179 S.E.2d at 364. The issue under *Woods*, therefore, becomes whether the defendant in this case intentionally inflicted the decedent's wound, thereby causing his death. The State argues that because defendant admitted intentionally striking the decedent, the trial judge properly omitted the element of foreseeability in his proximate cause instruction. We agree.

The trial court must instruct fully on proximate cause only as it relates to the facts of each case. *See State v. Pope*, 24 N.C. App. 217, 210 S.E.2d 267 (1974), *cert. denied*, 286 N.C. 419, 211 S.E.2d 799 (1975) (citing *State v. Dewitt*, 252 N.C. 457, 114 S.E.2d 100 (1960)). In *Pope*, where the defendant was charged with first degree murder

and convicted of second degree murder for shooting his wife, this Court distinguished *Mizelle* and held "[u]nder the facts of the case, foreseeability was not seriously in issue." *Pope*, 24 N.C. App. at 221, 210 S.E.2d at 271; *see also State v. Rogers*, 43 N.C. 177, 258 S.E.2d 418 (1979), *aff'd*, 299 N.C. 597, 264 S.E.2d 89 (1980). In *Pope*, the defendant admitted that he held a loaded gun and pointed it at his brother-in-law, who was standing close to the decedent.

When comparing the facts of the case at bar to the facts in the cases cited above, foreseeability was not seriously in issue. In this case, defendant clearly intentionally inflicted a wound upon Gregory Linton, who was highly intoxicated, by hitting him in the head. The trial court, therefore, did not err in failing to instruct the jury on foreseeability as an element of proximate cause.

We have carefully reviewed defendant's remaining assignments of error and find no prejudicial error.

No error.

Judges COZORT and LEWIS concur.

TRANSYLVANIA COUNTY DEPARTMENT OF SOCIAL SERVICES O/B/O DONLYN JNE. DOWLING, MOTHER AND MINOR CHILD, PLAINTIFFS v. JOHN M. CONNOLLY, III, DEFENDANT

No. 9329DC660

(Filed 7 June 1994)

1. Divorce and Separation § 417 (NCI4th)— arrearages under Georgia child support order—forgiving arrearages error

The trial court erred in modifying a Georgia support order by forgiving defendant for accrued arrearages under that order where there was no evidence that defendant petitioned for a modification of the child support order pursuant to Ga. Code Ann. § 19-6-19(a), and an order modifying the child support order can operate only prospectively.

Am Jur 2d, Divorce and Separation §§ 1056 et seq.

2. Divorce and Separation §§ 389, 393— child support—credit for payments made by mother—no credit for payments to child or medical providers

The trial court did not err in giving defendant credit for support payments made on behalf of defendant by defendant's mother where those payments consisted of checks made payable to plaintiff and payments made directly to various utility companies on behalf of plaintiff, since the evidence indicated that there was some agreed or understood modification of the court order by plaintiff and defendant, and plaintiff should not reap the benefit of the grandmother's benevolence regarding the support payments made directly to her, with her consent, and on behalf of defendant, when there was no resulting unfairness to plaintiff or the child; however, defendant was not entitled to credit for support payments which consisted of payments made directly to the child by defendant's mother, since the child had exclusive control over that money and did not use it for clothes or food, nor should defendant receive credit for payments to a bank for a car driven by plaintiff and titled in the names of defendant and his mother or for payments to medical providers, since those payments were defendant's responsibility under the terms of the divorce decree.

Am Jur 2d, Divorce and Separation §§ 1018 et seq.

Right to credit on accrued support payments for time child is in father's custody or for other voluntary expenditures. 47 ALR3d 1031.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments. 11 ALR5th 259.

Judge GREENE concurring.

Appeal by plaintiff from order entered 26 January 1993 by Judge Stephen F. Franks in Transylvania County District Court. Heard in the Court of Appeals 22 March 1994.

Attorney General Michael F. Easley, by Associate Attorney General Sybil Mann, for the State-appellant.

Ramsey, Hill, Smart, Ramsey & Pratt, P. A., by Michael K. Pratt, for defendant-appellee.

JOHNSON, Judge.

Donlyn Dowling (plaintiff) appeals from an order filed 26 January 1993 in Transylvania County District Court, denying her claim for past due child support and concluding that John M. Connolly, III (defendant) did not owe any sums for arrearage for child support.

Plaintiff and defendant married on 27 March 1981; a child was born of the marriage on 15 August 1984, and the parties separated on 16 April 1990. An interim order was entered requiring defendant to pay $100.00 per week until entry of the divorce decree. On 3 October 1990, a divorce decree was signed in Douglas County, Georgia, and ordered:

> The defendant shall pay child support in the amount of $260.00 per week, beginning October 5, 1990. Child support shall continue until the child marries, dies, or becomes otherwise emancipated. This award of child support is based upon an annual income of $80,000.00 and is within the present child support guidelines.

On 11 June 1991, plaintiff, a resident of Florida, through the Transylvania County Department of Social Services, instituted this action for past due child support, pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA). North Carolina General Statutes § 52A-1 to -32 (1992).

The record contains a copy of twenty-three checks from Margie Connolly (Mrs. Connolly), defendant's mother, made payable to the parties' child. Mrs. Connolly produced other checks showing six payments to various utilities, four payments to Trust Company Bank, five payments to medical providers for the child, and five payments to plaintiff.

After the hearing, the trial court made the following pertinent findings of fact:

> 4. . . . that an order was entered in Georgia upon the testimony of the Plaintiff directing the Defendant to pay the sum of $240 per week in child support; . . .
>
> 5. Thereafter the parents of the Defendant, on his behalf, made consistent payments for the support and maintenance of the child; that attached hereto and marked Exhibit A are copies of the checks from September, 1990, until the date of the trial of this action representing payments made to the Plaintiff for the support and maintenance of the minor child.

. . .

10. That while the Plaintiff testified that she received no monies from the Defendant for child support from the date of separation until the date of this trial, the Court finds as a fact that there was [sic] systematic and adequate payments made which were for the use and benefit of the minor child during the entire period.

The court concluded "[t]hat adequate child support payments were made from the date of separation until the date of the trial" and that "[d]efendant does not owe any sums for arrearage for child support." Therefore, the court ordered that plaintiff "recover nothing from the Defendant in this cause."

There are two issues raised which are dispositive of this appeal: (1) Whether the trial court may modify a child support order so as to relieve defendant of any obligation to pay accrued arrearages due under the order, and (2) whether the trial court may allow defendant father credit for child support payments made to plaintiff by defendant's mother on behalf of defendant.

Plaintiff brought an action pursuant to URESA to collect child support arrearages that have accrued under a Georgia order. This order is entitled to full faith and credit to the extent it represents past due child support payments which are vested. North Carolina General Statutes § 50-13.10(b) (1987). Thus, this Court is required to enforce that order to the extent the accrued arrearages are not subject to modification by the courts of Georgia. *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980); 42 U.S.C.A. § 666(a)(9)(c) (Cum. Supp. 1994) (requiring all states to give full faith and credit to child support orders of other states to the extent payments are vested).

Under Ga. Code Ann. § 19-6-19(a), an order for child support can only be modified by a petition filed "by either former spouse showing a change in the income and financial status of either former spouse or in the needs of the child[.]" Ga. Code Ann. § 19-6-19(a) (Cum. Supp. 1993). Because retroactive modification of a child support order would "vitiate the finality of the judgment obtained as to each past due installment," a trial court may not retroactively modify a child support obligation. *Hendrix v. Stone*, 261 Ga. 874, 875, 412 S.E.2d 536, 538 (1992). *See also Donaldson v. Donaldson*, 262 Ga. 231, 416 S.E.2d 514 (1992); *Butterworth v. Butterworth*, 228 Ga. 277, 185 S.E.2d 59 (1971); *accord* North Carolina General Statutes

§ 50-13.10(a),(b)(1987) (past due child support is vested when it accrues and is subject to divestment only as provided by law and only if written motion is filed and due notice is given to all parties before payment is due).

[1] In this case, the child support arrearages due to plaintiff accrued prior to the filing of this action. Because (1) there is no evidence that defendant petitioned for a modification of the child support order pursuant to Ga. Code Ann. § 19-6-19(a), and (2) an order modifying the child support order can operate only prospectively, the trial court erred in modifying the Georgia support order by forgiving defendant for the accrued arrearages.

[2] We must now consider whether the trial court erred in giving defendant credit for support payments made on behalf of defendant by defendant's mother.

If the rendering court has not reduced the arrearage to judgment or determined the amount of the arrearage, the responding court has the authority to determine the amount of the arrearage due under the out-of-state child support order. The responding court should take into account any payments that the obligor can prove were made under the order. The law of the rendering state, however, governs the issue of whether the obligor is entitled to credit for any child support payments allegedly made to the obligee directly and contrary to the provisions of the order requiring payment through the clerk or a child support agency. *See* John L. Saxon, *Enforcement and Modification of Out-of-State Child Support Orders*, Special Series No. 13, Institute of Government (1994) (citing Margaret C. Haynes, *Interstate Child Support Remedies* 104 (Margaret C. Haynes and G. Diane Dodson eds., 1989)).

A defense based on the payment of arrearage is different from the issue of the court's authority to retroactively modify or reduce a vested child support arrearage. Retroactive modification involves the attempt to reduce an undisputed, unpaid arrearage that has accrued under the order; the defense of payment is a challenge to the amount of money that actually remains unpaid under the order considering any credits to be applied. *Id.*

While the general rule in the state of Georgia is that the prohibition on retroactive application seems to preclude the allowance of "credit" for payments previously made, the Georgia courts have recognized equitable exceptions to this rule. In *Daniel v. Daniel*, 239 Ga.

466, 238 S.E.2d 108 (1978), the Court recognized an equitable exception "where the father had in fact provided child support and failure to allow him credit for such support would require double payment." *Skinner v. Skinner*, 252 Ga. 512, 513, 314 S.E.2d 897, 899 (1984). In *Daniel*, pursuant to a child custody agreement, the father was to pay $117 per month to the mother during the months of September to May when the mother had custody of the children, but not during the months of June through August when the father had custody of the children. The year after the husband and wife divorced, the children remained with their father from September to February because the mother went back to school. The father made no child support payments during those months and the mother later sued for those child support payments. Rejecting the mother's contentions, the Court opined:

> [W]hile we recognized [in *Daniel*] that a father is not entitled to modify the terms of the decree without the sanction of the court, we also recognized that this rule is inequitable in some situations where the father in fact has provided child support. Thus, credit for the father's voluntary expenditures consented to by the mother as alternatives to child support, or excusal for nonpayment of support obligations where the mother has requested that the father have custody of the children and he supported them during such period, may be appropriate so that the father is not required to pay child support twice when there is no resulting unfairness to the mother or children. In *Daniel*, however, it was stressed that such an equitable ruling required an "unusual combination of facts[.]"

Skinner, 252 Ga. at 514, 314 S.E.2d at 900. Footnote one in *Skinner* makes reference to other cases analogous to *Daniel*; these cases "also involved situations where the father had paid child support or its equivalent and the mother was seeking to require the father to pay child support again." *Id. Reach v. Owens*, 260 Ga. 227, 228, 391 S.E.2d 922, 924 (1990) clarified this "unusual combination of facts" further:

> The rule set forth in Daniel applies only in those unusual cases when the parties have agreed to some modification of the divorce decree and equity requires that the noncustodial parent receive a "credit" for the support the parent should have provided under the decree. Daniel does not support the use of such a "credit" as a set-off against future child support, alimony, or property division payments.

See also Brown v. Dept. of Human Resources, 263 Ga. 53, 428 S.E.2d 81 (1993).

In the case *sub judice*, we first examine the checks made payable to plaintiff. The evidence is undisputed that during the period of time the arrearages accrued, plaintiff willingly consented to and accepted these five child support payment checks totalling $1,150.00 made payable to her by defendant's mother on defendant's behalf. We further note defendant's mother was the sole provider of the child during the summer months plaintiff allowed the child to spend with her. Defendant was also aware of these various support payments his mother was providing on his behalf. We believe this undisputed evidence clearly indicates some agreed or understood modification of the court order by plaintiff mother and defendant. Therefore, as in *Daniel*, we believe an "unusual combination of facts" exists here and that equity requires that defendant should receive a "credit" on the arrearages for the $1,150.00 child support payments defendant's mother paid directly to plaintiff on defendant's behalf. Certainly, plaintiff should not reap the benefit of the grandmother's benevolence regarding the $1,150.00 support payments made directly to her, with her consent, and on behalf of defendant, when there is no resulting unfairness to plaintiff or the child.

Likewise, we believe defendant should also receive credit for the monies his mother paid as support in the form of utility bills. These payments totalling $69.01 were made by defendant's mother directly to various utility companies on behalf of plaintiff, as indicated in the record.

The evidence does not support the trial court's findings, however, that defendant "through his parents furnished adequate support for the minor child, which included . . . various cash payments" concluding "that adequate child support payments were made from the date of separation until the date of the trial of this cause for the use, benefit, and support of the minor child[.]" Defendant should not receive credit for payments defendant's mother made directly to the child. The evidence is undisputed that these checks were payable directly to the child because, in Mrs. Connolly's words, "[h]e takes a lot of pride in the checks being made out to him." Mrs. Connolly also testified that she "had money there for him in the bank that he can write checks for whatever he wants—needs—clothing and things." Further, when plaintiff was asked if she was able to use these checks for the child's benefit, she testified:

> No I'm not . . . [b]ecause those are sent to my son, put in his checking account, and he signed them, he keeps up with them, every penny that he has, every penny. He knows exactly how much interest he gains and the only time that he spends any of that money is when he wants to buy Nintendo games or things of that nature. . . . The money goes for whatever he desires. He will not—he won't buy clothes. Most little boys don't want to spend their money on clothes. And it certainly doesn't go to his upkeep. None of it has gone to his upkeep at all; none; zero. It goes for whatever he wants. And that does not include clothes or food.

The evidence further shows that plaintiff borrowed money from her son's account which was established by his grandmother, and that she was paying her son back with interest. Because of this evidence concerning the minor child's control over this money, we find that defendant should not have received credit for these payments made to the minor child.

We further find defendant should not have received credit for the payments to Trust Company Bank or to medical providers. The evidence is undisputed that the payments to Trust Company Bank were payments for a car which, although driven by plaintiff, was titled in the names of Mrs. Connolly and defendant. As to credit for payments made to medical providers for the child, these are not permitted because these payments were defendant's responsibility under the terms of the divorce decree.

The trial judge was required to follow Georgia law in determining whether the court order could be modified with respect to the accrued arrearages, and as to whether to allow defendant credits against his past due child support. Thus, we conclude that the trial court erred in (1) modifying the court order by forgiving defendant for the accrued arrearages, and (2) not giving defendant a "credit" of $1,219.01 on the accrued arrearages.

The judgment of the trial court is accordingly reversed. The case is remanded to the trial court for a determination of the arrearages due and payable pursuant to the Georgia order and for the court to give defendant credit of $1,219.01 on said arrearages.

Judgment is reversed and remanded.

Judge JOHN concurs.

Judge GREENE concurs in separate opinion.

Judge GREENE concurring.

I write separately only to emphasize the difference between a retroactive modification of a child support order and a credit on a child support obligation. These differences apply not only in Georgia, but also in North Carolina. Retroactive modification of past due child support is prohibited. *See* N.C.G.S. § 50-13.10(a), (b) (1987). Credits on a court-ordered child support obligation are permitted if the obligor has substantially complied with the child support order. *See* Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 17.3, at 748 (2d ed. 1988) [hereinafter *Clark*] (distinguishing between credits and modifications); *Goodson v. Goodson*, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977) (credit on child support obligation permitted where "equitable considerations" exist). For example, payments made by a third party to the custodian may be credited against the support obligation. *Clark* at 748-49. For another example, when the obligor fails to make payments as ordered but makes payments directly to the child, no credit is allowed unless the custodial parent consents. *Clark* at 749; *see Pieper v. Pieper*, 108 N.C. App. 722, 730, 425 S.E.2d 435, 439 (1993). Furthermore, as for payments to third parties for expenses incurred on behalf of the child, credit is more likely if the expense is incurred "with the consent or at the request of the parent with custody." *Goodson*, 32 N.C. App. at 81, 231 S.E.2d at 182.

STATE OF NORTH CAROLINA v. DAVID HARRIS, AKA DAVID TEASLEY

No. 939SC595

(Filed 7 June 1994)

1. Criminal Law § 975 (NCI4th)— expiration of time for appeal—trial court's ruling reviewable by certiorari

Defendant had no right to appeal from a motion for appropriate relief brought pursuant to N.C.G.S. § 15A-1415(b)(3) when the time for appeal from the conviction had expired and no appeal was pending; rather, the trial court's ruling on defendant's motion for appropriate relief was reviewable only by writ of certiorari.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies § 60.

2. Criminal Law § 1680 (NCI4th)— defendant resentenced—correction in way cases consolidated—no error

The trial court did not err in resentencing defendant in accordance with his original plea agreement after his original sentence was set aside, since nothing in N.C.G.S. § 15A-1335 prohibits a trial court from correcting the way in which it consolidated offenses during a sentencing hearing prior to remand.

Am Jur 2d, Criminal Law § 580.

3. Criminal Law § 1680 (NCI4th)— defendant sentenced to less than presumptive term—no violation of N.C.G.S. § 15A-1335

State v. Hemby, 333 N.C. 331, does not apply to situations in which a defendant is sentenced to less than the presumptive term.

Am Jur 2d, Criminal Law § 580.

4. Criminal Law § 933 (NCI4th)— judgment amended by court on its own motion—judgments facially invalid

The trial court had jurisdiction to amend the judgment on its own motion in consolidated cases, even though defendant's motion for appropriate relief attacked one particular judgment concerning the facially invalid habitual felon charge, since both judgments were the result of defendant's negotiated plea agreement and were part of a single sentencing transaction; at any time a defendant would be entitled to relief by a motion for appropriate relief, the court may grant such relief upon its own motion; if a judgment or sentence is invalid as a matter of law, defendant is entitled to relief by a motion for appropriate relief; and both judgments were finally invalid because they both listed habitual felon as a substantive offense. N.C.G.S. § 15A-1420(d).

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 44 et seq.

On defendant's writ of certiorari from judgment signed 22 April 1993 by Judge B. Craig Ellis in Franklin County Superior Court. Heard in the Court of Appeals 1 March 1994.

On 29 April 1991 and 24 June 1991, defendant was indicted on nine counts of felonious breaking and entering in violation of G.S. 14-54, nine counts of felonious larceny in violation of G.S. 14-72, four counts of felonious possession of stolen goods in violation of G.S. 14-71.1, one count of felonious possession of cocaine in violation of G.S. 90-95 and one count of being an habitual felon in violation of G.S. 14-7.1.

These cases came on for trial at the 29 July 1991 Criminal Session of the Franklin County Superior Court. As a result of plea negotiations, defendant signed two handwritten informations prepared by the Assistant District Attorney. In case number 91 CRS 999, the information added the charge of habitual felon to one of the charges of felonious possession of stolen goods (91 CRS 999) originally alleged in the indictment. In case number 3555, the information also charged the defendant with being an habitual felon but it listed the same three convictions as listed in the original habitual felon indictment. Defendant's plea agreement with the State provided:

> The defendant shall plead to two counts of habitual felon. He shall receive 14 years for the first habitual felon. The second habitual felon will run at the expiration of the 14 years. He shall receive 14 years for the second habitual felon. All other charges will be consolidated for judgment. All current charges pending in Granville County will be allowed to run concurrently if the defendant pleads to these charges.

The trial court accepted defendant's plea and imposed a 14 year sentence in case number 91 CRS 3555 for the offense of habitual felon, G.S. 14-7.1. The trial court consolidated all of the indictments returned by the Grand Jury with case number 91 CRS 999 and imposed an additional 14 year sentence to run consecutively to the sentence imposed in case number 91 CRS 3555. Defendant did not appeal.

On 1 December 1992, defendant moved for appropriate relief pursuant to G.S. 15A-1415(b)(3) from the sentence imposed in 91 CRS 3555. Defendant requested that the sentence imposed in 91 CRS 3555 be set aside because habitual felon is not a substantive crime that will support a criminal sentence by itself. At the hearing on defendant's motion on 19 April 1993, the evidence tended to show the following: The habitual felon charge in 91 CRS 3555 was intended to be ancillary to a felonious possession of stolen goods charged in the indictment in 91 CRS 999. The charge of habitual felon alleged in the

indictment in 91 CRS 3028 was intended to be ancillary to another felonious possession of stolen goods charged in the indictment in 91 CRS 1558.

The trial court concluded the following in open court:

> The Court concludes as a matter of law, that the judgment contained in 91 CRS 3555 was in error in that it purports to set forth habitual felon as a substantive offense and not as an enhancing mechanism.
>
> The Court also finds as a fact that the judgment contained in 91 CRS 999 . . . also contains habitual felon as a substantive offense.
>
> The Court notes that all of the judgments in those cases were consolidated; that the maximum sentence was [sic] for each is ten years, and the judgment itself carries a fourteen year sentence.
>
> This Court is of the opinion it could not do what is on that judgment without one of the offenses having been enhanced as a habitual felon.
>
> The Court finds that each of the judgments purports to set forth habitual felon as a substantive offense, and that the judgment should be set aside.

The trial court then ordered that the judgments in both 91 CRS 999 and 91 CRS 3555 be set aside. Following a resentencing hearing, the trial court removed the charges alleged in 91 CRS 999 from its consolidation with the other offenses and consolidated it with the offenses alleged in the habitual felon information (91 CRS 3555). The trial court then resentenced defendant to two consecutive fourteen year terms in accordance with the original plea agreement. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State.

North Carolina Prisoner Legal Services, by J. Phillip Griffin, for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred in resentencing defendant to a more severe sentence than the sentence originally

imposed and set aside. Defendant also contends that the trial court had no jurisdiction to set aside the judgment in 91 CRS 999 and consolidate it with the habitual felon information (91 CRS 3555). We affirm.

[1] We first address the State's contention that defendant's appeal should be dismissed. Defendant appealed the trial court's ruling on defendant's motion for appropriate relief. The State contends that defendant has no right to appeal from a motion for appropriate relief brought pursuant to G.S. 15A-1415(b)(3) when the time for appeal has expired and no appeal is pending. We agree. G.S. 15A-1422(c)(3) provides that "The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review: . . . (3) If the time for appeal has expired and no appeal is pending, by writ of certiorari." Here, defendant filed his motion for appropriate relief over a year and four months after his conviction. Defendant did not appeal his original sentence and his time to appeal that sentence has expired. Accordingly, the trial court's ruling on defendant's motion for appropriate relief is reviewable only by writ of certiorari. G.S. 15A-1422(c)(3). However, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we treat defendant's appeal now as a petition for a writ of certiorari and address the merits.

I.

[2] Defendant contends that the trial court erred in resentencing defendant by imposing a sentence greater than the sentence it set aside. G.S. 15A-1335 provides:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

Defendant argues that he received a 14 year sentence for all of the consolidated offenses in one of the judgments. Defendant contends that when the trial court removed 91 CRS 999 from the consolidated offenses and imposed the same fourteen year sentence with one less offense, defendant received a greater sentence on those consolidated offenses than originally imposed in the first sentencing hearing in violation of G.S. 15A-1335. We disagree. Nothing in G.S. 15A-1335 prohibits a trial court from correcting the way in which it

consolidated offenses during a sentencing hearing prior to remand. *State v. Ransom*, 80 N.C. App. 711, 713, 343 S.E.2d 232, 234 (1986). Defendant relies on *State v. Hemby*, 333 N.C. 331, 426 S.E.2d 77 (1993). We are not persuaded.

In *Hemby*, the defendant was convicted on eight indictments each charging one count of dissemination of obscene material, G.S. 14-190.1(a), and one count of possession of obscene material with intent to disseminate, G.S. 14-190.1(e). At the original sentencing hearing, the trial court consolidated the eight indictments into three groups. For indictments A, B and C, the defendant received a term of three years imprisonment. For indictments D, E and F, the defendant received another three year term to run consecutively to the first term. Finally, for indictments G and H, the trial court sentenced defendant to a term of two years to run consecutively to the first two sentences. In sum, defendant received a total of eight years imprisonment for the eight indictments.

Upon remand from this court in *State v. Hemby*, 97 N.C. App. 333, 388 S.E.2d 638 (1990), for resentencing, the trial court arrested judgment on indictments C, E, and F pursuant to this court's ruling in *Hemby*. The trial court then noted that indictments G and H were not subject to resentencing since they had been upheld on appeal. Of the eight indictments, only A, B and D remained for resentencing.

The trial court found aggravating factors and sentenced the defendant to three years imprisonment on indictment D. The trial court consolidated indictments A and B and sentenced the defendant to another three years imprisonment to run consecutively to the first sentence. Accordingly, the defendant in *Hemby* was resentenced to six years imprisonment for the three remaining indictments (A, B and D) when he had only been sentenced to a total of three years for those three indictments originally.

Our Supreme Court held that defendant's resentencing in *Hemby* violated G.S. 15A-1335 because defendant's new sentence of imprisonment was for a longer period on indictments A, B and D than he received at the original sentencing hearing. The Court stated:

> At resentencing, after the trial court arrested judgment on three of defendant's indictments, only three indictments, A, B and D, remained for resentencing, A and B having initially been consolidated in group one, and D in group two. When the trial court again consolidated indictments A and B for sentencing in group

> one, no more than two years' imprisonment could be imposed without exceeding the sentence originally imposed on these indictments. When the trial court imposed a new sentence of three years, the sentence was more severe than the original sentence on these indictments.

State v. Hemby, 333 N.C. 331, 336, 426 S.E.2d 77, 80 (1993). With respect to indictment D, the Court further stated:

> The trial court's error at resentencing is even more apparent for indictment D. At the original sentencing this indictment was consolidated with indictments E and F, and the trial court imposed a three-year sentence. At resentencing only one of the three originally consolidated indictments remained; yet defendant was given a new sentence of three years on this indictment. This new sentence on this indictment was more severe than the one-year sentence originally attributed to the same indictment.

Id. at 337, 426 S.E.2d at 80. We conclude that *Hemby* does not control here. In *Hemby*, the trial court on resentencing found aggravating factors and imposed sentences on indictments A, B and D greater than the presumptive terms for those offenses. Dissemination of obscene material, G.S. 14-190.1(a), and possession of obscene material with intent to disseminate, G.S. 14-190.1(e), are both Class J felonies with presumptive terms of one year each. When the trial court in *Hemby* resentenced defendant to a three year term for indictments A and B and a consecutive three year term for indictment D, the trial court imposed sentences of greater than the presumptive sentence of one year on each indictment.

[3] Here, defendant was sentenced to two counts of possession of stolen goods while being an habitual felon. Habitual felon status is a Class C felony with a presumptive term of fifteen years. Defendant was sentenced to a fourteen year term for each habitual felon charge, one year less than the presumptive term. G.S. 15A-1444(a1) provides that:

> A defendant who has . . . entered a plea of guilty or no contest to a felony is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article.

G.S. 15A-1444(a1) (emphasis added). We conclude that *Hemby* does not apply to situations in which a defendant is sentenced to less than the presumptive term.

Although the trial court in *Hemby* consolidated the eight indictments for sentencing, the *Hemby* trial court essentially sentenced the defendant to one year imprisonment on each indictment. The *Hemby* Court stated:

> It seems clear that the trial court intended to impose a sentence of one year on each indictment and, pursuant to N.C.G.S. § 15A-1340.4(a)(i), to total these sentences when it consolidated the indictments for sentencing purposes. We conclude, further, that when indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence, nothing else appearing in the record, the sentence, for purposes of appellate review, because of the provisions of N.C.G.S. § 15A-1340.4(a), will be deemed to be equally attributable to each indictment or conviction.

Hemby, 333 N.C. 331, 336, 426 S.E.2d 77, 80 (1993).

Here, it appears that the trial court at the original sentencing hearing did not total the presumptive terms of each of the consolidated offenses to arrive at defendant's sentence. At defendant's original sentencing hearing, the following offenses were consolidated for judgment: 1) 9 counts of felonious breaking, entering, and larceny, G.S. 14-54 and G.S. 14-72, 2) 3 counts of possession of stolen goods, G.S. 14-54 and G.S. 14-72, 3) 1 count of possession of cocaine, G.S. 90-95, and 4) 1 count of habitual felon, G.S. 14-7.1. The presumptive term for each of these offenses is three years except for habitual felon which carries a presumptive term of 15 years. If the trial court here had totaled the presumptive terms of the consolidated offenses, defendant would have been sentenced to 39 years imprisonment. However, defendant was sentenced to fourteen years imprisonment as an habitual felon. Accordingly, we conclude that the remaining consolidated offenses were not responsible for defendant's sentence. Since the other consolidated offenses were not responsible for defendant's sentence, defendant was not given a greater sentence on those offenses when he was again given a fourteen year sentence on resentencing although one of the substantive offenses which carried a presumptive sentence of three years (91 CRS 999) had been removed.

Finally, we note that defendant's original sentence was the result of a negotiated plea agreement. Defendant agreed to plead to two counts of being an habitual felon for which he would receive two consecutive fourteen year sentences. Considering that defendant's exposure was 39 years for the presumptive sentence, defendant's counsel negotiated a genuine bargain. When the trial court determined that an administrative error had been made on the judgments, the trial court merely corrected the error and resentenced defendant in compliance with his original plea agreement. Accordingly, we conclude that the trial court did not err in resentencing defendant.

II.

[4] Defendant also contends that the trial court erred in amending the judgment in cases consolidated under 91 CRS 999. We disagree.

Defendant contends that the trial court did not have jurisdiction to amend the judgment in the cases consolidated in 91 CRS 999 because defendant's motion for appropriate relief only attacked the judgment concerning the facially invalid habitual felon charge (91 CRS 3555). However, both judgments were the result of defendant's negotiated plea agreement and were part of a single sentencing transaction. G.S. 15A-1420(d) provides that "At any time that a defendant would be entitled to relief by a motion for appropriate relief, the court may grant such relief upon its own motion." *See also, State v. Oakley*, 75 N.C. App. 99, 103, 330 S.E.2d 59, 63 (1985). If a judgment or sentence is invalid as a matter of law, the defendant is entitled to relief by a motion for appropriate relief. G.S. 15A-1415(8). At the hearing on defendant's motion for appropriate relief, the trial court made the following findings of fact and conclusions of law:

> The Court concludes as a matter of law, that the judgment contained in 91 CRS 3555 was in error in that it purports to set forth habitual felon as a substantive offense and not as an enhancing mechanism.
>
> The Court also finds as a fact that the judgment contained in 91 CRS 999 . . . also contains habitual felon as a substantive offense.
>
> . . . .
>
> The Court finds that each of the judgments purports to set forth habitual felon as a substantive offense, and that the judgment[s] should be set aside.

Accordingly, the trial court found that both judgments were facially invalid because they both listed habitual felon as a substantive offense. Habitual felon status standing alone will not support a criminal sentence. *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988). The trial court had jurisdiction under G.S. 15A-1420(d) to amend both judgments on its own motion. Accordingly, we conclude that the trial court did not err in amending the judgment in the cases consolidated under 91 CRS 999.

III.

For the reasons stated, we affirm the judgment of the trial court.

Affirmed.

Judges MARTIN and McCRODDEN concur.

VERNON SIMPSON, PETITIONER v. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION; AND VULCAN MATERIALS COMPANY, RESPONDENTS

No. 9326SC268

(Filed 7 June 1994)

1. Zoning § 121 (NCI4th)— zoning ordinance—validity not before court

The trial court, in reviewing a board of adjustment's issuance of a quarry permit, erred by holding that a section of a city's ordinance allowing quarries to be established in any zoning district violated N.C.G.S. § 160A-381, which requires that zoning ordinances promote the health, safety, morals, and general welfare, since the validity of the ordinance was not before the superior court through its derivative appellate jurisdiction.

Am Jur 2d, Zoning and Planning §§ 1054-1061.

2. Zoning § 54 (NCI4th)— quarry permit—vested right under statute—statute inapplicable

The trial court erred in holding that respondent had received a vested right to a quarry permit under N.C.G.S. § 160A-385(b), since that statute speaks to those cases where a building permit has been issued prior to changes in zoning ordinances, but this

case did not involve a building permit, and the statute was therefore inapplicable.

Am Jur 2d, Zoning and Planning § 611.

3. Zoning § 54 (NCI4th)— quarry permit—vested interest by virtue of substantial beginning toward intended use—insufficient evidence

Whether respondent had a vested right to a permit to construct a quarry depended upon whether respondent had, acting in good faith, made a substantial beginning toward its intended use of the land, and this issue was not addressed, since the Zoning Board of Adjustment erroneously concluded that respondent had a vested right to the permit under N.C.G.S. § 160A-385(b).

Am Jur 2d, Zoning and Planning § 611.

4. Zoning § 67 (NCI4th)— application for quarry permit—noise and vibration ordinances inapplicable

The trial court did not err in concluding that two general zoning ordinances regarding noise and vibrations did not apply to respondent's application for a quarry permit, since those ordinances applied to the operation of a use, not whether a use permit should be issued, and, if respondent violated the noise and vibration ordinances, the code provided for an enforcement mechanism to compel compliance.

Am Jur 2d, Zoning and Planning §§ 986-1007.

Appeal by respondent Vulcan Materials Company from order entered 30 December 1992 by Judge Marcus Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 1994.

Horack, Talley, Pharr & Lowndes, P.A., by Russell J. Schwartz, Robert B. McNeill and Neil C. Williams and Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr. and Grady Barnhill, Jr., for respondent-appellant Vulcan Materials Company.

Weinstein & Sturges, P.A., by T. LaFontine Odom, Sr., and George Daly, P.A., by George Daly and Sharon Samek, for petitioner-appellee Vernon Simpson.

WYNN, Judge.

On 23 September 1991 the City of Charlotte adopted a new zoning ordinance effective 1 January 1992. The new ordinance contained

section 12.505 which allowed a quarry to be established in any zoning district, including residential districts, subject to certain requirements. Respondent Vulcan Materials Co. filed an application with the city's Building Standards Department for a permit for the construction and operation of a quarry on 112 acres of land zoned light industrial, general industrial, and multi-family. The land adjoins an existing quarry which has been in operation since 1972.

On 3 February 1992 the Charlotte-Mecklenburg Planning Commission filed a zoning ordinance text amendment application seeking to eliminate quarries and sanitary landfills as uses permitted in all districts and instead limiting those uses to the general industrial districts. Subsequently, on 13 March 1992 the Zoning Administrator issued a quarry permit to respondent. The ordinance amendment was presented to the Charlotte City Council on 16 March 1992 and the City Council approved the amendment on 20 April 1992.

On 28 April 1992, petitioner Vernon Simpson, an owner of multi-family and industrial-zoned property located across the street from a portion of respondent's proposed quarry, appealed the Zoning Administrator's decision to issue respondent a quarry permit to the Zoning Board of Adjustment (Board). The Board concluded that the Zoning Administrator had properly issued the permit in accordance with the unamended ordinance section 12.505 which permitted quarries in any district. Petitioner then filed a petition for writ of certiorari to review the Board's decision with the superior court pursuant to N.C. Gen. Stat. § 160A-388(e).

The superior court determined that respondent had complied with the zoning ordinance requirements and that the permit was properly issued. The court ruled, however, that the unamended section 12.505 violates the requirement of N.C. Gen. Stat. § 160A-381 that zoning regulations promote the "health, safety, morals, or the general welfare of the community." N.C. Gen. Stat. § 160A-381 (1987). The court concluded that the ordinance fails to require consideration of the noise, fumes, and vibrations which are the effects of quarry operations and that this failure violates N.C. Gen. Stat. § 160A-381. The court ruled that because the zoning ordinance violates the state statute, the permit issued to respondent is null and void.

From that order, respondent appeals. Petitioner Simpson cross-appeals the superior court's holding that respondent had a vested right to the permit and that Charlotte's noise and vibration ordinances did not apply to respondent's quarry application.

Respondent Vulcan Materials Company's Appeal.

[1] Respondent argues that the trial court erred by holding that the permit issued to petitioner was void because ordinance section 12.505 violated N.C. Gen. Stat. § 160A-381. Respondent contends the question of the validity of section 12.505 was not before the superior court on writ of certiorari. We agree.

Chapter 160A provides that every decision of a board of adjustment "shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-388(e) (Cum. Supp. 1993). When the superior court reviews the decision of a board of adjustment on certiorari the superior court sits as an appellate court. *Abernethy v. Town of Boone Bd. of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993); *Flowerree v. City of Concord*, 93 N.C. App. 483, 378 S.E.2d 188 (1989). The scope of review of the superior court in such instance 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.

Coastal Ready-Mix Concrete Co., Inc. v. Board of Comm'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980); *Guilford County Dept. of Emer. Serv. v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 441 S.E.2d 177 (1994); *Abernethy*, 109 N.C. App. at 462, 427 S.E.2d at 877. "The matter is before the Court to determine whether an error of law has been committed and to give relief from an order of the Board which is found to be arbitrary, oppressive or attended with manifest abuse of authority." *In re Campsites Unlimited, Inc.*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975). The superior court is not the trier of fact since that is the function of the town board. *Coastal*, 299 N.C. at 626, 265 S.E.2d at 383. The question before the superior court is whether the board's findings of fact are supported by competent evidence in the record;

if so, they are conclusive upon review. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990).

In the instant case, the superior court held that "Section 12.505 of the Zoning Ordinance is in violation of N.C. Gen. Stat. § 160A-381 which requires that zoning ordinances promote the health, safety, morals and general welfare." The validity of section 12.505, however, was not before the superior court through its derivative appellate jurisdiction. The Board of Adjustment only has the authority to grant or deny the permit under the zoning ordinance. *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985). Thus, the superior court, pursuant to a writ of certiorari under N.C. Gen. Stat. § 160A-388(e), only has the power to review the issue of whether the permit was properly granted or denied. *Sherrill*, 76 N.C. App. at 649, 334 S.E.2d at 105. *See Batch*, 326 N.C. at 10, 387 S.E.2d at 661-2 (petition for writ of certiorari to review decision of town denying subdivision application improperly joined with cause of action alleging constitutional violations pursuant to 42 U.S.C. §§ 1983 and 1988, and N.C. Gen. Stat. § 40A-8); *Seaboard Chemical*, 114 N.C. App. at 10-11, 441 S.E.2d at 182 (scope of review under N.C. Gen. Stat. § 153A-340 to review the decision of a county board of commissioners to issue or deny a special use permit does not include the adjudication of whether the denial of the permit constitutes a taking without just compensation, inverse condemnation, or a violation of 42 U.S.C. § 1983). Therefore, the superior court erred by concluding that section 12.505 violated N.C. Gen. Stat. § 160A-381 and that the permit issued to respondent was null and void.

Petitioner Vernon Simpson's Cross-Appeal

I.

[2] Petitioner first assigns error to the superior court's conclusion that respondent had a vested right to its permit to construct a quarry. Petitioner argues that the amendment to section 12.505 deleted quarries and sanitary landfills as uses permitted in all districts and instead limited those uses to general industrial districts. Petitioner contends that after this amendment was adopted by the City Council, respondent's permit allowing the operation of a quarry in a residential district was no longer valid. The Board found that N.C. Gen. Stat. § 160A-385(b) provides that respondent has a vested right to its permit and is not subject to the subsequent amendment to the ordinance. The superior court affirmed this finding. We conclude, how-

ever, that N.C. Gen. Stat. § 160A-385(b) is not applicable and that there was an insufficient factual record before the Board to determine that respondent had a vested right to its permit.

" 'A lawfully established non-conforming use is a vested right and is entitled to constitutional protection.' " *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986) (quoting 4 E. Yokley, *Zoning Law and Practice*, § 22-3 (4th ed. 1979)). There appears to be two ways in which a party can acquire a vested right to continue to develop land in a nonconforming use after a change in the zoning ordinance; either by complying with the requirements of N.C. Gen. Stat. § 160A-385(b) or by "acting in good faith, mak[ing] a 'substantial beginning' toward the intended use of [the] land." *Randolph County v. Coen*, 99 N.C. App. 746, 748, 394 S.E.2d 256, 257 (1990) (quoting *Campsites*, 287 N.C. at 501, 215 S.E.2d at 78 (1975)).

N.C. Gen. Stat. § 160A-385(b) provides in pertinent part:

> Amendments, modifications, supplements, repeal or other changes in zoning regulations and restrictions and zone boundaries shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which either (i) building permits have been issued pursuant to G.S. 160A-417 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 160A-418 and unrevoked pursuant to G.S. 160A-422 or (ii) a vested right has been established pursuant to G.S. 160A-385.1 and such vested right remains valid and unexpired pursuant to G.S. 160A-385.1.

N.C. Gen. Stat. § 160A-385(b) (Cum. Supp. 1993).

It is undisputed that part (ii) is inapplicable since respondent's quarry application is not a development plan covered by N.C. Gen. Stat. § 160A-385.1. Petitioner contends that the permit issued to respondent was not a building permit under part (i) of N.C. Gen. Stat. § 160A-385(b) and therefore respondent did not have a vested right to the quarry permit.

The Board concluded that the permit issued to respondent was a building permit under § 160A-385(b).

> 7. The zoning administrator properly interpreted and applied the zoning provisions in the issuance of the permit on March 13, 1992, and the applicant is not subject to the change in the Zoning

> Ordinance that occurred on April 20, 1992, because of N.C.G.S. § 160A-385(b) which refers to "building" permits but the quarry permit issued pursuant to Coce (sic) § 12.505 is within the purview of the statute.

The superior court affirmed this conclusion.

We conclude, however, that the permit issued to respondent was not a building permit under N.C. Gen. Stat. § 160A-385(b). The statute clearly requires that in order to obtain a vested right to a nonconforming use, a building permit "pursuant to N.C.G.S. 160A-417 must have been issued prior to the enactment of the ordinance making the change or changes." N.C. Gen. Stat. § 160A-385(b) (Cum. Supp. 1993). N.C. Gen. Stat. § 160A-417(a) provides that a building permit "shall be in writing and shall contain a provision that work done shall comply with the State Building Code and all other applicable State and local laws." N.C. Gen. Stat. § 160A-417(a) (Cum. Supp. 1993). The Zoning Administrator stated that the permit that was issued to respondent was the equivalent of a building permit. Respondent's permit, however, does not contain the compliance provision required by § 160A-417 and in the notice sent to adjoining property owners, the Zoning Administrator refers to respondent's permit as a "zoning permit." Therefore, we conclude that the trial court erred by holding respondent had received a vested right to the quarry permit under N.C. Gen. Stat. § 160A-385(b).

[3] Such a conclusion, however, does not end our inquiry. Respondent still could obtain a vested right to its permit if it, acting in good faith, made a substantial beginning towards its intended use of the land. *Sunderhaus v. Board of Adjustment of the Town of Biltmore Forest*, 94 N.C. App. 324, 326, 380 S.E.2d 132, 133 (1989); *see Cardwell v. Smith*, 106 N.C. App. 187, 415 S.E.2d 770, *disc. rev. denied*, 332 N.C. 146, 419 S.E.2d 569 (1992); *Coen*, 99 N.C. App. at 748, 394 S.E.2d at 257 (1990). Our Supreme Court has held:

> [O]ne who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such

> expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

Town of Hillsborough v. Smith, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969); *Campsites*, 287 N.C. at 500-1, 215 S.E.2d at 77; *Cardwell*, 106 N.C. App. at 191, 415 S.E.2d at 773.

A determination of whether respondent had a vested right to the quarry permit under this analysis requires the resolution of several questions of fact including the reasonableness of respondent's reliance on the permit, whether it exercised good or bad faith, and whether it incurred substantial expenditures prior to the amendment to the ordinance. *Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279. Since the Board erroneously concluded respondent had a vested right to the permit under N.C. Gen. Stat. § 160A-385(b), these issues were not addressed by the Board. There is evidence in the record that respondent made expenditures in the amount of $20,000.00 after it received the quarry permit. Whether these expenditures were substantial and made in good faith are questions of fact for the Board. *Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279. It is not the function of the reviewing court to find the facts. *Campsites*, 287 N.C. at 498, 215 S.E.2d at 76. Therefore, the question of whether respondent had a vested right to the permit must be remanded to the superior court for further remand to the Board for additional findings of fact. *See Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279.

II.

[4] Petitioner next assigns error to the superior court's conclusion that two general zoning ordinances regarding noise and vibrations did not apply to respondent's application for a quarry permit. We disagree. The ordinances read as follows in pertinent part:

> Section 12.701. Noise.
>
> No use shall be operated as to generate recurring noises that are unreasonably loud, cause injury or create a nuisance to any person of ordinary sensitivities. . . .
>
> Section 12.703. Vibration.
>
> No use shall be operated so as to generate inherent or recurring ground vibrations detectable at the property line which create a nuisance to any person of ordinary sensitivities on another property.

In interpreting a zoning ordinance, the basic rule is to discern and effectuate the intent of the legislative body. Coastal, 299 N.C. at 629, 265 S.E.2d at 385. The legislative intent is determined by examining the language, spirit, and goal of the ordinance. *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 431 S.E.2d 183 (1993). "Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof." Id. at 138-9, 431 S.E.2d at 188.

In the instant case, the Board determined and the superior court affirmed, that the noise and vibration ordinances apply to the operation of a use, not whether a use permit should be issued. The Board concluded that if respondent violated the noise and vibration ordinances the code provided for an enforcement mechanism to compel compliance. We agree with this interpretation and petitioner's assignment of error is overruled.

We have examined petitioner's two remaining assignments of error and find them to be without merit. We hold that the order of the superior court that ordinance section 12.505 violated N.C. Gen. Stat. § 160A-381 is reversed and the issue of whether respondent obtained a vested right to the permit must be remanded to the superior court for further remand to the Board of Adjustment for additional findings of fact. In all other respects the order of the superior court is affirmed.

Affirmed in part, reversed in part, and remanded.

Chief Judge ARNOLD and Judge MARTIN concur.

JOIST B. BRANDIS, NORTH CAROLINA, PLAINTIFF v. LIGHTMOTIVE FATMAN, INC., MAURICE L'ESPINOSO, AS AGENT FOR CORPORATION AND IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. 935SC523

(Filed 7 June 1994)

1. Contracts § 126 (NCI4th)— breach of employment contract—action improperly dismissed

The trial court erred in dismissing plaintiff's breach of contract claim against defendant corporation where plaintiff alleged

that defendant, through its agent, orally offered a specific job to plaintiff for a stated duration and for stated compensation, and plaintiff reported to work but was not permitted to complete the contract's stated duration of employment.

Am Jur 2d, Pleading §§ 69, 89.

2. Fraud, Deceit, and Misrepresentation § 25 (NCI4th)—offer of employment fraudulently made—action improperly dismissed

Plaintiff's action for fraud was sufficient to withstand defendant corporation's motion to dismiss where plaintiff alleged that defendant, through its agent, represented that plaintiff had a job in Wilmington, North Carolina for fourteen weeks paying $2,000 per week; plaintiff relied on the false representation, moving to Wilmington and turning down two other offers of employment; and the offer was made with reckless disregard as to whether defendant would actually hire plaintiff.

Am Jur 2d, Fraud and Deceit §§ 423 et seq.

3. Unfair Competition or Trade Practices § 8 (NCI4th)—Unfair and Deceptive Trade Practices Act—no applicability to employer-employee relations

The trial court properly dismissed plaintiff's unfair trade practices claim, since the Unfair and Deceptive Trade Practices Act does not apply to employer-employee relations.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Business Practices § 735.

Appeal by plaintiff from order filed 22 March 1993 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 1 March 1994.

On 2 July 1992 plaintiff filed this action against defendants alleging breach of contract, fraud, and unfair and deceptive trade practices, G.S. Chapter 75. In his complaint, plaintiff alleged that in February 1992 he "was working in Florida when he was contacted by the defendant [Lightmotive Fatman, Inc.,] through its duly authorized agent, Maurice L'Espinoso, hereinafter L'Espinoso, who represented that he was the production manager on the film, 'Super Mario Brothers.' " Plaintiff alleged "[t]hat on or about February 20, 1992 defendant [Lightmotive Fatman, Inc.,] through L'Espinoso offered employ-

ment to plaintiff for fourteen weeks at $2000 a week compensation to work as the gaffer on a film known as 'Super Mario Brothers.' " Plaintiff alleged that in his reliance on this offer, he "waived two other offers of employment, communicated his acceptance to the defendant and moved from Orlando, Florida back to New Hanover County to begin employment pursuant to the terms of defendant's offer." Additionally, plaintiff alleged that on 27 April 1992 he "was again assured of employment and actually began to work on the project," but that two days later defendant Lightmotive Fatman, Inc., "breached the contract with plaintiff by refusing to employ plaintiff as the gaffer and informing him that someone else had been given the job, and that there was no employment for plaintiff."

Alternatively, plaintiff alleged that defendant Maurice L'Espinoso exceeded the scope of his authority as Lightmotive Fatman, Inc.'s agent in that he "had no authority from the defendant corporation to make offers of employment to the plaintiff" and was "therefore personally liable for this breach of contract." As damages, plaintiff sought: (1) $28,000.00 arising from the breach of contract; (2) punitive damages; and (3) treble damages arising from the Unfair and Deceptive Practices Act claim.

On 24 February 1993, plaintiff filed a verified amendment to the complaint, alleging *inter alia* that at the time the offer of employment was made, plaintiff's wife was living in Wilmington and that she "was deathly ill with bone cancer which would require a bone marrow transplant, if she was to have any chance of surviving. . . . [T]his offer was made with full knowledge of the defendants of the condition of the plaintiff's wife." Plaintiff further alleged that he "communicated to the defendants that it would be extremely important for him to work in Wilmington as it would allow him to be near his family and would further offer plaintiff and his family the additional financial support necessary due to the circumstances of his wife's illness."

On 4 September 1992, defendant Lightmotive Fatman, Inc., filed a motion to dismiss plaintiff's claims pursuant to G.S. 1A-1, Rule 12(b)(6). On 22 March 1993, the trial court filed an order: (1) granting the G.S. 1A-1, Rule 12(b)(6) motion as to all of plaintiff's claims against defendant Lightmotive Fatman, Inc.; (2) denying the G.S. 1A-1, Rule 12(b)(6) motion as to defendant Maurice L'Espinoso; and, (3) ordering defendant Maurice L'Espinoso to file an answer. Plaintiff appeals.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Alan E. Toll, for plaintiff-appellant.

Burney, Burney & Jones, by John J. Burney, Jr., for defendant-appellee Lightmotive Fatman, Inc.

EAGLES, Judge.

Plaintiff argues that the trial court erred in granting the G.S. 1A-1, Rule 12(b)(6) motion as to all of plaintiff's claims against defendant Lightmotive Fatman, Inc. We affirm in part and reverse in part.

I.

[1] Plaintiff argues that the trial court erred in granting defendant's G.S. 1A-1, Rule 12(b)(6) motion as to the breach of contract claim. We agree and accordingly reinstate plaintiff's breach of contract claim.

Regarding a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), in *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 218, 367 S.E.2d 647, 648-49, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 227 (1988), our Supreme Court stated,

> A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). In ruling on the motion, the allegations of the complaint are 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. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976). In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial. *See Sutton v. Duke*, 277 N.C. at 104, 176 S.E.2d at 167; *see also Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). A claim should be dismissed under Rule 12(b)(6) where it appears that the plaintiff is entitled to no relief under any statement of facts which could be proven. *See Newton v. Standard Fire Ins. Co.*, 291 N.C. at 111, 229 S.E.2d at 300; *Sutton v. Duke*, 277 N.C. at 102, 176 S.E.2d at 166.

Here, plaintiff alleged that defendant Lightmotive Fatman, Inc., through Maurice L'Espinoso, orally "offered employment to plaintiff for fourteen weeks at $2000 a week compensation to work as the gaffer on a film known as 'Super Mario Brothers.' " Accordingly, the complaint alleges the existence of an employment contract containing a specific duration of employment, and it is well established that this type of employment contract is not terminable at will. *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 370 S.E.2d 605, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 590 (1988); *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987). Plaintiff reported to work on 27 April 1992 but was not permitted to complete the contract's stated duration of employment. Taking plaintiff's allegations as true, we conclude that the breach of contract claim as alleged in the complaint was sufficient to withstand defendant's G.S. 1A-1, Rule 12(b)(6) motion to dismiss.

II.

[2] Next, plaintiff argues that the trial court erred in granting defendant's G.S. 1A-1, Rule 12(b)(6) motion as to the fraud claim. We agree and accordingly reinstate plaintiff's fraud claim.

Regarding the essential elements for a claim of actual fraud, in *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568-69, 374 S.E.2d 385, 391-92 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989), our Supreme Court stated:

> In *Myrtle Apartments*, [*v. Casualty Co.*, 258 N.C. 49, 127 S.E.2d 759 (1962)], the Court stated that in order to constitute fraud
>
> > there must be false representation, known to be false, or made with reckless indifference as to its truth, *and it must be made with intent to deceive.*
>
> *Myrtle Apartments*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (emphasis added). Plaintiff itself relies on *Ragsdale* [*v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974)], which correctly defines the elements of fraud as follows:
>
> > While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably cal-

> culated to deceive, (3) *made with intent to deceive*, (4) which does in fact deceive, (5) resulting in damage to the injured party.
>
> *Ragsdale*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (emphasis added).

See Malone v. Topsail Area Jaycees, Inc., 113 N.C. App. 498, 502, 439 S.E.2d 192, 194 (1994). In *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Service, Inc.*, 91 N.C. App. 539, 542-43, 372 S.E.2d 901, 903 (1988), this Court stated:

> Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by "our liberal rules of notice pleading." *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733, *disc. rev. denied*, 314 N.C. 670, 336 S.E.2d 402 (1985) (citations omitted). Rule 9(b) of the North Carolina Rules of Civil Procedure provides in relevant part that:
>
> > (b) . . . In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.
>
> N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 9(b) (1983). In *Terry*, our Supreme Court instructed that "in pleading actual fraud the particularity requirement is met by alleging time, place, and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent act or representation." 302 N.C. at 85, 273 S.E.2d at 678. *Terry's* formula ensures that the requisite elements of fraud will be pleaded with the specificity required by Rule 9(b).

In his appellate brief, plaintiff argues that the following allegations in the complaint were sufficient to withstand defendant's G.S. 1A-1, Rule 12(b)(6) motion to dismiss:

> 1. The representation was that [plaintiff] Brandis had a job at $2,000.00 per week for 14 weeks in Wilmington, North Carolina.
>
> 2. This representation was material in that it deceived Brandis and induced him to move to New Hanover County and forego other work. [Paragraph XVII of the complaint states "That plaintiff did in fact rely on the false representation that defendant would employ him by waiving two other offers of employment and moving back to New Hanover County to begin work."]

3. Paragraph XV of the Third Cause of Action states:

> That the offer of employment was made by Defendant with reckless disregard as to whether it would actually hire the plaintiff.

. . . .

4. The complaint properly alleges that the offer was made with the intent that Brandis would rely upon the offer.

5. The complaint properly alleges that Brandis reasonably relied upon the offer and Brandis reaffirmed the false representations that work would begin on April 27, 1992.

6. The injury to Brandis is properly alleged at $28,000.

Defendant argues that plaintiff's failure to allege that the statement constituting the alleged misrepresentation was "false when [it was] made" amounts to "a fatal defect." We disagree.

Defendant argues that "[i]n *Forbes Homes, Inc. v. Trimpi*, 318 N.C. 473, 479, 349 S.E.2d 852, 856 (1986), the Supreme Court stated where 'there is no allegation that, at the time [defendant] represented to the plaintiff . . . the representation was false,' the complaint fails to state a cause of action based on fraud and the Court ordered the action be dismissed for that reason." (Emphasis supplied by defendant.) A careful reading of *Forbes Homes, Inc. v. Trimpi*, 318 N.C. 473, 349 S.E.2d 852, *reh'g denied*, 318 N.C. 703, 351 S.E.2d 745 (1986), reveals that it was an appeal from a bench trial on the merits, *id.* at 476-77, 349 S.E.2d at 854, and that it did not address the denial of a G.S. 1A-1, Rule 12(b)(6) motion to dismiss. In *Forbes Homes*, the parties had waived a jury trial after remand from a *prior appeal* from the trial court's order dismissing plaintiff's complaint for breach of contract pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiff did not allege fraud as a cause of action. In the first appeal, this Court found the pleadings in plaintiff's complaint sufficient to withstand defendants' G.S. 1A-1, Rule 12(b)(6) motion and reversed the trial court's order of dismissal of the breach of contract action. *Forbes Homes*, 70 N.C. App. 614, 320 S.E.2d 328 (1984). The defendants appealed and the reversal was affirmed per curiam by an equally divided Court. *Forbes Homes*, 313 N.C. 168, 326 S.E.2d 30 (1985). In the *second appeal*, our Supreme Court stated, "Because the Court of Appeals' decision was affirmed per curiam without opinion by this Court, the opinion of the majority of the Court of Appeals became the law of the case." *Forbes*

Homes, 318 N.C. at 475, 349 S.E.2d at 854. Later in the same opinion, the quoted text cited by defendant *Lightmotive Fatman, Inc.*, *supra*, appears in the following paragraph:

> We are not unmindful that an agent may be personally liable for damages caused to third persons by his fraud or false representations "even though he is acting in behalf of his employer, and even though he receives no benefit from the transaction." 37 Am. Jur. 2d, *Fraud and Deceit* § 320 (1968). *See also Norburn v. Mackie*, 262 N.C. 16, 136 S.E.2d 279 (1964); *Mills v. Mills*, 230 N.C. 286, 52 S.E.2d 915 (1949). However, in the case *sub judice* there is no allegation that, at the time Mr. Trimpi represented to the plaintiff that Mr. Simpson had authorized payment from the settlement, the representation was false. An agent does not become liable because of his principal's breach of a contract negotiated by the agent for the principal. *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E.2d 375 (1946).

Forbes Homes, 318 N.C. at 479-80, 349 S.E.2d at 856 (footnote omitted).

Notwithstanding defendant's reliance on *dicta* from *Forbes Homes*, 318 N.C. at 479, 349 S.E.2d at 856, we find that our decision here is controlled by *Williams v. Williams*, 220 N.C. 806, 18 S.E.2d 364 (1942), a seminal case addressing actions for fraud based upon unfulfilled promises. In *Williams*, our Supreme Court stated:

> It is generally held, and is the law in this State, that mere unfulfilled promises cannot be made the basis for an action of fraud. If, however, a promise is made fraudulently—that is, with no intention to carry it out, thus being a misrepresentation of a material fact, the state of the promisor's mind, and with intention that it shall be acted upon, and it is acted upon to the promisee's injury—then, it will sustain an action based on fraud and misrepresentation, and the plaintiff will be entitled to legal or equitable relief.

Williams, 220 N.C. at 810-11, 18 S.E.2d at 366-67 (citations omitted). In *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452, 279 S.E.2d 1, 6 (1981), this Court re-emphasized the distinction between the bases upon which an action for fraud may be maintained in light of the alleged unfulfilled promises of a defendant:

> Our Supreme Court has held that while the general rule is that mere unfulfilled promises cannot be made the basis of an action

for fraud, if a promise is made fraudulently—that is, with no intention to carry it out—such is a misrepresentation of the state of the promisor's mind at the time of the promise, *i.e.*, a pre-existing material fact. *Williams v. Williams*, 220 N.C. 806, 810-811, 18 S.E.2d 364, 366-67 (1942); *see also, Johnson v. Insurance Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616 (1980) and cases cited therein; *Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E.2d 760, 762 (1961); *Davis v. Davis*, 236 N.C. 208, 211, 72 S.E.2d 414, 415 (1952). *Cf.*, *Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E.2d 599 (1940); *Whitley v. O'Neal*, 5 N.C. App. 136, 168 S.E.2d 6 (1969).

Here, we conclude that plaintiff's complaint alleged an action for fraud with sufficient particularity and taking plaintiff's allegations as true, we hold that the action for fraud as alleged in the complaint was sufficient to withstand defendant's G.S. 1A-1, Rule 12(b)(6) motion to dismiss. *Compare Braun v. Glade Valley School*, 77 N.C. App. 83, 87, 334 S.E.2d 404, 407 (1985) (affirming trial court's order dismissing complaint where there was no allegation that the promissory representation was made recklessly without regard for its truth). We note that for purposes of further proceedings in this action that "[m]ere proof of nonperformance is not sufficient to establish the necessary fraudulent intent," *Williams*, 220 N.C. at 811, 18 S.E.2d at 367, and that mere "evidence of reckless indifference to a representation's truth or falsity is not sufficient to satisfy the element of scienter." *Malone*, 113 N.C. App. at 502, 439 S.E.2d at 194. *See also Strum v. Exxon Co. U.S.A., A Div. of Exxon Corp.*, 15 F.3d 327, 331 (4th Cir. 1994)

III.

[3] Plaintiff argues that the trial court erred in granting defendant's G.S. 1A-1, Rule 12(b)(6) motion as to the Unfair and Deceptive Practices Act, G.S. Chapter 75, claim. We disagree. Our Supreme Court has expressly stated that the Unfair and Deceptive Practices Act "does not cover employer-employee relations." *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991) (citing *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982)). Accordingly, this argument fails.

IV.

For the reasons stated, we reverse the portion of the trial court's 22 March 1993 order dealing with plaintiff's breach of contract claim and plaintiff's fraud claim. Accordingly, these claims are reinstated and the cause is remanded for further proceedings not inconsistent with this opinion. The portion of the trial court's 22 March 1993 order dismissing the G.S. Chapter 75 claim is affirmed.

Affirmed in part; reversed in part and remanded.

Judges MARTIN and McCRODDEN concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFF v. ANDREW JESSE YOUNG, MARY, CORTEZ WIMBERLY, NICHOLAS YOUNG, A MINOR, AND MAY GEE YOUNG, A MINOR, DEFENDANTS.

No. 9321SC269

(Filed 7 June 1994)

Insurance § 528 (NCI4th)— definition of underinsured vehicle—vehicle owned by insured included

An underinsured highway vehicle as defined in N.C.G.S. § 20-279.21(b)(4) can include a motor vehicle owned by the named insured, and the provisions in the policies issued by plaintiff attempting to exclude such coverage are invalid and unenforceable.

Am Jur 2d, Automobile Insurance § 322.

Automobile insurance: what constitutes an "uninsured" or "unknown" vehicle or motorist, within uninsured motorist coverage. 26 ALR3d 883.

Uninsured motorist coverage: validity of exclusion of injuries sustained by insured while occupying "owned" vehicle not insured by policy. 30 ALR4th 172.

Appeal by defendants from judgment entered 28 December 1992 by Judge James A. Beaty, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 1994.

Frazier, Frazier & Mahler, by James D. McKinney and Torin L. Fury, for plaintiff-appellee.

Robinson Maready Lawing & Comerford, by W. Thompson Comerford, Jr., and Jerry M. Smith, for defendant-appellants.

MARTIN, Judge.

Plaintiff brought this declaratory judgment action seeking a determination of its obligations under the underinsured motorist coverage provisions of automobile insurance policies issued to its insureds, defendants Andrew Jesse Young (hereinafter "Young") and Mary Cortez Wimberly (hereinafter "Wimberly"). The parties stipulated to the following facts. On 26 January 1990, Nicholas Young ("Nicholas"), the minor son of defendants Young and Wimberly, sustained serious injuries when the automobile in which he was a passenger was involved in an accident. The automobile was owned and operated by Young, and the accident was caused solely by Young's negligence. Young's vehicle was insured under a policy issued to him by plaintiff covering two vehicles and providing $100,000 per person/$300,000 per accident limits for both liability and underinsured motorist (hereinafter "UIM") benefits. That policy was issued before G.S. § 20-279.21 was amended to preclude intrapolicy stacking of underinsured motorist coverage and accordingly afforded possible stacked UIM benefits of $200,000 per person/$600,000 per accident. *See Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992). Additionally, plaintiff had issued to Wimberly a policy insuring a single vehicle and containing $100,000 per person/$300,000 per accident limits for both liability and UIM benefits. Both policies contain the following pertinent language:

> "*Insured*" as used in this Part means:
>
> 1. You or any family member.
>
> . . .
>
> "*Uninsured motor vehicle*" means a land motor vehicle or trailer of any type: . . .
>
> 5. To which, with respect to damages for *bodily injury* only, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is:

a. equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina: and

b. less than the limit of liability for this coverage.

. . .

However, "*uninsured motor vehicle*" does not include any vehicle or equipment:

1. Owned by you.

. . .

Although Young and Wimberly were divorced at the time of the accident, for purposes of this appeal, the parties have stipulated that Nicholas is a resident of both households, and accordingly, a Class I insured under each parent's insurance policy issued by plaintiff. *See Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991). Plaintiff paid Nicholas $100,000 representing the entire amount of liability coverage available under the policy issued to Young. Because his damages exceeded that amount, Nicholas sought additional recovery pursuant to Young and Wimberly's UIM coverage in the amounts of $200,000 and $100,000 respectively, with a credit to plaintiff for the $100,000 paid under the liability provision of the Young policy. However, plaintiff denied UIM benefits, relying on a concurrent reading of the above cited provisions of the Young policy which excluded vehicles owned by Young from the definition of an uninsured motor vehicle and which included an underinsured vehicle within the definition of an uninsured motor vehicle. On 28 December 1992 the trial court awarded summary judgment in favor of plaintiff concluding that under the language of the policies issued to Wimberly and Young and under the provisions of G.S. § 20-279.21(b) *et seq.*, there was no UIM coverage available to defendants under either of the policies.

Defendants appeal, contending that the policy provisions which exclude "owned vehicles" from UIM coverage are invalid because they conflict with the statutory provisions for UIM coverage contained within the Motor Vehicle Safety and Financial Responsibility Act (the "Act"). We agree and reverse the decision of the trial court. Summary judgment should be granted when the materials before the court establish that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c); *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E.2d 117 (1980). When appropriate, summary judgment may be rendered

against the moving party. N.C. Gen. Stat. § 1A-1, Rule 56(c). In this case, the relevant material facts have been stipulated, leaving only questions of law for the court.

Under the Act an "uninsured motor vehicle" is defined as:

> [A] motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the insurance denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of the motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the . . . Act.

N.C. Gen. Stat. § 20-279.21(b)(3). However, under the statute, the term "uninsured motor vehicle" specifically excludes five categories of vehicles including "a motor vehicle owned by the named insured." *Id.* While G.S. § 20-279.21(b)(4) states that "[a]n 'uninsured motor vehicle,' as described in subdivision (3) of this subsection includes an 'underinsured highway vehicle'. . . .," that section goes on to separately define "underinsured highway vehicle" as:

> [A] highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4). Unlike G.S. § 20-279.21(b)(3), section (b)(4) does not specifically exclude a motor vehicle "owned by the named insured" from the term "underinsured motor vehicle" although it does specifically exclude three other types of vehicles. Plaintiff argues that because "uninsured motor vehicle" includes one that is "underinsured" pursuant to both the policies at issue and the Financial Responsibility Act, then the definition of an "underinsured vehicle" also excludes coverage for a vehicle owned by the named insured; and thus, there is no underinsured coverage available to defendants under either of the policies issued to Young or Wimberly.

The question of whether an insured is entitled to stack liability coverage from the tortfeasor's policy with the underinsured coverage under the same policy presents a novel issue in this State. Plaintiff directs this Court to several decisions wherein courts in other jurisdictions have disallowed such recovery citing the danger of effectively converting underinsured motorist coverage into liability coverage, resulting in insurance carriers charging more for underinsured motorist coverage to match the cost of the presently more expensive liability coverage. *See e.g., Millers Cas. Ins. Co. v. Briggs*, 100 Wash.2d 1, 665 P.2d 891 (1983); *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288 (Minn. 1983). (The result in this case has since been overruled by an amendment to Minn. Stat. s 65B.49, subd. 3a(5) which requires that an occupant be allowed to collect UIM benefits from the policy covering the vehicle involved in the accident.); *Sullivan v. State Farm Mut. Auto. Ins. Co.*, 513 So.2d 992 (Ala. 1987). We have reviewed these decisions, and while we do not necessarily disagree with their rationale, the language of our statute and the principles of statutory interpretation require us to reach a different conclusion. Rather, we must conclude that any interpretation of the policies at issue which would exclude "an owned vehicle" from UIM coverage is void as being contrary to the requirements of the Act.

The provisions of the Act are written into every automobile liability policy as a matter of law, and when a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls. *Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977), *appeal after remand*, 298 N.C. 246, 258 S.E.2d. 334 (1979). Accordingly, an exclusionary provision of a policy which contravenes the Act is void. *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

The exclusion of a particular circumstance from a statute's general operation is evidence of legislative intent not to exempt other particular circumstances not expressly excluded. *Batten v. N.C. Department of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990). Similarly, the statutory construction doctrine of *expressio unius est exclusio alterius* provides that the mention of specific exceptions implies the exclusion of others. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 354 S.E.2d 495 (1987). Furthermore, North Carolina courts disfavor exclusionary language in insurance policies and will construe such language strictly against the insurer. *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App 152, 426 S.E.2d 451, *disc. review denied*, 333 N.C. 790, 431 S.E.2d 22 (1993).

The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant. *Hall v. Simmons*, 329 N.C. 779, 407 S.E.2d 816 (1991). The Financial Responsibility Act is remedial and will be liberally construed to carry out its beneficent purpose of providing compensation for those injured by automobiles. *Jones v. Insurance Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

We are guided in our decision by the recent holding of this Court in *Cochran v. N.C. Farm Bureau Mutual Ins. Co.*, 113 N.C. App. 260, 437 S.E.2d 910, *disc. review denied*, 335 N.C. 768, ___ S.E.2d ___ (1994). In that case we were asked to decide whether an underinsured highway vehicle as defined in G.S. § 20-279.21(b)(4) could include a state-owned vehicle despite the fact that the definition of an uninsured motor vehicle specifically excluded "[a] motor vehicle that is owned by . . . a state." N.C. Gen. Stat. § 20-279.21(b)(3). The insurer in that case argued that due to the fact that G.S. § 20-279.21(b)(4) states that: "[a]n 'uninsured motor vehicle,' as described in subdivision (3) of this subsection, includes an 'underinsured highway vehicle'. . . ," to qualify as an underinsured highway vehicle, it must meet the definition of an uninsured motor vehicle; and thus, an underinsured highway vehicle, like an uninsured vehicle, could not include a state-owned vehicle. We disagreed, holding in pertinent part that:

> The language in Section 20-279.21(b)(4) that an uninsured motor vehicle includes an underinsured highway vehicle is far from being clear and unambiguous as to whether to qualify as an underinsured highway vehicle, a vehicle must first meet the definition of uninsured motor vehicle set out in Section 20-279.21(b)(3). Furthermore, an underinsured highway vehicle has its own specific definition in Section 20-279.21(b)(4) which is different from the definition of an uninsured motor vehicle and which makes no mention of an exclusion for state-owned vehicles. Because of this ambiguity, we resort to tenets of statutory construction to ascertain legislative intent . . . .
>
> Although it is possible for a vehicle to be an underinsured vehicle and an uninsured vehicle simultaneously where the vehicle is insured with liability limits less than those required by Section 20-279.5 or where the vehicle is self-insured, to attempt to define **every** underinsured highway vehicle as an uninsured motor vehicle under all circumstances is, by the definitions contained in

> Sections 20-279.21(b)(3) and (b)(4), an impossible task . . . . Due to the impossibility of every underinsured highway vehicle meeting the definition of an uninsured motor vehicle as defined in Section 20-279.21(b)(3) and because state-owned vehicles are specifically excluded in the circumstance where an uninsured motor vehicle is involved, but are not specifically excluded in the definition of an underinsured highway vehicle in Section 20-279.21(b)(4), we do not believe the legislature intended to fully incorporate the definition of an uninsured motor vehicle into the definition of an underinsured highway vehicle . . . .
>
> For these reasons, we hold that an underinsured highway vehicle as defined in Section § 20-279.21(b)(4) can include a state-owned vehicle.

Cochran, 113 N.C. App. at 262-63, 437 S.E.2d at 911-12. The *Cochran* court also realized that an opposite interpretation of the language of G.S. § 20-279.21(b)(4) would conflict with the required liberal construction of the Motor Vehicle Safety and Financial Responsibility Act. *Id.* at 263, 437 S.E.2d at 912. Similarly, the definition of underinsured highway vehicle makes no mention of an exclusion for a "motor vehicle owned by the named insured." Additionally, the definition of "underinsured highway vehicle" contains its own less-inclusive list of specific exclusions, which are all also named as exclusions to the definition of an "uninsured motor vehicle" and would be repetitive if the definition of an uninsured motor vehicle were fully incorporated into the definition of an underinsured highway vehicle. Thus, in accord with our decision in *Cochran*, we hold that an underinsured highway vehicle as defined in G.S. § 20-279.21(b)(4) can include a motor vehicle owned by the named insured, and the provisions in the policies issued by plaintiff attempting to exclude such coverage are invalid and unenforceable. The legislature can amend the statute so as to authorize the exception which plaintiff included in its policies. However, this Court may not.

Accordingly, because we hold that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law, summary judgment on this issue is reversed as to plaintiff and the case is remanded with instructions to enter summary judgment in favor of defendants on this issue and for trial on defendants' remaining counterclaims.

Reversed and Remanded.

Chief Judge ARNOLD and Judge WYNN concur.

JANELLE M. LAVELLE, PLAINTIFF-APPELLANT, v. GUILFORD COUNTY AREA MENTAL ILLNESS, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY, AND DR. TIMOTHY DAUGHTRY, IN HIS OFFICIAL CAPACITY AS AREA DIRECTOR OF GUILFORD COUNTY AREA MENTAL ILLNESS, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY, DEFENDANTS-APPELLEES

No. 9318SC259

(Filed 7 June 1994)

Injunctions § 7 (NCI4th)— relief previously granted plaintiff—summary judgment proper

Since plaintiff received the relief she requested, release of her medical files by appellees to her attorney, there were no remaining issues to be determined, and the trial court properly entered summary judgment for defendants.

Am Jur 2d, Injunctions §§ 23 et seq.

Judge ORR dissenting.

Appeal by plaintiff from judgment entered 10 December 1992 by Judge Julius A. Rousseau in Guilford County Superior Court. Heard in the Court of Appeals 6 January 1994.

Central Carolina Legal Services, Inc., by Sorien K. Schmidt, for plaintiff-appellant.

Guilford County Attorney's Office, by Deputy County Attorney J. Edwin Pons, for defendants-appellees.

WYNN, Judge.

Plaintiff Janelle M. Lavelle received outpatient mental health services from defendant Guilford County Area Mental Illness, Mental Retardation and Substance Abuse Authority (Mental Health) for approximately two years. In April 1991 plaintiff disagreed with Mental Health's proposed course of treatment which included termination of her therapy. Plaintiff filed a grievance with Mental Health and obtained an external advocate pursuant to N.C. Gen. Stat. § 122C-53 to assist her with the grievance process. Plaintiff and her advocate

requested a copy of plaintiff's confidential records but Mental Health refused to release them.

Plaintiff then retained an attorney who requested access to plaintiff's records and provided a release signed by plaintiff. Dr. Jan D. Lhotsky, a Mental Health employee, replied that he would only give plaintiff's attorney copies of plaintiff's grievance form and her involuntary commitment certificate and would not release any other of plaintiff's mental health records. Dr. Lhotsky said the other records in plaintiff's file would be injurious to plaintiff's physical or mental health if shown to her.

Plaintiff then filed this action seeking a temporary restraining order and a preliminary injunction directing defendants to release plaintiff's complete file with Mental Health, a permanent injunction to the same effect, a declaratory judgment that N.C. Gen. Stat. § 122C-53(i) requires Mental Health to release all confidential information to an attorney upon the request of a client without restrictions, and attorney's fees. On 19 September 1991 the trial court granted plaintiff a preliminary injunction which provided in pertinent part:

> 1. That the Defendants and all other persons who are their officers, agents, servants, employees and attorneys are hereby enjoined from refusing to release Plaintiff's confidential records with Defendants to counsel for Plaintiff upon Plaintiff's request;
>
> 2. That the attending physician or facility director or his designee must identify and mark which specific documents in Plaintiff's confidential Mental Health record may be injurious to Plaintiff's mental or physical well-being;
>
> . . . .
>
> 5. That counsel for Plaintiff must not release to Plaintiff such confidential records that have been marked as injurious to plaintiff as set out in paragraph 2 (two) above, unless or until a psychiatrist or psychologist of Plaintiff's choice determines that such marked documents would not be injurious to Plaintiff's mental or physical well-being, or unless or until a judgment or order in this action or an action superceding (sic) this action finds that Plaintiff may have access to such documents;

Subsequently both plaintiff and defendants moved for summary judgment. The trial court granted defendants' motion for summary judgment. From that judgment, plaintiff appeals.

Plaintiff assigns error to the trial court's granting of defendants' motion for summary judgment on the grounds that N.C. Gen. Stat. § 122C-53 "requires defendants to release to an attorney all confidential information relating to a client upon the request of that client." Our review of the record reveals, however, that plaintiff has not raised the issue of the proper construction of N.C. Gen. Stat. § 122C-53 before the trial court nor presented any argument in her brief that she is entitled to a permanent injunction or a declaratory judgment interpreting this statute. Questions not presented and discussed in a party's brief are deemed abandoned. N.C.R. App. P. 28(a); *see Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 371 S.E.2d 302 (1988); *State v. Oliver*, 82 N.C. App. 135, 345 S.E.2d 697 (1986), *cert. denied*, 321 N.C. 123, 361 S.E.2d 601 (1987). Since plaintiff has received the relief she requested, there is no question of law remaining and summary judgment was properly entered for defendants.

Summary judgment shall "be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The moving party must carry the burden of establishing the lack of a genuine issue as to any material fact and its entitlement to judgment as a matter of law. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Myers v. Barringer*, 101 N.C. App. 168, 398 S.E.2d 615 (1990). An issue is genuine if it can be supported by substantial evidence. *Martin v. Ray Lackey Enterprises, Inc.*, 100 N.C. App. 349, 396 S.E.2d 327 (1990). A fact is material if would establish any material element of a claim or defense. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980). The purpose of summary judgment is to eliminate formal trials where only questions of law are involved. *Baumann v. Smith*, 298 N.C. 778, 260 S.E.2d 626 (1979).

In the instant case, plaintiff has already received the relief which she requested. The preliminary injunction ordered defendants to provide plaintiff's attorney with her mental health records which is what she requested in her complaint. Although plaintiff's contention that N.C. Gen. Stat. § 122C-53 requires that no confidential information may be withheld from the client's attorney by a facility was not properly preserved for appeal, we note that the statute explicitly prohibits

a client from access to information in the client's record that would be injurious to the client's physical or mental well-being as determined by the attending physician. N.C. Gen. Stat. § 122C-53(c) (1989). It would subvert the purpose of this prohibition to allow the client's attorney to obtain the injurious information and then pass such material to the client without restriction. Common sense requires the conclusion that an attorney should not, of his own accord, contradict the opinion of a medical professional that certain medical records would be harmful if released to the patient. The statute does not require such an absurd result.

Since plaintiff received the relief to which she requested, the release of her medical file to her attorney, there were no remaining issues to be determined and the trial court properly entered summary judgment for defendants.

Affirmed.

Judge LEWIS concurs.

Judge ORR dissents.

Judge ORR dissenting.

Because I disagree with the majority's statement that plaintiff failed to present argument with regard to her request for a declaratory judgment and because I disagree with the majority's assertion that "plaintiff has already received the relief which she requested", I respectfully dissent.

Although the preliminary injunction of 19 September 1991 granted plaintiff the initial relief she sought as far as her request for the release of plaintiff's records up to the point of the injunction, it did not affect plaintiff's request for a declaratory judgment that N.C. Gen. Stat. § 122C-53(i) requires defendants to release to an attorney all confidential information relating to the client upon the request of a client, *with no restrictions.*

As correctly stated by the majority, summary judgment is proper where no genuine issue of material fact exists and one party is entitled to a judgment as a matter of law. Further, "summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is

entitled to judgment as a matter of law." *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694, *disc. review denied*, 314 N.C. 667, 336 S.E.2d 400 (1985).

In the present case, the basis for the conclusion that defendants were entitled to a judgment as a matter of law cannot, however, be that plaintiff already received the relief she asks for on appeal, as plaintiff's request for a declaratory judgment was never addressed. Further, my review of plaintiff's brief shows that she did not fail to present argument on the issue of this declaratory judgment, and I disagree, therefore, with the majority's assertion that plaintiff abandoned this claim. Thus, in order to determine whether the trial court erred in granting defendants' summary judgment motion, I would reach the merits of plaintiff's claim and interpret N.C. Gen. Stat. § 122C-53(i).

On the issue of statutory construction, our Supreme Court stated in *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993):

> In construing a statute, the Court must first ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out. . . . To make this determination, we look first to the language of the statute itself. . . . If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

(Citations omitted.)

The statute at issue in the present case is N.C. Gen. Stat. § 122C-53(i) which states:

> (i) Upon the request of a client, a facility shall disclose to an attorney confidential information relating to that client.

I find this language to be clear and unambiguous. N.C. Gen. Stat. § 122C-53(i) clearly applies to releasing confidential information only to attorneys. Further, the language clearly states that when a client requests that the facility release confidential information concerning that client to an attorney, the facility is required to do so, without restrictions.

My reading of the language in N.C. Gen. Stat. § 122C-53(i) is further bolstered by an examination of two other provisions in the statute that deal with releasing confidential information to the client

and the client's legal representative. N.C. Gen. Stat. § 122C-53(c) and (d) state:

> (c) Upon request a client shall have access to confidential information in his client record except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if there is none, by the facility director or his designee. If the attending physician or, if there is none, the facility director or his designee has refused to provide confidential information to a client, the client may request that the information be sent to a physician or psychologist of the client's choice, and in this event the information shall be so provided.
>
> (d) Except as provided by G.S. 90-21.4(b), upon request the legally responsible person of a client shall have access to confidential information in the client's record; except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if there is none, by the facility director or his designee. If the attending physician or, if there is none, the facility director or his designee has refused to provide confidential information to the legally responsible person, the legally responsible person may request that the information be sent to a physician or psychologist of the legally responsible person's choice, and in this event the information shall be so provided.

Thus, the Legislature placed specific limitations on the confidential information to which the client or the client's legal representative may have access. If the Legislature intended to limit the confidential information to which an attorney may have access, then I presume the Legislature would have included language similar to the language found in N.C. Gen. Stat. § 122C-53(c) and (d) in N.C. Gen. Stat. § 122C-53(i) and if from a policy standpoint that is desirable, then it is for the Legislature to amend the statute accordingly.

Therefore, I would reverse the order of the trial court granting defendants' motion for summary judgment and remand the case for entry of judgment consistent with my dissent.

DAWN COLOMBO, PLAINTIFF v. WILLIAM THOMPSON DORRITY; AND CITY OF DURHAM, DEFENDANTS

No. 9314SC878

(Filed 7 June 1994)

1. Appeal and Error § 112 (NCI4th)— sovereign immunity— refusal of trial court to dismiss—denial immediately appealable

Sovereign immunity is a matter of personal jurisdiction, not subject matter jurisdiction; therefore, the trial court's refusal to dismiss a suit against the State on this ground is immediately appealable under N.C.G.S. § 1-277(b).

Am Jur 2d, Appeal and Error §§ 47 et seq.

2. Highways, Streets, and Roads § 66 (NCI4th)— state roads maintained by city—city's liability arising out of contract—action barred by statute of limitations

In an action arising out of an automobile accident where plaintiff claimed that a city negligently failed to clear vegetation which obscured a stop sign at the intersection where the accident occurred and failed to properly sign the intersection, the trial court erred in denying defendant city's motion for summary judgment, since a city is not liable for accidents which occur on a street which is part of the State highway system and under the control of the North Carolina Department of Transportation; the roads where the accident occurred were part of the State highway system; any liability that the city might have had for the accident in question would arise out of the contract between the city and North Carolina Department of Transportation; but plaintiff's action against the city was commenced after the expiration of the two-year statute of limitations of N.C.G.S. § 1-53(1) and is therefore barred.

Am Jur 2d, Highways, Streets, and Bridges §§ 460, 462.

Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 22 ALR4th 624.

Appeal by defendant City of Durham from orders entered 6 April 1993 and 10 May 1993 by Judge Robert L. Farmer in Durham County Superior Court. Heard in the Court of Appeals 20 April 1994.

Pulley, Watson & King, P. A. by Richard N. Watson and Julie Cheek Woodmansee, for plaintiff-appellee.

Faison and Fletcher, by Reginald B. Gillespie, Jr. and Selina S. Nomeir, for defendant-appellant City of Durham.

JOHNSON, Judge.

This case arises out of an automobile collision which occurred on 16 June 1988 at the intersection of Sparger Road and U.S. 70 in Durham, North Carolina. Plaintiff, Dawn Colombo, was a passenger in a vehicle owned by William Malec and operated by Mariah Elizabeth Malec. The Malec vehicle was travelling in a southerly direction along Sparger Road approaching the intersection of Sparger Road and U.S. 70. After Mariah Malec failed to stop at the stop sign at the intersection of Sparger Road and U.S. 70, the Malec vehicle collided with William Thompson Dorrity's vehicle. At the time of the collision, the portions of Sparger Road and U.S. 70 in question, were within the municipal limits of Durham, but part of the State highway system.

On 22 February 1989, plaintiff filed a complaint against Mariah Elizabeth Malec and William S. Malec, alleging that Mariah Malec had negligently run the stop sign at the intersection of Sparger Road and U.S. 70.

On 17 June 1991, plaintiff filed an amended complaint asserting claims against William Thompson Dorrity, the City of Durham (the City), and the North Carolina Department of Transportation (NCDOT). In the amended complaint, plaintiff alleged that the City negligently failed to clear vegetation that obscured the stop sign at the intersection of Sparger Road and U.S. 70 and that the City failed to properly sign the intersection.

On 26 August 1991, the City filed a motion to dismiss plaintiff's amended complaint. The motion was heard by Judge Anthony M. Brannon on 4 September 1991 in Durham County Superior Court. On 1 June 1992, Judge Brannon entered an order denying the City's motion to dismiss.

On 12 March 1993, the City filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The motion came on for hearing before Judge Robert L. Farmer at the 25 March Civil Session of Superior Court and the 3 May 1993 Civil Session of Superior Court. On 6 April 1993, an order was entered

denying the City's motion for summary judgment based on the City's contention that plaintiff's claim was barred by the statute of limitations and that the City was not responsible for the accident. On 10 May 1993, an order was entered denying the remainder of the City's motion for summary judgment based on governmental immunity. From these orders, the City appealed to our Court.

At the outset, we note that plaintiff contends that the trial court's order denying the City's motion for summary judgment based on the doctrine of governmental immunity is interlocutory, and therefore not appealable. We disagree. North Carolina General Statutes § 1-277(b)(1983) provides:

> [a]ny 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 or such party may preserve his exception for determination upon any subsequent appeal in the cause.

[1] This Court has held that sovereign immunity is a matter of personal jurisdiction, not subject matter jurisdiction; therefore, the trial court's refusal to dismiss a suit against the state on these grounds is immediately appealable under North Carolina General Statutes § 1-277(b). *Zimmer v. N. C. Dept. of Transportation*, 87 N.C. App. 132, 360 S.E.2d 115 (1987). The Court in *Zimmer* stated:

> [w]hether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction is an unsettled area of the law in North Carolina. The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to G.S.1A-1, Rule 12(b)(1) is non-appealable, G.S. 1-277(a), but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to G.S.1A-1, Rule 12(b)(2) is immediately appealable. G.S. 1-277(b).

Id. at 133, 360 S.E.2d at 116. (Citation omitted.) The *Zimmer* Court also noted that the North Carolina Supreme Court in *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982) expressly declined to decide "whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable." *Teachy* at 328, 293 S.E.2d at 184. Therefore, following the precedent of this Court, we hold that the present appeal based on governmental immunity is properly before this Court.

Additionally, plaintiff argues that the City's motion for summary judgment was based on several grounds other than governmental immunity and that the denial of the City's motion for summary judgment on these grounds is interlocutory. We disagree. We believe that allowing an immediate appeal only from the order denying the City's motion for summary judgment on the grounds of governmental immunity would create a fragmentary appeal. As such, we allow an immediate appeal from both orders denying the City's motion for summary judgment.

As we have established that this appeal is properly before this Court, we address the merits of the City's appeal.

By the City's sole assignment of error, the City contends that the trial court erred in denying its motion for summary judgment on the grounds that plaintiff's actions were barred by governmental immunity and/or the applicable statute of limitations.

The purpose of summary judgment is to eliminate formal trials when the only questions involved are questions of law. *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987). A motion for summary judgment tests the legal sufficiency of a claim for submission to the jury; if the pleadings, depositions, interrogatories, admissions on file and affidavits demonstrate that there is no genuine issue of any material fact and that only questions of law exist, then summary judgment is proper. *Bolick v. Townsend Co.*, 94 N.C. App. 650, 381 S.E.2d 175, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 495 (1989). Therefore, we must determine whether the pleadings, depositions, interrogatories and admissions on file, establish that summary judgment was not warranted in this case.

Generally, a municipality may not be held liable for its acts if the incident arises out of a governmental function. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983). Unless a right of action is given by statute, municipal corporations may not be held civilly liable for neglecting to perform or negligence in performing duties which are governmental in nature. *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963). Additionally, a municipality while acting on the State's behalf in promoting or protecting health, safety, security, or the general welfare of its citizens, is an agency of the sovereign and not subject to an action in tort for resulting injury to person or property, in the absence of waiver of governmental immunity under the statute. *Clark v. Scheld*, 253 N.C.

732, 117 S.E.2d 838 (1961). In the case *sub judice*, we find no statutory waiver of governmental immunity.

[2] In the instant case, plaintiff alleges that a common law exception to the doctrine of governmental immunity exists. Plaintiff alleges that the courts of this state have long recognized a common law exception to the doctrine of governmental immunity where a municipality creates a dangerous condition in its streets that proximately causes injury to a person using the street. Specifically citing *Hunt v. City of High Point*, 226 N.C. 74, 36 S.E.2d 694 (1946) which held that "the right to recover against a city for actionable negligence for defects in its streets and sidewalks is based on the common law, and requires no statute to proclaim it," *Id.* at 75, 36 S.E.2d at 695 (citation omitted), plaintiff claims that the City is not protected by governmental immunity.

The City argues that it was merely acting on the State's behalf because the portions of Sparger Road and U.S. 70 in question were part of the State highway system and not part of the Municipal Street System at the time of the accident; therefore, the doctrine of governmental immunity applies.

By virtue of the North Carolina General Statutes, a municipality is not liable for accidents which occur on a street which is part of the State highway system and under the control of the NCDOT. North Carolina General Statutes § 160A-297(a) (1987) provides:

> [a] city shall not be responsible for maintaining the streets or bridges under the authority and control of the Board of Transportation, and shall not be liable for injuries to persons or property resulting from any failure to do so.

North Carolina General Statutes § 136-45 (1993) sets forth the general purpose of the laws creating the NCDOT and provides in pertinent part:

> [t]he general purpose of the laws creating the [North Carolina] Department of Transportation is . . . for the . . . purpose of permitting the State to assume control of the State highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire State, and to relieve the counties and cities and towns of the State of this burden.

In the case *sub judice*, the City contracted with the NCDOT to care and maintain the streets in question pursuant to North Carolina General Statutes § 136-66.1(3) (1993) which provides:

> [a]ny city or town, by written contract with the Department of Transportation, may undertake to maintain, repair, improve, construct, reconstruct or widen those streets within municipal limits which form a part of the State highway system and may also, by written contract with the Department of Transportation, undertake to install, repair and maintain highway signs and markings, electric traffic signals and other traffic-control devices on such streets.

The portions of Sparger Road and U.S. 70 in question were part of the State highway system, and as such, the responsibility of the NCDOT. Therefore, based upon the foregoing statutes, apart from its contract with the NCDOT, the City had no responsibility for the maintenance or condition of the traffic signal in question. According to our Supreme Court's holding in *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E.2d 481 (1974), the contract between the City and the NCDOT does not change the status of the streets in question from being part of the State highway system. Nor does the contract bring the streets in question within the general rule that a city is under a duty to use due care to keep *its* **own** streets safe for ordinary use. Therefore, we find that any liability that the City might have for the accident in question would arise out of the contract between the City and the NCDOT. Nonetheless, even under the theory of contract law, and without addressing the issue of third party beneficiary, plaintiffs' action must fail because it was not timely instituted.

North Carolina General Statutes § 1-53(1) (1983) provides a two-year statute of limitations for "[a]n action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied. . . ." As the accident from which this action arises occurred on 16 July 1988, and plaintiff did not commence an action against the City until on or about 17 July 1991, plaintiff's action was commenced after the expiration of the two-year statute of limitations and is barred. Accordingly, we find the trial court erred in denying the City's motion for summary judgment.

We reverse the decision of the trial court and remand with direction for the trial court to enter summary judgment for the City of Durham.

Chief Judge ARNOLD and Judge JOHN concur.

GUILFORD COUNTY PLANNING & DEVELOPMENT DEPARTMENT AND GUILFORD COUNTY, PLAINTIFFS-APPELLANTS v. DALE SIMMONS AND WIFE, JUDY SIMMONS, DEFENDANTS-APPELLEES

No. 9318DC644

(Filed 7 June 1994)

1. **Zoning § 6 (NCI4th)— failure to appeal ruling by Board of Adjustment—defendants not estopped from arguing location of property**

Though defendants failed to appeal the board of adjustment's determination that their property was located in Guilford County, defendants were not subsequently estopped from arguing the issue of the location of their property, since that issue determines the fundamental question of whether the board of adjustment had subject matter jurisdiction over this matter.

Am Jur 2d, Zoning and Planning § 129.

2. **Zoning § 6 (NCI4th)— chicken house built in violation of zoning ordinance—chicken house outside county**

In an action to restrain and enjoin defendants from building chicken houses in violation of Guilford County's zoning ordinances, the evidence was sufficient to support the trial court's determination that plaintiff failed to meet its burden of proving that defendants' chicken houses were located in Guilford County.

Am Jur 2d, Zoning and Planning § 129.

Appeal by plaintiffs from order entered 22 January 1993 by Judge J. Bruce Morton in Guilford County District Court. Heard in the Court of Appeals 21 March 1994.

Guilford County Attorney's Office, by Deputy County Attorney J. Edwin Pons and County Attorney Jonathan V. Maxwell, for plaintiffs-appellants.

No brief filed for defendants-appellees.

LEWIS, Judge.

Defendants sought building permits from the Guilford County Department of Planning and Development to erect two chicken houses on their property. The department denied the permits because defendants' property did not meet dimensional requirements, although it was zoned correctly. Defendants appealed the denial to the Guilford County Board of Adjustment, requesting variances from the dimensional requirements and raising the issue of whether their property is actually located in Guilford County. The Board ruled that the property is located in Guilford County and denied the variances. Instead of petitioning the superior court for review of the Board's decision, according to N.C.G.S. § 153A-345(e) (1991), defendants began building their chicken houses without the appropriate permits.

In October 1985, the Guilford County Planning and Development Department and Guilford County (hereinafter "the County") brought the present action in Guilford County District Court to restrain and enjoin defendants from building the chicken houses. The court issued a preliminary injunction preventing defendants from building the chicken houses without the necessary permits. When the case proceeded to a hearing the parties stipulated to two issues: (1) whether defendants' property is subject to Guilford County zoning, and (2) whether defendants' property is located in Guilford County. The court ruled, on 23 January 1990, *nunc pro tunc* for 28 March 1986, that defendants' property was not subject to Guilford County zoning, but did not rule on whether the property was located in Guilford County. The County appealed to the Court of Appeals.

On 19 March 1991 the Court of Appeals remanded the case for a determination of the threshold issue of whether the property is located in Guilford County, stating that the trial court could hear additional evidence on the issue. *Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 401 S.E.2d 659, *disc. review denied*, 329 N.C. 496, 407 S.E.2d 533 (1991). On remand, in February 1992, without hearing any additional evidence, the trial court signed an order *nunc pro tunc* for 7 November 1991 finding that the property was located in Guilford County and permanently enjoining defendants from building their chicken houses. On 8 June 1992, however, the court granted defendants' motion for a new trial. In January 1993 the court dismissed the County's action, finding that the County had

failed to meet its burden of proving that the property is located in Guilford County. The County now appeals to this Court.

On appeal the County contends the court erred in dismissing its action, because: (1) defendants were estopped from denying that their property is located in Guilford County because they failed to appeal the Board of Adjustment's decision, and (2) the evidence at trial was sufficient to show that the property and chicken houses are located in Guilford County. The County also contends that the trial court erred in setting aside its 17 February 1992 judgment and permanent injunction.

I.

[1] The County contends that defendants should be estopped from denying that the chicken houses are in Guilford County, because they failed to appeal the Board of Adjustment's determination that the houses are located in Guilford County. As the County points out, by statute defendants' only remedy from an adverse decision of a Board of Adjustment is an appeal to the superior court in the nature of certiorari. N.C.G.S. § 153A-345(e) (1991). It is well settled that collateral attacks on a decision of a Board of Adjustment are not permitted. *See, e.g., Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 401 S.E.2d 659, *disc. review denied*, 329 N.C. 496, 407 S.E.2d 533 (1991); *Durham County v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964). Thus, the County contends that defendants may not, in a later action, raise defenses and issues which were before the Board of Adjustment, such as the location of the property.

Although the County's statement of the law is accurate, we must overrule this assignment of error. The issue of the location of the property determines the fundamental question of whether the Board of Adjustment had subject matter jurisdiction over this matter. *See Simmons*, 102 N.C. App. at 327, 401 S.E.2d at 660-61. If the property is not in Guilford County, the Board had no jurisdiction. *Id.* at 327, 401 S.E.2d at 661; N.C.G.S. §§ 153A-320, -340 (1991). If the Board lacked jurisdiction, the district court lacked jurisdiction. *Simmons*, 102 N.C. App. at 327, 401 S.E.2d at 661. For this reason this Court remanded the case to the district court for a determination of the location of the property. If the district court determined that the property is not in Guilford County, the case would have to be dismissed. *Id.* If the district court determined that the property is in Guilford County, defendants would be estopped from raising any issues they should have raised by petitioning for review of the

Board's decision. *Id.* The threshold issue, therefore, in determining whether defendants should be estopped, is whether the property is located in Guilford County. For the purposes of determining this threshold issue, defendants were not estopped from arguing the issue of the location of their property.

II.

[2] The County next contends that the evidence was sufficient to establish that defendants' chicken houses are located in Guilford County. The County points out that all witnesses who referred to official federal and state maps testified that the maps showed that the chicken houses are in Guilford County. The County discredits defendants' evidence of aerial photos and topographic maps, stating that the maps contain no indicia of accuracy, are not tied to the coordinate plane system, and are not as reliable as tax maps. The County also points out that the tax maps show the chicken houses to be located in Guilford County.

In cases where the trial judge sits as the trier of fact, the court's judgment is binding upon this Court if there is any competent evidence to support its findings, whether or not contrary evidence also exists. *Institution Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 555-56, 421 S.E.2d 370, 372 (1992). The trial court is in the best position to evaluate and weigh the evidence, and determine the credibility of the witnesses. *Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990).

We find that there was sufficient competent evidence to support the court's judgment. In its order dismissing the action, the court carefully set forth and reviewed the evidence presented. Several maps, including the tax maps, indicate that the property is located in Guilford County. However, other maps indicate that the property is located in Alamance County. The court considered whether the various maps were based upon field surveys, or whether they were composites from various sources such as deeds. Notably, the official zoning map for Guilford County, prepared in January 1992, clearly shows that the property in question is located in Alamance County. A witness from the Guilford County Planning Department testified that the county zoning map and topographic map indicate that the property is in Alamance County. He also testified that those maps may not be accurate and that the department relies more on the tax maps. An assistant tax supervisor for Guilford County visited the property in search of a monument indicating the location of the County line.

Finding none, he concluded that any monuments had been either removed or destroyed.

The court also found that the boundary line between Guilford and Alamance Counties had been established by the Colonial Legislature in 1770. It was to be a line running north and south, "25 miles due west of Hillsborough." However, no specific location in Hillsborough was mentioned. Other testimony established that there never has been a survey of the Alamance/Guilford County line, and that there are no monuments to mark it.

None of the evidence presented, according to the court, was reliable enough to clearly indicate the location of the county line. The court noted that plaintiffs had the burden of proof on the issue and concluded that plaintiffs had failed to show by a preponderance of the evidence that the land is located in Guilford County. We conclude that competent evidence supported the court's findings and find no basis for disturbing the court's well-reasoned determination that the County has failed to meet its burden of proof.

III.

Finally, the County contends that the trial court erred in setting aside its 27 February 1992 judgment. The County argues that defendants' Rule 59 motion was insufficient to warrant a new trial. We note that the court granted the new trial pursuant to Rule 59(a)(9). Rule 59(a)(9) is a catch-all provision, permitting a new trial for "[a]ny other reason heretofore recognized as grounds for new trial." N.C.G.S. § 1A-1, Rule 59(a)(9) (1990); *Britt v. Allen*, 291 N.C. 630, 231 S.E.2d 607 (1977).

A court's decision regarding a Rule 59 motion is reviewable only for a manifest abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). In granting the motion to set aside, the trial court made findings of fact and conclusions of law. In its findings of fact the court noted and discussed the evidence presented in the new trial motion. The court did not grant the trial on the basis of newly-discovered evidence under Rule 59(a)(4), but concluded that, pursuant to Rule 59(a)(9), "justice and equity require that this court consider any additional evidence" concerning the issue of the location of the property. It is well established that a court may set aside a verdict under Rule 59(a)(9) in the interests of justice and equity. *See, e.g., Sizemore v. Baxter*, 58 N.C. App. 236, 293 S.E.2d 294, *disc.*

review denied, 306 N.C. 744, 295 S.E.2d 480 (1982); *Goldston v. Chambers*, 272 N.C. 53, 157 S.E.2d 676 (1967).

We find no abuse of discretion in the case at hand. The judgment of the trial court is hereby affirmed in all respects.

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

STATE OF NORTH CAROLINA v. JEFFREY ALAN SWANN

No. 9328SC585

(Filed 7 June 1994)

1. Criminal Law § 104 (NCI4th)— officers' reports—change in terminology—defendant not surprised—issue not raised prior to appeal

There was no merit to defendant's contention that changes in the police officers' report of defendant's statements omitting racial phraseology and substituting acceptable terminology impermissibly violated N.C.G.S. § 15A-903 by depriving defense counsel of the opportunity to voir dire prospective jurors regarding their reactions to the racial slurs prior to hearing those epithets during the officers' testimony, since the State voluntarily provided the discovery at issue; defendant was not deceived or unfairly surprised when he discovered during trial what terms the officers used in their report; defendant did not move for discovery pursuant to N.C.G.S. § 15A-903 in order to determine the actual terminology used by defendant in his statement, nor did he move for sanctions for the State's failure to comply with discovery pursuant to N.C.G.S. § 15A-910; and defendant did not object to the testimony of the police officers at the time the statements were made and thereby waived any evidentiary assignment of error he might have had.

Am Jur 2d, Depositions and Discovery §§ 436 et seq.

2. Criminal Law § 1098 (NCI4th)— use of deadly weapon evidence to show malice—use of pistol not to be considered in sentencing

Evidence that defendant took a deadly weapon with him into the homicide victim's neighborhood was so closely connected to the evidence possibly used by the jury to find that the killing was done with malice that it was error for the trial court to consider the use of the pistol again in sentencing.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 3 February 1993 by Judge Shirley L. Fulton in Buncombe County Superior Court. Heard in the Court of Appeals 28 February 1994.

The defendant was indicted by the grand jury on 2 November 1992 on a charge of first degree murder in the shooting death of Reginald Whiteside on 5 September 1992. The charge arose out of an incident occurring in the Shiloh area of Asheville, North Carolina. At trial, evidence presented by both the prosecution and the defendant tended to show that the defendant drove to a house in the area where he was approached by the victim. They engaged in an argument while the defendant remained seated in his car. Evidence was presented that the victim "grabbed the defendant's wallet" during the conversation. The defendant had a .32 caliber pistol beneath the driver's seat of his automobile. At some point, he reached under the seat and fired the gun, fatally striking the victim in the abdomen.

At the close of the State's evidence, the trial court granted the defendant's motion to dismiss the first degree murder charge. The case proceeded to the jury on second degree murder and voluntary manslaughter. The jury convicted the defendant of murder in the second degree.

During sentencing of the defendant, the trial court found as aggravating factors that the defendant had prior convictions of criminal offenses punishable by more than sixty days imprisonment, and that "the defendant deliberately armed himself with a gun and went into an area which he believed to be dangerous to commit an illegal act i.e. to purchase and possess a schedule II controlled substance, cocaine." The court further found the defendant's good character in the community to be a mitigating factor to be considered in sentencing. Judge Fulton concluded that the aggravating factors outweighed

the factors in mitigation, and on 3 February 1993, sentenced the defendant to life imprisonment. From the verdict and judgment, the defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Stepp, Groce & Cosgrove, by W. Harley Stepp, Jr. and Christopher S. Stepp, for defendant-appellant.

ORR, Judge.

I.

[1] The defendant argues four assignments of error before this Court. He first argues that changes in the police officers' report omitting racial phraseology and substituting acceptable terminology impermissibly violated N.C. Gen. Stat. § 15A-903 by depriving defense counsel of the opportunity to *voir dire* prospective jurors regarding their reactions to the racial slurs prior to hearing those epithets during the officers' testimony. He argues that the changes between the verbatim reports of defendant's statements to police and the subsequent testimony of the officers unfairly surprised the defendant. We disagree with this contention and accordingly affirm the trial court.

N.C. Gen Stat. § 15A-903 provides in pertinent part:

(a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:

(1) To permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant, or copies thereof, ...

"N.C.G.S. 15A-903(a)(2) requires the trial court, upon motion by the defendant, to order the prosecutor to disclose 'the substance of any oral statement' by the defendant. As used in the statute, 'substance' means: 'Essence; the material or essential part of a thing, as distinguished from "form". That which is essential.' " *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985) (quoting Black's Law Dictionary 1280 (rev. 5th ed. 1979)).

In the case at bar, the State voluntarily provided the discovery at issue. The defendant does not argue that the prosecution failed to provide the officers' reports; rather, he contends that the use of the word "B/M" in the reports and the subsequent use of the actual racially inflammatory language created prejudicial error in his trial. Obvi-

ously, defense counsel was aware that the defendant did not literally use the term "B/M" when questioned by the officers. "B/M" commonly indicates that the person speaking is referring to an African-American male, and we do not believe that the defendant was deceived or unfairly surprised when he discovered during trial that another term, even one more racially inflammatory, was used.

Furthermore, the record indicates that the defendant did not move for discovery pursuant to N.C.G.S. § 15A-903 in order to determine the actual terminology used by the defendant in his statement. Additionally, he did not move for sanctions for the State's failure to comply with discovery pursuant to N.C.G.S. § 15A-910 which would have allowed the court in its discretion, *inter alia*, to declare a mistrial, dismiss the charges, recess, or issue "other appropriate orders." Rather, the defendant argues for the first time in this appeal that N.C.G.S. § 15A-903 has been violated by the State. We find no violation of the statute in question.

We also note that under N.C.G.S. § 15A-1446, an assignment of error will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. Failure to do so amounts to a waiver. *State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988). In the case *sub judice*, it was incumbent upon defendant to object to the testimony of the police officers at the time the statements were made. Our review of the transcript indicates no such objections. We therefore hold that any evidentiary assignment of error in the admission of testimony of the officers has been waived by the defendant.

II.

[2] Secondly, the defendant argues that the trial court committed reversible error in instructing the jury that malice could be inferred from the use of a deadly weapon, then applying as an aggravating factor in sentencing the fact that the defendant armed himself prior to going into the area. He contends that since the evidence of the use of the deadly weapon was necessary to prove the element of malice in the second degree murder offense, it could not be again used as an aggravating factor during sentencing. He further argues that the trial court failed to find or to consider as a factor in mitigation that the defendant acted under strong provocation during the altercation leading to the victim's death. Finally, he argues that the trial court should have found as a mitigating factor that the victim, as a thirty-one-year-old, was a "voluntary participant." He contends that

because these applications of aggravating and mitigating factors were erroneous, a new sentencing hearing is mandated. We agree that the non-statutory aggravating factor that the defendant "deliberately armed himself with a gun" was used impermissibly by the trial court in sentencing and accordingly remand for sentencing consistent with the reasoning set forth below.

The Fair Sentencing Act, N.C.G.S. §§ 15A-1340.1 *et seq.*, applies to sentencing of all convictions other than Class A or Class B felonies. N.C.G.S. § 15A-1340.4(a) provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, ..."

In *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), our Supreme Court adopted a "bright-line" rule regarding the use of a deadly weapon as an aggravating factor where the jury had been given instructions that it might consider the use of that weapon in finding malice as an element of second degree murder. The Court held that when "the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing." *Id.* at 417, 306 S.E.2d at 788. The rule was adopted in order "to avoid hairsplitting factual disputes necessitated by having to second-guess jury decisions as to the existence of malice." *Id.*

We find that *Blackwelder* controls the case *sub judice*. After the close of all the evidence, the trial court instructed the jury as follows:

> [T]he defendant, Jeffrey Alan Swann, has been accused of Second Degree Murder. Under the law and under the evidence in this case, it is your duty to return one of the following verdicts: Guilty of Second Degree Murder, or Guilty of Voluntary Manslaughter, or Not Guilty.
>
> Now Second Degree Murder is the unlawful killing of a human being with malice. . . .
>
> . . .
>
> Now I charge that for you to find the defendant guilty of Second Degree Murder, the state must prove three things beyond a reasonable doubt:
>
> First, that the defendant intentionally and with malice killed the victim with a deadly weapon.

. . .

> Now if the state proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer first that the killing was unlawful; and, second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, the defendant would be guilty of Second Degree Murder.

Nothing in the record indicates the reasoning behind the jury's decision to convict the defendant of second degree murder rather than the lesser included offense of voluntary manslaughter. The *Blackwelder* Court pointed out that

> short of requiring every jury to specify upon what facts and circumstances it relied in determining the existence of malice, it is simply not possible to conclude . . . that a jury instructed on the inference of malice would not have considered the use of a deadly weapon as evidence necessary to prove the element of malice.

Id. at 417-18, 306 S.E.2d at 788.

The State argues in its brief before this Court that this does not fall within the rule set forth in *Blackwelder* and its progeny, since the trial court found as an aggravating factor that the defendant armed himself with a deadly weapon, rather than that he used a deadly weapon. Common sense dictates that the use of a deadly weapon implies that a defendant has armed himself with a deadly weapon prior to the altercation giving rise to the murder charge. Therefore, if such were the case, in any conviction where a deadly weapon was used, the fact that the defendant had such a weapon with him at the time of the offense could be used in a finding of aggravation.

As stated above, evidence necessary to prove the offense may not be used to prove any factor in aggravation. We find that the evidence that the defendant took a deadly weapon with him into the victim's neighborhood was so closely connected to the evidence possibly used by the jury to find that the killing was done with malice that under *Blackwelder*, it was error for the trial court to consider the use of the pistol again in sentencing. We therefore remand for resentencing on this issue.

We have reviewed the defendant's remaining assignments of error in his sentencing and find that there was no error by the trial court in failing to find that the defendant did not act under strong provocation. The defendant has provided neither authority nor support for his final argument, and accordingly we decline to review this assignment of error.

No error in the trial. Remanded for resentencing.

Judges WELLS and WYNN concur.

ROBERT L. DAVIS, PETITIONER v. THE PUBLIC SCHOOLS OF ROBESON COUNTY, BOARD OF EDUCATION, AND DOUGLAS Y. YONGUE, SUPERINTENDENT, RESPONDENTS

No. 9316SC924

(Filed 7 June 1994)

1. Schools § 158 (NCI4th)— suspended teacher—reinstatement denied—teacher not prejudiced

There was no merit to petitioner teacher's contention that respondent board of education was without authority to deny the reinstatement of petitioner because more than ninety days passed between the notice of suspension with pay and the notification of the recommendation to dismiss, since petitioner's reinstatement was automatic, based on *Evers v. Pender County Bd. of Education*, 104 N.C.App. 1, and N.C.G.S. § 115C-325(f1); however, the superintendent's failure to reinstate petitioner was of no practical effect because school was not in session, petitioner was compensated, and a new suspension began shortly thereafter.

Am Jur 2d, Schools §§ 111 et seq.

2. Schools § 245 (NCI4th)— dismissal of teacher—violations of N.C.G.S. § 115C-325 alleged—teacher not prejudiced

There was no merit to petitioner teacher's argument that respondent board of education violated various sections of N.C.G.S. § 115C-325 during his dismissal hearing, since petitioner received information concerning witnesses and documents in a timely fashion; petitioner who was accused of immorality was

not prejudiced by the presence of a minor child's parents in the hearing room during the child's testimony; petitioner received timely notice of respondent's decision; and the board's decision was clearly supported by a preponderance of competent evidence.

Am Jur 2d, Schools §§ 180 et seq.

Appeal by petitioner from order entered 5 July 1993 by Judge Henry V. Barnette, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 9 May 1994.

Robert L. Davis, petitioner-appellant, pro se.

Locklear, Jacobs, Sutton and Hunt, by Arnold Locklear, for respondents-appellees.

JOHNSON, Judge.

Petitioner Robert L. Davis was employed by respondent Board of Education for the Public Schools of Robeson County (hereafter, Board) as a tenured teacher on 23 March 1992 when he was suspended with pay pursuant to North Carolina General Statutes § 115C-325(f1) (Cum. Supp. 1993). By letter dated 22 July 1992, petitioner was informed by the interim superintendent that he intended to recommend petitioner's dismissal to the Board on the grounds of immorality pursuant to North Carolina General Statutes § 115C-325(e)(1)(b) (Cum. Supp. 1993).

Petitioner requested a hearing before the Professional Review Committee (hereafter, PRC) and this hearing was scheduled for 16 September 1992. The PRC, by letter dated 16 September 1992, "found that the Superintendent had provided inadequate evidence to substantiate the charge of immorality. Although the panel does not in any way condone Mr. Davis' behavior . . . they did not feel the isolated incident constituted grounds for dismissal."

By letter dated 24 September 1992, the interim superintendent informed petitioner that, having received the report of the PRC, he intended to recommend petitioner's dismissal to the Board. The petitioner by letter dated 28 September 1992 to the interim superintendent requested a hearing before the Board.

The Chairman of the Board, by letter dated 6 October 1992, notified petitioner that the superintendent's recommendation for his dismissal would be heard on 26 October 1992 at 6:30 p.m. The hearing

began as scheduled and was continued the following evening, and during the early morning hours of 28 October 1992, it was announced to the reporter that " . . . the Board reached a compromise with Mr. Davis and will not be reaching a decision on the merits of the case at this time." However, on 3 November 1992, the Chairman of the Board, before the Board resumed its deliberations in executive session, said, "let it be noted that the efforts and informal resolution of this matter proved unsuccessful." The Board thereafter accepted unanimously the interim superintendent's recommendation to dismiss petitioner on the grounds of immorality.

Petitioner filed a petition for judicial review on 30 November 1992, appealing the order of dismissal. The superior court judge entered an order 5 July 1993 affirming the decision and resolution of the Board dismissing petitioner. From this order, petitioner appeals to our Court.

[1] Petitioner first contends that the Board was without authority to deny the reinstatement of petitioner because 124 days passed between the notice of suspension and the notification of the recommendation to dismiss. The record indicates that on 23 March 1992, petitioner was suspended with pay; that by letter dated 22 July 1992, petitioner was notified that the interim superintendent intended to recommend his dismissal to the Board; that on 13 August 1992, petitioner was notified that his employment status was changed to suspension without pay; and that by letter dated 29 August 1992, petitioner requested that the interim superintendent reinstate him to his position.

North Carolina General Statutes § 115C-325(f1) states:

> Suspension with Pay.—If a superintendent believes that cause may exist for dismissing or demoting a probationary or career teacher for any reasons specified in G.S. 115C-325(e)(1)b through 115C-325(e)(1)j, but that additional investigation of the facts is necessary and circumstances are such that the teacher should be removed immediately from his duties, the superintendent may suspend the teacher with pay for a reasonable period of time, not to exceed 90 days. The superintendent shall immediately notify the board of education of his action. If the superintendent has not initiated dismissal or demotion proceedings against the teacher within the 90-day period, the teacher shall be reinstated to his duties immediately and all records of the sus-

pension with pay shall be removed from the teacher's personnel file at his request.

Our Court examined North Carolina General Statutes § 115C-325(f1) in *Evers v. Pender County Bd. of Education*, 104 N.C. App. 1, 407 S.E.2d 879 (1991), *aff'd*, 331 N.C. 380, 416 S.E.2d 3 (1992). In *Evers*, our Court held "that while N.C. Gen. Stat. § 115C-325(f1) clearly requires the reinstatement of a teacher who has been suspended with pay once ninety days without the initiation of dismissal proceedings have lapsed, it does not prohibit the subsequent initiation of dismissal proceedings against such teacher." *Id.* at 12, 407 S.E.2d at 885. Our Court opined:

> [W]e are of the opinion that the General Assembly, in enacting N.C. Gen. Stat. § 115C-325(f1), did not intend to prohibit the initiation of dismissal proceedings against a teacher who has been suspended with pay once ninety days beyond the date of such suspension have lapsed.
>
> . . .
>
> In the instant case, the language of N.C. Gen. Stat. § 115C-325(f1) is clear and unambiguous: If the superintendent fails to initiate dismissal proceedings against a teacher who has been suspended with pay within ninety days of such suspension, the teacher must be reinstated. However, we believe the language of N.C. Gen. Stat. § 115C-325(f1) is equally clear that reinstatement from suspension and upon request removal of the suspension action from the teacher's record are the *only* consequences which follow from a superintendent's failure to timely initiate dismissal proceedings. Section 115C-325(f1) does not provide that the failure to initiate dismissal proceedings within the statutorily prescribed time limit will forever bar the initiation of dismissal proceedings; the statute merely requires that the teacher be removed from suspension.

Id. at 11-12, 407 S.E.2d at 884-85 (emphasis retained). In *Evers*, because the plaintiff challenged only the initiation of proceedings and not the superintendent's failure to reinstate him to his position after ninety days, the Court did not address the failure to reinstate.

At petitioner's hearing in the instant case, the Board found that

> N.C.G.S. 115C-325(f1) permits the Superintendent to suspend a teacher with pay for a period of time not to exceed ninety (90)

days. The Board finds that the Superintendent failed to initiate dismissal or demotion proceedings within the ninety (90) day period. There was no evidence presented that Mr. Davis requested reinstatement to his position when the ninety (90) day time period expired. It is also noted that the extended period of suspension occurred during the summer when school was not in session. The Board has ordered that Mr. Davis be paid any salary to which he would have been entitled from the ninety first (91st) day until the day that the Superintendent initiated dismissal proceedings against him.

We are of the opinion that petitioner need not have requested reinstatement to his position when the ninety day time period elapsed; this reinstatement was automatic, based on *Evers* and North Carolina General Statutes § 115C-325(f1). The superintendent's failure to reinstate petitioner, however, was of no practical effect because school was not in session, petitioner was compensated, and a new suspension began shortly thereafter. Therefore, we find this argument without merit.

[2] Petitioner next argues that the Board violated various sections of North Carolina General Statutes § 115C-325 (Cum. Supp. 1993) during the dismissal hearing and that therefore, the Board's resolution should be overturned. First, petitioner argues that North Carolina General Statutes § 115C-325(j)(5) (requiring the superintendent and teacher to exchange a list of witnesses and documents within at least five days of the hearing) was violated; we note that this information was transmitted verbally seven days before the hearing and in written form less than five days before the hearing, and that petitioner was not prejudiced by this procedure.

Next, petitioner argues that North Carolina General Statutes § 115C-325(j)(1) requires that the hearing be private, yet, the minor child's parents were allowed to attend the hearing while their daughter testified. A review of the evidence indicates that petitioner was not unduly prejudiced by the presence of the minor child's parents in the hearing room, and we therefore overrule this argument. *Cf.* North Carolina General Statutes § 15A-1225 (1988) (where upon motion of a party the judge may order witnesses other than the defendant to remain outside of the courtroom until called to testify; except when a minor child is testifying, a parent or guardian may be present even though the parent or guardian is to be called subsequently).

Petitioner also argues that North Carolina General Statutes § 115C-325(l)(5), which requires the Board to notify the teacher of the Board's decision within five days of the hearing, was violated. The record shows that the Board reached a final decision in this matter on 3 November 1992, and that petitioner received a copy of this resolution on 5 November 1992. Petitioner's argument is overruled.

Finally, petitioner argues that the decision of the Board is not supported by competent evidence as set forth in the record. We have reviewed the record and find the decision of the Board was clearly supported by a preponderance of competent evidence.

Petitioner's remaining arguments are without merit or are based on matters stipulated to by petitioner previously.

Affirmed.

Judges WELLS and JOHN concur.

EARLENE LEONARD, PLAINTIFF v. VAUGHN ENGLAND, GUARDIAN FOR MICHAEL DANIEL, DEFENDANT

No. 9326SC868

(Filed 7 June 1994)

Limitations, Repose, and Laches § 119 (NCI4th)— emotional distress—battery—repressed memories—incompetent plaintiff—statute of limitations tolled

In the 39-year-old plaintiff's action against her grandmother for battery and intentional infliction of emotional distress which allegedly occurred when plaintiff was a child, she produced sufficient evidence that her repression of memories and post-traumatic stress syndrome suffered as a result of her grandmother's alleged sexual, physical, and emotional abuse rendered plaintiff "incompetent" within the meaning of N.C.G.S. § 35A-1101(7), thereby tolling the statutes of limitations so that summary judgment for defendant was improper. N.C.G.S. § 1-17(a).

Am Jur 2d, Limitation of Actions §§ 182 et seq.

Emotional or psychological "blocking" or repression as tolling running of statute of limitations. 11 ALR5th 588.

Post-traumatic syndrome as tolling running of statute of limitations. 12 ALR5th 546.

Appeal by plaintiff from order entered 27 May 1993 in Mecklenburg County Superior Court by Judge Forrest A. Ferrell. Heard in the Court of Appeals 21 April 1994.

Murphy & Chapman, P.A., by Ronald L. Chapman, for plaintiff-appellant.

No brief filed for defendant-appellee.

GREENE, Judge.

Earlene Leonard (plaintiff) appeals from an order filed 27 May 1993 in Mecklenburg County Superior Court, granting summary judgment based upon the statute of limitations for Vaughn England, Guardian for Michael Daniel, in plaintiff's action for battery and intentional infliction of emotional distress.

On 15 February 1991, plaintiff filed a complaint against her grandmother, Michael Daniel (Daniel), alleging that "[w]hile the plaintiff was a child, and specifically while the plaintiff was between the approximate ages of 9 to 11, [Daniel] abused the plaintiff sexually, physically and emotionally." Plaintiff, who was 39 years of age at the time of filing suit, alleged that this abuse that occurred approximately 28 years ago constituted a battery and intentional infliction of emotional distress, entitling her to compensatory and punitive damages. On 28 May 1991, the court granted Daniel's motion to substitute Vaughn England (defendant), guardian for Daniel, as defendant due to Daniel's incompetency. Also on 28 May 1991, defendant filed an answer, denying plaintiff's allegations and moving to dismiss her complaint for insufficiency of service of process and because it is barred by the statutes of limitations for battery and intentional infliction of emotional distress.

On 25 May 1993, John Humphrey, M.D. (Dr. Humphrey), filed an affidavit which states in pertinent part:

> 2. . . . [on 30 March 1990], [plaintiff] related a history of having been troubled by "pictures of abuse." She thought she was

hallucinating and was "losing her mind", but was beginning to wonder if the "pictures" could possibly be of real events.

3. . . . these events were interfering with [plaintiff]'s ability to function in everyday life . . . .

4. On April 25, 1990, with [plaintiff]'s consent, I performed a sodium amytal interview. Sodium amytal is a drug (popularly referred to as "truth serum") used for therapeutic interviews and is recognized as an effective treatment for disorders involving repression.

5. Following this session, it became clear to [plaintiff] that the experiences she was reliving were in fact real, and not hallucinations.

6. [Plaintiff] had uncovered sexual abuse as a child, committed by her uncle and grandmother. These relatives had also threatened her with physical, emotional and "religious" harm if she revealed their acts. I diagnosed her as suffering from major depression and post-traumatic stress disorder.

7. It is a fairly typical defense mechanism for an abused person to repress memories of abuse so deeply that, even as an adult, suggestions of abuse would be denied by the victim. At some point, abused individuals typically begin to be troubled by flashbacks, which, as in [plaintiff]'s case, became more and more troublesome to the point that treatment was sought.

8. The fact that these flashbacks began to bring to the conscious mind the events of abuse, does not mean there was no mental illness through the interim period. Far from it. In fact, the timing of the flashbacks is entirely consistent with the diagnoses listed above and fit the pattern of post-traumatic stress syndrome. That pattern is a contributing fact in my diagnosis.

9. Based upon my examination and treatment of [plaintiff], it is my professional opinion to a reasonable degree of medical certainty that [plaintiff], until her sodium amytal session of April 25, 1990, lacked sufficient capacity to make or communicate important decisions regarding her legal rights, her person and property, including, specifically, the decision to file suit for damages for childhood abuse, because she lacked awareness or knowledge of such abuse, having repressed this knowledge to deal with the trauma caused thereby, that repression being a direct result of

> her mental condition. As a result of her mental illness and condition, [plaintiff] was incompetent to proceed until she became conscious of what happened to her and accepted the events as real rather than some hallucination on her part. Until that happened she was simply incapable of competently making important decisions about her life, all aspects of which were affected by her mental condition.

The trial court, after treating defendant's motion to dismiss as a motion for summary judgment by consent of the parties, allowed defendant's motion for summary judgment because "there is no genuine issue as to any material fact on the issue of the failure of the Plaintiff to file this action within the statute of limitations, and that the Defendant is entitled to judgment as a matter of law."

The issue presented is whether plaintiff has produced evidence that her repression of memories and post-traumatic stress syndrome suffered as a result of her grandmother's alleged sexual, physical, and emotional abuse rendered plaintiff "incompetent" thereby tolling the statutes of limitations so that summary judgment for defendant was improper.

Because plaintiff failed to include a certificate of service in her notice of appeal and because defendant, by her counsel's withdrawing and by her failing to file a brief in this Court, did not "waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal," *see Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993), we treat plaintiff's appeal as a petition for writ of certiorari.

Statutes of limitations achieve several purposes, including "strik[ing] a delicate balance between the rights of the diligent plaintiff who should not be barred from pursuing a meritorious claim and the defendant who deserves protection from stale claims." *Black v. Littlejohn*, 312 N.C. 626, 635, 325 S.E.2d 469, 476 (1985). Under North Carolina law, the statute of limitations for a claim of intentional infliction of emotional distress is three years, N.C.G.S. § 1-52(5) (1993); *see King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 385 S.E.2d 812 (1989), *cert. denied*, 326 N.C. 265, 389 S.E.2d 114 (1990) (because not specifically denominated under any limitations statute, claim for emotional distress falls under general three-year provision of Section 1-52(5)), and the statute of limitations for battery is one year. N.C.G.S. § 1-54(3) (1993). These provisions are subject to

expansion, however, by North Carolina's "discovery" and "disabilities" statutes. The discovery statute provides that personal injury causes of action "shall not accrue until bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant." N.C.G.S. § 1-52(16) (1993). The disabilities statute provides in pertinent part that

> (a) A person entitled to commence an action who is at the time the cause of action accrued either
>
> (1) Within the age of 18 years;
>
> (2) Insane; or
>
> (3) Incompetent as defined in G.S. 35A-1101(7) or (8) may bring his action . . . within three years next after the removal of the disability, and at no time there after.

N.C.G.S. § 1-17(a) (1993). Because plaintiff does not argue the insanity exception or the discovery statute, we address only whether plaintiff was incompetent within the meaning of Section 35A-1101(7) "at the time the cause of action accrued." *See generally* Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action,* 26 Wake Forest L. Rev. 1245 (1991); Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression,* 84 J. Crim. L. & Criminology 129 (1993) (states have either allowed or rejected tolling statutes of limitations in adult survivor's claims based on childhood sexual abuse through "insanity" exceptions or discovery statutes while some states have addressed the issue through legislation).

Plaintiff argues that Dr. Humphrey's affidavit represents a "competent and unchallenged expert opinion that [plaintiff] was until April 1990, less than one year prior to filing of this claim, an incompetent adult for purposes of the tolling of the statute of limitations," and that summary judgment for defendant was improper. We agree. Section 35A-1101(7), the relevant section in this case, provides that

> "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental ill-

ness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury or similar cause or condition.

N.C.G.S. § 35A-1101(7) (1987). Dr. Humphrey states that plaintiff was, until 25 April 1990, mentally ill and suffering from post-traumatic stress syndrome, causing her to repress memories of abuse and to lack "sufficient capacity to make or communicate important decisions regarding her legal rights, her person and property, including, specifically, the decision to file suit for damages for childhood abuse." This uncontradicted evidence fully supports the classification of plaintiff as "incompetent" within the meaning of Section 35A-1101(7) at all times from the date of the alleged abuse until 25 April 1990, which necessarily includes the date of accrual of the cause of action. *See Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 13, 437 S.E.2d 519, 526 (1993) (action for emotional distress does not accrue until distress manifests itself). Therefore, because plaintiff filed her complaint within three years after 25 April 1990, the date her incompetency terminated, her claim is not barred by the statute of limitations. The order of the trial court granting summary judgment for the defendant on the basis of the statute of limitations is accordingly

Reversed.

Chief Judge ARNOLD and Judge McCRODDEN concur.

STATE OF NORTH CAROLINA v. DAN LEMAR BLUE

No. 9312SC816

(Filed 7 June 1994)

Homicide § 349 (NCI4th)— submission of second-degree murder—no objection—absence of plain error

Even if the evidence in a homicide prosecution clearly established all of the elements of first-degree murder and would not support a charge of second-degree murder, the trial court's submission of second-degree murder as a possible verdict did not constitute plain error, and defendant may not assign error to the trial court's submission of second-degree murder to the jury, where the trial court announced at the charge conference that it

would submit verdicts of guilty of first-degree murder, guilty of second-degree murder, or not guilty, and defendant failed to object at the charge conference or at any time before the jury retired, since to allow a defendant who did not object to then use his choice at trial to gain reversal on appeal would afford a criminal defendant the right to appellate review predicated on invited error.

Am Jur 2d, Homicide §§ 496, 497.

Appeal by defendant from judgment entered 26 May 1993 by Judge Joe Freeman Britt in Cumberland County Superior Court. Heard in the Court of Appeals 18 April 1994.

Defendant was indicted in a four-count indictment on charges of first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted armed robbery, and conspiracy to commit armed robbery. The homicide case was tried as a noncapital first degree murder.

The State's evidence tended to show that at approximately 2:00 on the afternoon of 30 August 1992, the 16-year-old defendant and another young man named Brewington entered the East Coast Pawn Shop in Fayetteville. Defendant and Brewington purchased a Nintendo game cartridge from the clerk, Delmar Moses. As they were completing this purchase, two other customers entered the shop. Defendant and Brewington exchanged comments and left the store.

Minutes later, defendant and Brewington re-entered the shop. Jimmy Denning, one of the owners of the shop, waited on the two men as they selected another Nintendo game cartridge. Defendant and Brewington selected a game, and Denning removed it from the counter where it was kept and set it down for them. Defendant picked the game up and carried it as the three men went back to the sales counter where defendant laid the game down. While defendant and Brewington stood in front of the sales counter, Denning began to write a sales ticket for the game. Delmar Moses was standing behind Denning.

The record of evidence, which included a videotape of the shooting, shows that as Brewington was in the act of placing the tape on the counter, defendant, who was standing immediately to the right of Brewington and facing the counter, turned to his left and stepped back from Brewington. Brewington immediately drew a pistol from

his pocket and fired four quick shots in succession. One shot struck Denning below the heart, and two shots struck Moses, causing his immediate death. After firing the shots, Brewington immediately fled from the shop and was followed by defendant.

Brewington was apprehended when a female acquaintance called the Cumberland County Sheriff's Office and reported that Brewington had been shot. Defendant was not with Brewington at the time. Brewington agreed to telephone defendant in the presence of law enforcement officers and to allow them to record this call. The law enforcement officers later went to defendant's home, where they found the clothing defendant had worn in the pawnshop hidden behind the dresser in his room.

Miss Elisha Bath testified that in August of 1992, she had been going steady with a young man named Scott Fisher for about a year. Miss Bath was then 15 years old, and Fisher was 17 or 18. Fisher and defendant were friends. On 30 August 1992, Fisher was at Miss Bath's home. At one point during his visit, the two went into Miss Bath's parents' bedroom, where her father kept his handguns. Fisher was familiar with these guns and had fired them before. Fisher looked through the drawer where the guns were kept, but neither of them took a gun out of the room. Fisher later left, and Miss Bath went across the street to a babysitting job.

Miss Bath saw Fisher again that day when he and defendant came to the house where she was babysitting. They stayed only a few minutes. Miss Bath commented to defendant that Fisher looked uncharacteristically nervous, and defendant responded that nothing was wrong. Miss Bath did not see where they went when they left. Fisher returned alone a short while later to the house where Miss Bath was babysitting. He came into the house and pulled a gun wrapped in a yellow bandanna from under his shirt. He put the wrapped gun into Miss Bath's purse and left.

Miss Bath returned home when she finished babysitting and found Fisher and other members of her family there. Fisher asked her about the gun, and she told him it was in her purse. On Fisher's instructions, she took the gun out of her purse and got the holster from her parents' bedroom. She watched Fisher remove the gun from the bandanna and put it in the holster. Fisher took care not to leave any fingerprints on the gun as he did so. At Fisher's direction, Miss Bath replaced the gun in its holster in the drawer in her parents' room. Miss Bath testified that she did not know when the gun was

taken from her home. She also testified she kept her spare house key in Fisher's car. Tests revealed that Miss Bath's father's gun was the gun used by Brewington to shoot Denning and Moses. Defendant offered no evidence.

The jury found defendant guilty of second degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted armed robbery, and conspiracy to commit armed robbery. Defendant was given the presumptive sentence of fifteen years for second degree murder, to be served consecutively to the presumptive sentence of fourteen years for attempted robbery with a firearm; the presumptive sentence of six years for assault with a deadly weapon with intent to kill inflicting serious injury, to be served consecutively to the second degree murder sentence; and the presumptive sentence of three years for conspiracy to commit robbery with a firearm, to be served concurrently with the six year sentence for assault with a deadly weapon.

Attorney General Michael F. Easley, by Assistant Attorney General P. Bly Hall, for the State.

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

WELLS, Judge.

Pursuant to one of his assignments of error, defendant contends that the trial court erred in submitting to the jury second degree murder as a possible verdict because there was no evidence to support such a charge.

After the jury verdicts were returned, in the beginning stages of the charge conference, the trial judge stated that on the murder indictment, he would submit verdicts of guilty of first degree murder, or guilty of second degree murder, or not guilty. Defendant did not object then or at any time during the court's very thorough charge conference, or at any time before the jury retired.

Rule 10(b)(2) of our Rules of Appellate Procedure provides:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hear-

ing of the jury, and, on request of any party, out of the presence of the jury.

Thus, the standard of review we must employ is the "plain error" rule adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). As the Court stated in *Odom*, the adoption of the "plain error" rule does not mean that an improper instruction will mandate reversal regardless of a defendant's failure to object at trial, because to so hold would negate Rule 10(b)(2). Even when the "plain error" rule is applied, an improper instruction will rarely justify reversal of a criminal conviction when no objection was made in the trial court. *Id.* In this case, we accept for the purpose of our ruling defendant's contention that the evidence clearly established all the elements of first degree murder: malice, premeditation, and deliberation. Had defendant objected at trial to submitting the second degree verdict to the jury, we would be required to reverse his conviction. *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991). But to allow a defendant who does not so object to then use his choice at trial to gain reversal on appeal would afford a criminal defendant the right to appellate review, predicated on invited error. We refuse to recognize such a right. To do so would defy common sense and establish bad law. Accordingly, we hold that this defendant may not assign error in this appeal to the trial court's submitting the second degree verdict to the jury.

In his second, third, and fourth assignments of error, defendant challenges the sufficiency of the evidence to support his conviction of (1) attempted armed robbery, (2) conspiracy to commit robbery with a dangerous weapon, and (3) assault with a deadly weapon with intent to kill inflicting serious injury. Our review of the State's evidence, giving the State the benefit of all reasonable inferences to be drawn therefrom, persuades us that the evidence was more than sufficient to submit these charges to the jury. The evidence relating to the gun used in the killing, and the telling evidence of defendant's conduct in the pawn shop before and after the shooting deflate defendant's arguments on these assignments, and they are overruled.

We have considered defendant's argument that the trial court erred in instructing the jury on acting in concert, find it to be without sufficient merit to require discussion, and overrule it. For the reasons stated, we find no error in the trial.

There is one other aspect of defendant's appeal which merits our discussion. At trial, after judgments were pronounced at the jury's

verdicts, there ensued a discussion between the defendant, defendant's trial counsel, and the trial judge as to whether defendant chose to appeal his convictions. This discussion culminated in defendant's informing the trial judge that he chose not to appeal. As the record reveals, the judgments were entered and signed on 26 May 1992. In his brief, defendant states that he gave notice of appeal on 4 June 1992. The record on appeal includes appellate entries dated 4 June 1992, signed by the Honorable Coy E. Brewer, Jr., but contained no written notices of appeal as required by Rule 4 of the Rules of Appellate Procedure. Upon inquiry, we have determined that there are no written notices of appeal on file in the Office of the Clerk of Superior Court of Cumberland County, but only an entry in the Clerk's minutes of the proceedings at the 4 June 1992 session that defendant gave notice of appeal. Thus, defendant did not preserve his right to appeal his convictions; therefore, his appeal is not before us as a matter of right. Because defendant's purported appeal of his conviction of second degree murder presented a question of importance to the criminal jurisprudence of this State, we have determined that it is not in the public interest to dismiss defendant's appeal. *See* Rule 2 of the Rules of Appellate Procedure.

No error.

Judges JOHNSON and JOHN concur.

TOWN OF CARY v. FRANKLIN-SLOAN V.F.W. POST 7383, VETERANS OF FOREIGN WARS OF THE UNITED STATES

No. 9310SC805

(Filed 7 June 1994)

Dedication § 11 (NCI4th)— site plan to obtain special use permit—thoroughfare marked—insufficient description—no dedication

An 80-foot proposed thoroughfare on defendant's site plan which was submitted to plaintiff in order to get a special use permit was insufficient to constitute a dedication, since the site plan contained only two lines consisting of a series of dashes with no markings indicating distances or bearings, with the words "80

foot proposed thoroughfare" written between the two lines; the plan did not have any ascertainable monuments; and there was no information attempting to locate the right of way on the property. N.C.G.S. § 160A-381.

Am Jur 2d, Dedication §§ 29-33.

Appeal by plaintiff from judgment entered 17 March 1993 in Wake County Superior Court by Judge Robert L. Farmer. Heard in the Court of Appeals 19 April 1994.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, and Charles Henderson, Town Attorney, for plaintiff-appellant.

Young Moore Henderson & Alvis P.A., by Henry S. Manning and Evelyn M. Coman, for defendant-appellees.

GREENE, Judge.

The Town of Cary, North Carolina (the Town), appeals from an order dated 17 March 1993 in Wake County Superior Court, ordering that the Town compensate Franklin-Sloan V.F.W. Post 7383, Veterans of Foreign Wars of the United States (VFW) for a 100 foot right-of-way running through VFW's property.

In 1978, VFW acquired property zoned R-30 (residential) in the Town. In 1979, VFW's governing officers voted to establish a post home on the property, a use not permitted of right because it was zoned R-30. Dennis G. Beck (Beck), who represented VFW, learned that VFW would have to obtain a special use permit to have a post home and that the Town would have to approve VFW's site plan pursuant to Section 11-25 of the Town's Planning, Zoning, Subdivision, and Sedimentation Ordinance. On 13 August 1979, Beck appeared before the Town's Board of Adjustment which unanimously approved a Special Use Permit for VFW. On 15 October 1979, the Town's Planning and Zoning Board (the Board) approved the site plan with a notation in the minutes that a "right-of-way dedication for a section of Maynard Road is required." The site plan shows a 4.999 acre tract of land with the west end of the property adjoining Reedy Creek Road. On the east end, the site plan reveals two apparently parallel lines consisting of a series of dashes. The lines have no markings indicating distances or bearings. Between the two lines is written the words "80 foot proposed thoroughfare." There is no information on the site plan which attempts to locate the right-of-way on the prop-

erty. On 25 October 1979, the Town Council unanimously approved the Board's recommendation to approve VFW's site plan. VFW built the post home and has since used the property in accordance with its special use permit.

On 20 October 1989, the Town filed a complaint, declaration of taking, and notice of deposit in Wake County Superior Court, alleging that VFW, on 25 October 1979, had dedicated, for zero compensation, an 80 foot right-of-way on Maynard Road to the Town by virtue of VFW's obtaining a special use permit, and attempting to acquire an additional 20 feet by condemnation. VFW filed an answer and counterclaim, denying it dedicated any land to the Town and alleging it intended only to reserve and agree not to build on the 80 foot area in question.

A non-jury trial was held in which Beck testified that during the site plan approval process in 1979 and 1980, Reedy Creek Road was the only road that served the VFW property, VFW was not aware of the Town's thoroughfare plan at that time, and VFW "had no agreement" with the Town "regarding the right-of-way for Maynard Road at the time of the site plan approval process." Beck also stated that VFW did not "sign anything conveying an interest in its property to the town." As "VFW's representative for the site plan approval process," Beck "was never authorized by any member or officer" of VFW to agree to donate the Maynard Road right-of-way to the Town at no cost. The right-of-way was included on the site plan to show that the area "would be kept open but never given to the town," and there has been "no . . . road [easement] . . . that had been recorded." Furthermore, "that word dedication was not discussed or explained when [VFW] went through that process of getting site plan approval." VFW, which had maintained the area reserved for the right-of-way since 1979, first learned the Town was claiming an interest in the Maynard Road right-of-way in 1988. The site plan that was ultimately approved included the Maynard Road thoroughfare because Beck "was told that it was only a proposal. It was—nothing was ever going to be done with it in the future, and that's why we said, hey, in that area we would reserve that area for the road. We didn't object to it, but we—we weren't going to give it away."

Mike Sorensen (Sorensen), the assistant planning director with the Town in 1979, testified that Maynard Road was on the Town's thoroughfare plan to serve traffic, and that through reviewing the meeting minutes from 13 August 1979, "the board of adjustment was

requiring dedication of a right-of-way as a condition for the issuance of the special use permit" to VFW because "it's tied into the thoroughfare plan," and there was indication at that meeting that VFW was aware of the thoroughfare plan. Sorensen stated that in 1979, when the site plan was approved, there was no metes and bounds location for Maynard Road, the Town "did not have a time schedule for that road," and he was "not aware" if the Town ever got anything in writing from VFW concerning the Maynard Road right-of-way. After Sorensen reviewed the minutes of the 15 October 1979 planning and zoning board meeting in which he indicated the proposed thoroughfare had been "set aside for the Maynard loop," he stated that the words set aside meant "dedicated for future use." He also testified that VFW used its property for post purposes for more than ten years before Maynard Road was built.

The trial court, in its 17 March 1993 order, made the following pertinent findings of fact:

> 6. As a condition to obtaining site plan approval, the VFW was required to sketch in on the site plan a proposed 80 foot wide corridor for the possible future extension of Maynard Road.
>
> 7. The VFW agreed that it would erect no improvements on the rear or easternmost portion of their property where this proposed corridor was located, and it did not do so. The showing of the proposed corridor on the VFW site plan was not a conveyance or dedication of the corridor to the Town. No metes and bounds description of the corridor was given.

The court concluded VFW never dedicated or conveyed any of its real property to the Town "for the Maynard Road Extension Project," and "[t]he acquisition of the entire 100 foot right of way for the Maynard Road Extension is a lawful taking by the Town of Cary for the full amount of which compensation must be paid to the VFW." The court then ordered the Town to compensate VFW for the entire right-of-way for the Maynard Road Extension running through VFW's property.

The issue presented is whether the description of the "80 foot proposed thoroughfare" on the VFW site plan is sufficient to constitute a dedication.

N.C. Gen. Stat. § 160A-381, which grants municipalities the power to place conditions on the issuance of special use permits, states that

"such conditions may include requirements that street and utility rights-of-way be dedicated to the public" "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community." N.C.G.S. § 160A-381 (1987). Pursuant to this statute, the Town enacted Section 11-25 which provides "[i]n the development of any property for which a site plan is required by Subsection (a) of this Section, the owner or developer shall be required to dedicate any additional right-of-way necessary to the width required by the Town thoroughfare plan for streets adjoining the property. . . ." Cary, North Carolina, Code § 11-25(d).

Assuming the constitutionality of the ordinance permitting the Town to require dedication of a right-of-way across the VFW property as a condition of obtaining a special use permit, *see* 6 *Powell, Law of Real Property* § 866.3[1] (1984) ("if applicant must donate property for a public use that bears no relationship to the benefit conferred on the applicant . . . there is a taking of property"), the Town's claim must nonetheless fail because it granted the special use permit without demanding, as a condition precedent, the dedication of the right-of-way. A dedication of a street can occur, in the context of this ordinance, only if the site plan contains an adequate description of the street. *See* 2 *Thompson on Real Property* § 369, at 465 (1961) (map must reflect both bearings and length of street); 23 *Am. Jur.* 2d *Dedication* § 39, at 36 (1983) (under ordinance requiring dedication, plat or other instrument must particularly describe and designate land proposed to be dedicated); *Farmville v. Monk & Co.*, 250 N.C. 171, 108 S.E.2d 479 (1959) (conveyance of land describing street as boundary without any reference to plat or map and without a street in existence at time of conveyance is insufficient to show dedication of any part of land as a street). An adequate description is one which is "either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers," *Duckett v. Lyda*, 223 N.C. 356, 358, 26 S.E.2d 918, 919 (1943); therefore, an indefinite description will suffice only "if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed." *Foreman v. Sholl*, 113 N.C. App. 282, 288, 439 S.E.2d 169, 173 (1994) (quoting 2 C.J.S. *Adverse Possession* § 108, at 802 (1972)). For example, a drawing which "does not have any ascertainable monuments, does not indicate the size of the tracts of land shown, does not indicate any courses and very few distances, and has no ascertain-

able beginning point" is not a sufficient description. *Id.* at 289, 439 S.E.2d at 174.

In this case, the site plan only contains two lines consisting of a series of dashes with no markings indicating distances or bearings, with the words "80 foot proposed thoroughfare" written between the two lines. The plan "does not have any ascertainable monuments," and there is no information attempting to locate the right-of-way on the property. Because of the insufficiency of the description of the proposed thoroughfare, the trial court did not err in determining that VFW did not dedicate any portion of its land to the Town.

Affirmed.

Chief Judge ARNOLD and Judge McCRODDEN concur.

STATE OF NORTH CAROLINA v. JIMMY DEAN ROTEN

No. 9323SC791

(Filed 7 June 1994)

1. **Criminal Law § 738 (NCI4th)— State's burden of proof—instruction prior to evidence not required**

A trial court is not required, after a jury has been empaneled but before evidence has been presented, to instruct the jury as to the State's burden of proof.

Am Jur 2d, Trial §§ 1077 et seq.

2. **Criminal Law § 762 (NCI4th)— reasonable doubt—moral certainty—instruction proper**

The trial court did not err by using the term "moral certainty" in its instruction to the jury concerning reasonable doubt.

Am Jur 2d, Trial § 832.

3. **Burglary and Unlawful Breakings § 151 (NCI4th)— first-degree burglary—instructions—felonious intent—felony not named in indictment**

The trial court did not err by instructing the jury that it could find defendant guilty of first-degree burglary if it found that he

broke into the victim's home with the intent to commit a second-degree sexual offense when the indictment alleged that defendant intended to commit a first-degree sexual offense since the indictment is required to allege only that defendant intended to commit a felony, and any language in the indictment which states with specificity the felony defendant intended to commit is surplusage and may be disregarded.

Am Jur 2d, Burglary § 69.

Appeal by defendant from judgment entered 4 February 1993 in Wilkes County Superior Court by Judge Julius A. Rousseau, Jr. Heard in the Court of Appeals 12 April 1994.

Michael F. Easley, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Herbert H. Pearce for defendant-appellant.

GREENE, Judge.

Jimmy Dean Roten (defendant) appeals from judgments and commitments entered upon jury verdicts finding him guilty of attempted second degree sexual offense and first degree burglary.

Defendant was indicted and tried for first degree sexual offense and first degree burglary. The burglary indictment alleged that defendant unlawfully, willfully, and feloniously during the nighttime did break and enter the occupied dwelling house of Ms. Betty Jean Wyatt "with the intent to commit a felony therein: first degree sexual offense."

At trial, the trial court did not give a preliminary instruction concerning the State's burden of proof. The victim, Ms. Wyatt, defendant's ex-mother-in-law, testified that on 6 April 1992, she lived in a house trailer with her daughter, Janie Roten, who was defendant's ex-wife, and two grandchildren. Ms. Wyatt testified that between 9:30 and 10:30 P.M., Janie Roten left the house trailer, that defendant soon thereafter entered the house trailer, grabbed her from behind, tore off part of her clothing, pulled down her pants, forced her to lay over the back of a couch, and touched her rectum with his penis but did not make penetration. Ms. Wyatt then testified that defendant left the house trailer shortly before Janie Roten returned home.

At the close of the State's evidence, the first degree sexual offense charge was dismissed and the case proceeded on the lesser included offense of second degree sexual offense.

The trial court charged the jury concerning the State's burden of proof as follows:

> Under our system of justice, when a Defendant pleads not guilty, he is not required to prove his innocence. He is presumed to be innocent. The State of North Carolina must prove to you that the Defendant is guilty beyond a reasonable doubt.
>
> Now, a reasonable doubt is not a vain, imaginary, or fanciful doubt, but it's a sane and rational doubt. It's a doubt based on common sense.
>
> When it's said that you, the jury, must be satisfied of the Defendant's guilt beyond a reasonable doubt, it is meant that you must be fully satisfied, or entirely satisfied, or satisfied to a moral certainty of the truth of the charges.
>
> If, after considering, comparing, and weighing the evidence, or lack of evidence, the minds of the jury, are such, the minds of the jury are in such, are in such a condition that you cannot say that you have an abiding faith to a moral certainty in the Defendant's guilty [sic], then you have a reasonable doubt. Otherwise, not.

The trial court dismissed the second degree sexual offense charge and instead instructed the jury as to attempted second degree sexual offense. The trial court further instructed the jury that it could find defendant guilty of first degree burglary if, in addition to the other elements of the offense, it found that defendant "at the time of the breaking and entering, . . . intended to commit a second degree sexual act."

The issues presented are whether the trial court erred in (I) failing to give a preliminary instruction concerning the State's burden of proof; and (II) instructing the jury that it could find defendant guilty of first degree burglary if it found he broke into the victim's home with the intent to commit a second degree sexual offense when the indictment alleged defendant possessed the intent to commit a first degree sexual offense.

I

[1] Defendant appears to argue that a trial court is required, after a jury has been empaneled, but before evidence has been presented, to instruct the jury as to the State's burden of proof. Defendant cites no

authority for this position and we have found none. The trial court is certainly permitted to give a preliminary instruction regarding the State's burden of proof before evidence is presented, but it is not required to do so.

[2] Defendant cites *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976) for the proposition that a preliminary "erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point." While this proposition is correct, *Harris* is not applicable to the present case because in *Harris* the trial court gave conflicting instructions to the jury. In this case, the trial court gave no preliminary instructions concerning the State's burden of proof, and properly instructed the jury on this point during the final instructions. Accordingly, conflicting instructions were not given. We also reject defendant's argument that the trial court violated *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990) by using the term "moral certainty" in its instruction to the jury concerning reasonable doubt. This Court recently upheld as proper a jury instruction identical to that given in this case. *State v. Long*, 113 N.C. App. 765, 773, 440 S.E.2d 576, 580 (1994); *see also State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

II

[3] Defendant next argues that the trial court erred in instructing the jury that it could find defendant guilty of first degree burglary if it found that defendant entered the victim's dwelling with the intent to commit a second degree sexual offense when the indictment alleged defendant possessed the intent to commit a first degree sexual offense.

The State, in an indictment for burglary, is not required to specify the felony the defendant intended to commit when he broke into the dwelling house. *State v. Worsley*, 336 N.C. 268, 280, 443 S.E.2d 68, 73-74 (1994). *Worsley*, however, only removed the requirement of specifying in an indictment for first degree burglary the felony the defendant intended to commit; *Worsley* did not remove the State's burden of proving at trial that the defendant possessed the intent to commit a specific felony at the time of the breaking and entering into the dwelling house. *See State v. Warren*, 313 N.C. 254, 262, 328 S.E.2d 256, 262 (1985) (essential element of first degree burglary is that defendant possess the intent to commit a felony at the time of the breaking and entering). Accordingly, the State, at trial, must present substantial evidence that the defendant intended to commit a partic-

ular felony in order to have the case submitted to the jury. If the State does present substantial evidence that the defendant possessed the intent to commit a particular felony, the trial court is required to instruct the jury that it may convict the defendant of first degree burglary if the jury finds the defendant possessed the intent to commit that particular felony. *See State v. Austin*, 320 N.C. 276, 297, 357 S.E.2d 641, 654, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987) (trial court required to instruct upon matters arising upon the evidence at trial).

We reject defendant's argument that when, as here, the indictment alleges that a defendant possessed the intent to commit a specified felony, the State must prove that the defendant possessed the intent to commit the specified felony. Because the State is only required in the indictment to allege that the defendant intended to commit *a* felony, *Worsley*, slip. op. at 14, any language in the indictment which states with specificity the felony defendant intended to commit is surplusage which may properly be disregarded. *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 745 (1985).

In this case, the indictment alleged that defendant unlawfully, willfully, and feloniously during the nighttime did break and enter the occupied dwelling house of Ms. Wyatt "with the intent to commit a felony therein: first degree sexual offense." The language following the colon is surplusage and may be disregarded. *Freeman*, 314 N.C. at 436, 333 S.E.2d at 745. During the trial, the State was required to prove that defendant possessed the intent to commit some felony at the time he broke and entered Ms. Wyatt's dwelling house. The State did this by presenting substantial evidence from which the jury could find that defendant intended to commit a second degree sexual offense at the time he broke and entered the dwelling house. *See State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (jury may infer defendant's intent at time of breaking and entering from defendant's actions after entering the dwelling house). There being substantial evidence of the felony which defendant intended to commit, the trial court was required to instruct the jury that it could convict defendant of first degree burglary if it found that he possessed the intent to commit a second degree sexual offense at the time he broke and entered Ms. Wyatt's dwelling house.

We have reviewed defendant's remaining assignments of error and hold that there was no prejudicial error for the following reasons: assignments of error numbers 2 and 6—defendant failed to

make an offer of proof regarding what the answers to the objectionable questions would have been; assignments of error numbers 3, 9, 10, and 12—the evidence and testimony which defendant sought to introduce was later introduced; assignments of error numbers 4 and 8—the trial court's limiting instruction was sufficient; assignment of error number 5—the testimony was admissible for purposes of corroborating Ms. Wyatt's testimony and defendant failed to request a limiting instruction, *see State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989); assignment of error number 7—the testimony was admissible as a statement made for purposes of medical diagnosis or treatment, see N.C.G.S. § 1A-1, Rule 803(4); assignment of error number 11—defendant failed to ask for a limiting instruction; assignment of error number 13—inquiry into specific instances of conduct that would rebut earlier reputation or opinion evidence offered by the defendant is admissible, *see State v. Cummings*, 332 N.C. 487, 507, 422 S.E.2d 692, 703 (1992) and N.C.G.S. § 8C-1, Rule 405(a) (1992); assignment of error number 15—defendant failed to object to the charge before the jury retired to consider its verdict, see N.C. R. App. P. 10(b)(2).

No error.

Chief Judge ARNOLD and Judge McCRODDEN concur.

HAROLD F. THARRINGTON, EXECUTOR OF THE ESTATE OF DORIS H. WILLIAMS v. STURDIVANT LIFE INSURANCE COMPANY

No. 9323SC774

(Filed 7 June 1994)

Insurance § 254 (NCI4th)— insurance application—material misrepresentation

In an action to recover on a credit life and disability insurance policy issued by defendant, the trial court properly entered summary judgment for defendant where defendant satisfied its burden of showing as a matter of law that decedent's application for insurance contained a material misrepresentation that she had not consulted a doctor or been treated for a condition of the lungs at the time she signed; decedent, in fact, had consulted a

physician and was being treated for pulmonary fibrosis; decedent was not aware of the diagnosis until after she signed, but her knowledge was not required under the law; and this material misrepresentation entitled plaintiff to cancel the policy.

Am Jur 2d, Insurance §§ 1055 et seq., 1067 et seq.

Insured's lack of knowledge of adverse health condition as affecting applicability of "good health" clause in insurance policy. 30 ALR3d 389.

Appeal by plaintiff from judgment entered 29 June 1993 by Judge Julius A. Rousseau in Yadkin County Superior Court. Heard in the Court of Appeals 22 March 1994.

Franklin Smith for plaintiff-appellant.

E. James Moore for defendant-appellee.

MARTIN, Judge.

Plaintiff, the Executor of the Estate of Doris H. Williams, brought this action to recover upon a credit life and disability insurance policy issued by defendant. The record discloses that on 6 October 1989, the decedent, Doris H. Williams, entered into a conditional sales contract with Gene McNeil Autoworld, Inc., for the purchase of a 1987 Buick Skylark. Concurrent with this purchase, decedent made an application to defendant, Sturdivant Life Insurance Company, for a credit life, accident and health insurance policy. In her policy application, dated 6 October 1989, decedent signed a statement that she had not, within the preceding twelve months, been consulted or treated for certain enumerated health conditions. The policy application was accepted by defendant with coverage effective from the date of purchase.

On 1 August 1989, prior to her purchase of the automobile, decedent sought treatment from Dr. Paul H. Gulley, her family physician, for a persistent cough which had begun about a month earlier. Initially, Dr. Gulley thought decedent's cough might be due to allergies, but when it did not resolve he ordered a chest x-ray. In early September, Dr. Gulley referred decedent to Dr. James C. Martin, who diagnosed her as suffering from rhinosinusitis with post nasal drip and cough.

Decedent's cough did not improve and she again consulted with Dr. Gulley on 9 October 1989. On 18 October 1989, twelve days after she purchased the automobile and applied for the credit life and health insurance, decedent was seen by Dr. Villeponteaux, a pulmonary specialist. Dr. Villeponteaux diagnosed decedent with pulmonary fibrosis based on his physical examination and x-rays taken that day, as well as x-rays which had been taken one week and seven weeks prior thereto. He scheduled decedent for a lung biopsy on 30 October 1989, which decedent postponed.

Decedent's symptoms worsened and she was hospitalized 27 November 1989 and underwent a bronchoscopy on 28 November 1989 and a bone scan on 8 December 1989. Based on the results of these tests, Dr. David F. Jones and Dr. David D. Hurd diagnosed decedent with advanced stage large cell lung cancer and began treating her with chemotherapy.

On 28 November 1989, decedent filed a statement of accident or sickness with defendant in which she claimed that she had been unable to work since 1 November 1989. She requested defendant to make payments on her vehicle in accordance with the insurance policy. Dr. Gulley certified that she was disabled from 1 November 1989 due to pulmonary fibrosis which had begun in the summer of 1989, and for which he had first been consulted on 1 August 1989. After reviewing decedent's medical records, defendant cancelled decedent's policy due to her failure to disclose on her insurance application that she had consulted or been treated for conditions of the lungs. In addition, defendant advised decedent that her condition was a pre-existing condition for which coverage was excluded by the policy. Defendant fully refunded decedent's premium.

Decedent died of lung cancer in April 1990. The executor of her estate brought this suit alleging wrongful termination of the insurance policy. Defendant answered, alleging that it had the right to cancel the policy based on a material misrepresentation made in the policy application and the right to deny coverage under the pre-existing condition clause of the policy. From a judgment granting defendant's motion for summary judgment, plaintiff appealed. We affirm.

G.S. § 1A-1, Rule 56(c) provides that summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Pembee Mfg. Corp. v. Cape*

Fear Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 352 (1985); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

> In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. . . . Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim [citation omitted], *or cannot surmount an affirmative defense which would bar the claim.* [Citation omitted.]

Ward v. Durham Life Insurance Co., 325 N.C. 202, 209-10, 381 S.E.2d 698, 702 (1989), *citing Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Defendant argues that decedent's application contained a material misrepresentation which entitles defendant to cancel the policy. If true, this would constitute an affirmative defense to plaintiff's claim. Thus, we must determine whether defendant has satisfied its burden of showing as a matter of law the existence of this affirmative defense and, if so, whether plaintiff has forecast evidence which, if believed by a jury, would overcome it.

On the Insurance Application and Authorization form, decedent signed the following statement:

> To the best of my knowledge and belief, I have not been consulted or treated during the last twelve months for: aids related complex, acquired immunodeficiency syndrome, cancer, diabetes or conditions of the heart, circulatory system, high blood pressure, lungs, brain, liver, kidneys or back.

Defendant contends that since decedent was being treated for pulmonary fibrosis, a condition of the lungs, her signature on this statement constituted a misrepresentation.

In North Carolina, statements made in an application of insurance are deemed to be representations rather than warranties. G.S. § 58-3-10 states:

> All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy.

Thus, false statements will avoid a policy if fraudulently made, irrespective of materiality; however, absent fraud, the falsity of an applicant's answer must be material to the risk in order to warrant avoidance of the policy on that ground. See 43 Am Jur 2d, Insurance, §§ 1035, 1036 and 1055. There is no evidence in this case that decedent fraudulently signed the statement. Since fraud is not claimed, the two-part question before us is whether defendant has proved that decedent made a material and false representation on her application. A life insurance contract may be avoided by showing that the insured made representations which were material and false. *Hardy v. Integon Life Ins. Corp.*, 85 N.C. App. 575, 355 S.E.2d 241, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 85 (1987).

The first part of the question is whether decedent's representation that she had not been consulted or treated for a condition of the lungs at the time she signed the application was material. Our Supreme Court has held that a representation in an application for an insurance policy is material "if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Goodwin v. Investors Life Insurance, North America*, 332 N.C. 326, 331, 419 S.E.2d 766, 769 (1992), *quoting Tolbert v. Insurance Co.*, 236 N.C. 416, 418-19, 72 S.E.2d 915, 917 (1952). (Emphasis omitted). While materiality is generally a question of fact for the jury, *Michael v. St. Paul Fire & Marine Ins. Co.*, 65 N.C. App. 50, 308 S.E.2d 727 (1983), it is clearly the law in North Carolina that, in an application for a life insurance policy, written questions and answers relating to health are deemed material as a matter of law. *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E.2d 614 (1961); *Jones v. Insurance Co.*, 254 N.C. 407, 119 S.E.2d 215 (1961); *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. 278, 77 S.E.2d 692 (1953); *Tolbert v. Insurance Co., supra; Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E.2d 830 (1939); *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E 496 (1937); *Gardner v. Insurance Co.*, 163 N.C. 367, 79 S.E. 806 (1913); *In Re Appeal By McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993). Therefore, decedent's representation that she had not been treated or consulted in the last twelve months for a condition of the lungs is unquestionably material in this case.

The second part of the question is whether the statement was false. Plaintiff admits that pulmonary fibrosis is a condition of the lungs; the issue is whether decedent had been consulted or treated for pulmonary fibrosis in the twelve months prior to 6 October 1989,

the date upon which she signed the insurance application. Decedent was treated by several doctors over a period in excess of two months prior to the date of the application for symptoms including a persistent cough, discomfort in breathing, and occasional wheezing and asthmatic symptoms. Dr. Gulley, decedent's primary physician, stated in his affidavit that he treated her from August 1, 1989 until November 7, 1989 "for a continuing problem which she was then having with a chronic cough" and that his "diagnosis of [decedent's] disease was pulmonary fibrosis which is a condition of the lung." Decedent also consulted Dr. Villeponteaux, a pulmonary specialist. Although decedent's first appointment with Dr. Villeponteaux was twelve days after the date of the application, his report indicates that decedent first developed the cough in June, 1989 and that chest x-rays taken five weeks prior to the date of the application revealed "extensive fibrosis involving both lungs."

Plaintiff argues, however, that decedent was unaware of the diagnosis of pulmonary fibrosis at the time she made the representation. Considered in the light most favorable to plaintiff, the evidence suggests that decedent may have been first advised of the formal diagnosis of pulmonary fibrosis after she had made the application for insurance. However, decedent's knowledge of the condition is not required under the law. In this jurisdiction it is well settled that a misrepresentation of a material fact, or the suppression thereof, in an application for insurance, will avoid the policy "even though the assured be innocent of fraud or an intention to deceive or to wrongfully induce the assurer to act, or whether the statement be made in ignorance or good faith, or unintentionally." *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. at 282, 77 S.E.2d at 695. (Citations omitted.)

Plaintiff produced no evidence to contradict the showing by defendant that decedent had been medically treated for a condition of the lungs within twelve months prior to her application for insurance. Thus, there is no genuine issue of fact as to either the falsity or materiality of decedent's statement to the contrary on the policy application and defendant was entitled, as a matter of law, to judgment in its favor. Having concluded that defendant was entitled to cancel the policy, we need not decide whether decedent's disability was due to a pre-existing condition excluded from coverage under the terms of the policy.

Affirmed.

Judges EAGLES and McCRODDEN.

IN THE MATTER OF: THE APPEAL OF R. W. MOORE EQUIPMENT COMPANY, INC., FROM THE DISCOVERY OF CERTAIN PERSONAL PROPERTY BY WAKE COUNTY FOR 1988, 1989, 1990, AND 1991

No. 9310PTC959

(Filed 7 June 1994)

1. **Taxation § 65 (NCI4th)— equipment rented subject to sale—no tax exempt status**

There was no merit to taxpayer's contention that its equipment did not lose its tax exempt status merely because it was rented to third parties because taxpayer retained the right to sell the property to another party, since the language of N.C.G.S. § 105-273(8a) requires that the goods be held by merchants; the equipment here was not held by taxpayer but by the lessees of the equipment; it is the use to which the property is dedicated, rather than the nature or characteristics of the owning entity, which ultimately determines the property's exemption status; and the evidence showed that the equipment of taxpayer in question was primarily used for rental purposes.

Am Jur 2d, State and Local Taxation §§ 332 et seq.

2. **Taxation § 66 (NCI4th)— equipment treated as income producing property and not inventory—no tax exclusion for rented equipment**

The North Carolina Property Tax Commission properly found that taxpayer's treatment of equipment as income producing property rather than inventory rendered the equipment used for rental purposes ineligible for tax exclusion because its use and consumption as income producing property was incompatible with its character as inventory.

Am Jur 2d, State and Local Taxation §§ 332 et seq.

Appeal by R. W. Moore Equipment Company from a Final Decision of the North Carolina Property Tax Commission entered 5 April 1993. Heard in the Court of Appeals 11 May 1994.

Poyner and Spruill, by Thomas L. Norris, Jr. and Thomas H. Cook, Jr. for appellant.

Wake County Attorney's Office, by Deputy County Attorney Shelley T. Eason for appellee Wake County.

JOHNSON, Judge.

The facts of this appeal are as follows: Taxpayer, R. W. Moore Equipment Company, Inc. (hereafter, Taxpayer), is challenging the denial of tax exclusions for certain items of heavy equipment rented to third parties during the tax years 1988 to 1991.

Taxpayer is a wholesaler and retailer of new and used John Deere heavy equipment. In addition to selling John Deere equipment, Taxpayer also rents equipment under week to week or month to month rental agreements. All of Taxpayer's rental agreements provide that Taxpayer may withdraw the equipment from the renter at any time and sell it to another party. It is estimated that Taxpayer exercises this contractual right approximately 3 to 6 times per year.

In October of 1991, the Wake County Assessor (hereafter, Assessor), pursuant to North Carolina General Statutes § 105-312(c) (1992), issued a notice of discovery of personal property taxes for the tax years 1987 through 1991 to Taxpayer. The notice stated that the Assessor had determined that Taxpayer was liable for property taxes on "Rental Equipment" discovered by the County. On 18 November 1991, Taxpayer filed written exception to the discovery of the property. A hearing on the matter was held before the Wake County Tax Committee, acting by appointment of the Wake County Commissioners. By letter dated 6 February 1992, the Wake County Board of Commissioners affirmed the discovery. On 27 February 1992, Taxpayer timely appealed the discovery to the North Carolina Property Tax Commission (hereafter, the Commission). The Commission heard the matter on stipulated facts, documentary evidence and testimony and issued a decision dated 5 April 1993 affirming the County's decision as to the taxability of Taxpayer's property. From the decision of the Commission, Taxpayer appealed to our Court.

By Taxpayer's first assignment of error, Taxpayer contends that the Commission erred in holding, as a matter of law, that Taxpayer's property does not constitute goods held for sale while rented to third parties.

The scope of appellate review of cases from the Commission is set out by North Carolina General Statutes § 105-345.2(1992), which in pertinent part provides:

> (a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure.
>
> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings[.] . . .

In applying this "whole record test" to determine whether the record fully supports the Commission's decision, this Court must evaluate whether the Commission's decision is supported by substantial, competent and material evidence. Where the Commission's findings are supported by such evidence, they are binding on appeal. *In re Forestry Foundation*, 296 N.C. 330, 250 S.E.2d 236 (1979).

North Carolina General Statutes § 105-274(1992) provides that all property located within North Carolina, both real and personal, is subject to taxation unless expressly excluded or exempt from taxation by a statutory or constitutional provision. North Carolina General Statutes § 105-275(34) (1992) expressly excludes from taxation, "[i]nventories owned by retail and wholesale merchants." "Inventories" is defined by North Carolina General Statutes § 105-273(8a) (1992) as "goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and contractors[.] . . ."

[1] Taxpayer contends that the property in question does not lose its exemption status merely because it is rented to third parties because Taxpayer retains the right to sell the property to another party. Taxpayer argues that the relevant statute only requires that Taxpayer's equipment be held for sale in the regular course of business. Therefore, because the equipment in question was held primarily for the purpose of sale and marketed for sale, even while being rented, the equipment was held for sale within the meaning of North Carolina

General Statutes § 105-273(8a) and exempt from taxation. We disagree for two reasons.

We disagree, first, because of the language in the relevant statute. North Carolina General Statutes § 105-273(8a) requires that the "goods be **held** for sale by manufacturers, retail and wholesale merchants, and contractors[.] . . ." (Emphasis added.) The term "held" has not been defined by statute or judicial decision; therefore, we look to its natural, approved and recognized meaning. *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E.2d 433 (1951). Webster's Third New International Dictionary primarily defines "hold" as: "to retain in one's keeping or maintain possession of." Webster's Third New International Dictionary 1078 (3rd ed. 1966).

Utilizing this definition, we find that the equipment in question was not "held" by Taxpayer, but rather the lessee of the equipment. While Taxpayer argues that it "held" the equipment because it retained the right to repossess the equipment and sell it to another at any time, the equipment was in the lessee's possession until Taxpayer exercised its right to repossess the equipment. Additionally, Taxpayer's power to sell the leased equipment to others is limited by Taxpayer giving the present renter the option to purchase the equipment prior to the equipment being sold to a third party. As such, we cannot find that the equipment in question was "held" by Taxpayer when rented to third parties.

We disagree secondly, because of the previous holdings of this Court that it is the use to which the property is dedicated, rather than the nature or characteristics of the owning entity which ultimately determines the property's exemption status. *In re Wake Forest University*, 51 N.C. App. 516, 277 S.E.2d 91, *disc. review denied*, 303 N.C. 544, 281 S.E.2d 391 (1981). (Citations omitted.) While Taxpayer contends that it holds all its equipment for the purpose of sale, the evidence shows that the equipment of Taxpayer in question is primarily used for rental purposes. We, therefore, agree with the Commission that Taxpayer, by renting the equipment to third parties, is not entitled to the inventory tax exclusion for the rented equipment.

[2] By Taxpayer's second assignment of error, Taxpayer contends that the Commission erred in failing to hold that in order to qualify for the inventory exclusion, Taxpayer need not exclusively hold the property for sale.

Taxpayer argues that implicit in the Commission's decision to tax the property in question is the assumption that while Taxpayer's equipment is being rented, it cannot be held for sale and thus cannot qualify as nontaxable inventory. In essence, Taxpayer contends the Commission has placed an exclusive use requirement in the statute.

We agree with the Commission that Taxpayer's use of the property in question disqualifies the property from exemption. The record reflects that defendant treats the equipment as income producing property rather than inventory for financial reporting purposes, depreciating only that part of its inventory of new and used equipment that it uses for rental purposes. We, therefore, agree with the Commission's finding that this treatment renders the equipment used for rental purposes ineligible for tax exclusion because its use and consumption as income producing property is incompatible with its character as inventory. The Commission merely recognized that allowing inventory to be used for income producing purposes would be inconsistent with the general definition of inventory as defined by North Carolina General Statutes § 105-273(8a); the Commission did not find that the equipment in question needs to be exclusively held for sale. However, we do not believe the Commission erred in not holding that in order to qualify for the inventory exclusion, Taxpayer need not exclusively hold the property for sale.

By Taxpayer's final assignment of error, Taxpayer contends that the Commission erred in comparing the tax treatment of Taxpayer to the property tax treatment of equipment leasing companies such as Hertz Equipment Rental Corporation and Rex Rentals, Inc.

We do not find that the Commission erred in comparing Taxpayer to the above named rental companies. In essence, Taxpayer is in direct competition with the rental companies, since Taxpayer does not require that its lessees purchase the equipment. While Taxpayer contends that it should not be compared with such companies because such companies are in the primary business of leasing and Taxpayer is in the primary business of selling, an individual can lease from Taxpayer just as easily as it can from the comparison companies. We do not feel that Taxpayer's right to repossess the equipment is dispositive. Accordingly, we overrule Taxpayer's final assignment of error.

The decision of the Commission is affirmed.

Judges WELLS and JOHN concur.

KENNETH ALLEN ANDERSON PLAINTIFF v. CURTIS DALE AUSTIN, RONALD AUSTIN, AND FRANCES AUSTIN, DEFENDANTS

No. 9315SC648

(Filed 7 June 1994)

1. Automobiles and Other Vehicles § 564 (NCI4th)— automobile accident—willful and wanton conduct by plaintiff passenger—sufficiency of evidence

In an action to recover for injuries sustained in an automobile accident, the trial court properly instructed on and submitted to the jury the issue of willful or wanton conduct on the part of plaintiff where the evidence tended to show that plaintiff routinely drank beer, smoked marijuana, and then either drove an automobile or rode with a driver who had engaged in that same behavior; on the night of the accident both plaintiff and the driver had been drinking, and the driver had a blood alcohol level of .234; and plaintiff knew the driver's license had been revoked for driving while impaired.

Am Jur 2d, Automobiles and Highway Traffic § 423.

2. Automobiles and Other Vehicles § 564 (NCI4th)— plaintiff's use of alcohol, marijuana, cars—evidence of habit—admissibility to show willful and wanton conduct

In an action to recover for injuries sustained in an automobile accident, evidence of plaintiff's habits with regard to alcohol, marijuana, and automobiles was relevant to defendants' claim of willful or wanton conduct on the part of plaintiff, and the trial court did not abuse its discretion in concluding that the relevancy of the evidence was not substantially outweighed by the danger of unfair prejudice.

Am Jur 2d, Automobiles and Highway Traffic § 423.

Appeal by plaintiff from order and judgment filed 30 December 1992 and appeal by defendants Curtis Dale Austin and Frances Austin from ruling denying motions for directed verdict by Judge J. Milton Read, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 10 March 1994.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler and Laurel E. Solomon, for plaintiff.

Carruthers & Roth, P.A., by Kenneth R. Keller and John M. Flynn, for defendant Curtis Dale Austin.

Henson Henson Bayliss & Sue, by Walter K. Burton and Brian A. Buchanan, for defendants Ronald Austin and Frances Austin.

LEWIS, Judge.

Plaintiff commenced this action to recover for injuries sustained as a result of an automobile accident. Plaintiff alleged that he was a passenger in the car driven by defendant Curtis Dale Austin (hereinafter "Curtis"). Plaintiff sought to hold Ronald and Frances Austin, the parents of Curtis, liable under the family purpose doctrine and under the theory of negligent entrustment. The trial court directed a verdict in favor of defendant Ronald Austin and submitted the case to the jury. The jury found that Curtis negligently drove the car and that his conduct was willful or wanton. In addition, the jury found that plaintiff was contributorily negligent and that his conduct was also willful or wanton, and thus awarded plaintiff no damages. Accordingly, the jury did not address the issues of family purpose and negligent entrustment. From the order granting defendant Ronald Austin's motion for directed verdict, and from the judgment, plaintiff appeals. From rulings denying Curtis and Frances Austin's motions for directed verdict, defendants Curtis and Frances Austin appeal.

The evidence at trial tended to show that on the evening of 28 September 1990 at approximately 10:30 p.m., Curtis drove to John Michael Mitchell's (hereinafter "John") home in a 1974 Oldsmobile, which was titled in Frances Austin's name. When Curtis arrived, John and plaintiff were in the backyard drinking beer. Shortly thereafter, the three went to a nearby convenience store to purchase more beer, with Curtis driving plaintiff's car. They then returned to John's house and drank the beers. When they had finished all the beer, they went to the store to purchase more beer. On this occasion, Curtis was driving the 1974 Oldsmobile. As they left the store, Curtis was driving, John was in the passenger's seat, and plaintiff was in the back seat. Thereafter, at approximately 1:20 a.m., the car left the roadway and crashed, injuring all three men.

Medical testimony at trial showed that at the time of the accident, Curtis' blood alcohol level was approximately .234, and plain-

tiff's was between .11 and .13. Furthermore, urine tests of both plaintiff and Curtis revealed the presence of marijuana. Curtis testified, over plaintiff's objections, that he, John, and plaintiff would regularly meet at John's house to drink beer and smoke marijuana, and then drive in one of their cars. Curtis also testified, and plaintiff denied, that plaintiff knew that Curtis' driver's license had been revoked, and as of the date of the accident was still revoked, for driving while impaired.

[1] Plaintiff's first contention on appeal is that the trial court erred in submitting to the jury the issue of plaintiff's willful or wanton conduct. Plaintiff argues that his conduct amounted to no more than simple contributory negligence, and therefore an instruction on a greater degree of culpability was improper. We disagree.

Plaintiff bases his argument on the holdings of *Pearce v. Barham*, 271 N.C. 285, 156 S.E.2d 290 (1967) and similar cases, which have stated that where the driver of a vehicle engages in willful or wanton conduct, the mere failure of the passenger to protest or remonstrate, or to ask the driver to stop and let him out, amounts to no more than simple contributory negligence, and will not bar recovery against the driver. However, in the present case, there was evidence tending to show that plaintiff did more than merely fail to protest or remonstrate, and that his actions rose to the level of willful or wanton conduct.

An act is willful when it is done purposely and deliberately in violation of the law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *King v. Allred*, 76 N.C. App. 427, 431, 333 S.E.2d 758, 761, *disc. review denied*, 315 N.C. 184, 337 S.E.2d 857 (1985). An act is wanton when it is done of wicked purpose, or when it is done needlessly, with reckless indifference to the rights of others. *Id.* at 432, 333 S.E.2d at 761.

It is the duty of the trial court to instruct the jury on the law with regard to every substantial feature of the case. *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 448, 386 S.E.2d 76, 79 (1989), *disc. review on additional issues denied*, 326 N.C. 363, 389 S.E.2d 811, *aff'd per curiam*, 327 N.C. 464, 396 S.E.2d 323 (1990). The instructions must be based on evidence, which when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. *Id.* at 448-49, 386 S.E.2d at 79.

In the instant case, the evidence, when viewed in the light most favorable to defendants, tended to show that plaintiff routinely drank beer, smoked marijuana, and then either drove an automobile or rode with a driver who had engaged in that same behavior. On the night of the accident, both plaintiff and Curtis had been drinking, and had gone to the store twice for more beer. Curtis' blood alcohol level at the time of the accident was approximately .234. Plaintiff's expert testified that at such a level of intoxication, Curtis would be flush-faced, his pupils would be dilated, his eyeballs would move rapidly, he would stagger when turning, and his speech would be thick. Furthermore, plaintiff knew that Curtis' driver's license had been revoked for driving while impaired, yet he still allowed Curtis to drive the car in which he was a passenger. We conclude that the jury could reasonably find that plaintiff acted knowingly and of set purpose, and that his behavior indicated a reckless disregard for his own safety and the safety of others. Accordingly, the trial court properly instructed on, and submitted to the jury, the issue of willful or wanton conduct on the part of plaintiff.

[2] Plaintiff's next contention on appeal is that the trial court erred in admitting the testimony relating to his prior course of conduct involving alcohol, marijuana, and automobiles. The trial court admitted such testimony under Rule 406 of the Rules of Evidence, which provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

N.C.G.S. § 8C-1, Rule 406 (1992). Plaintiff argues that the evidence was inadmissible because evidence of alcohol use on a prior occasion is not relevant to the issue of whether a person was drinking on the date in question, and that if it was relevant in the instant case, any relevance was substantially outweighed by the danger of unfair prejudice.

We first note that the habit evidence in the present case was not admitted to prove that plaintiff was drinking on the night in question. The theory advanced at trial by defendants was that plaintiff had a habit of engaging in the above-described behavior, and that his conduct on the night in question was willful or wanton, in conformity with the habit. That is, the evidence showed that plaintiff was taking

the same risk on the night in question that he habitually took. The more often plaintiff took this risk, the greater the knowledge he had of the dangers inherent in taking the risk. And, knowledge of the dangers involved, together with an intentional or reckless disregard of those dangers, tends to show that his conduct was willful or wanton. We agree with defendants' theory of admissibility and conclude that the evidence of habit was relevant to defendants' claim of willful or wanton conduct on the part of plaintiff, and that the trial court did not abuse its discretion in concluding that the relevance of the evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court properly admitted the evidence.

Plaintiff also argues that the trial court erred in granting defendant Ronald Austin's motion for a directed verdict and in excluding testimony regarding Ronald Austin's maintenance of automobile insurance. However, the jury found that plaintiff's conduct was willful or wanton, barring his recovery, and thus did not have to reach the issues regarding the liability of the parents of Curtis Austin. Therefore, because we find no error in the judgment of the trial court, we need not address the issues regarding the liability of Ronald Austin.

Defendants Curtis and Frances Austin have also appealed, arguing that the trial court erred in denying their motions for directed verdict. Because we find no error in the judgment of the trial court, which was in favor of defendants and which dismissed plaintiff's claims, we need not address Curtis and Frances Austin's appeals.

For the reasons stated, we conclude that the trial court committed no error.

No error.

Chief Judge ARNOLD and Judge COZORT concur.

WIKE v. WIKE

[115 N.C. App. 139 (1994)]

TERESA T. WIKE v. EDWIN WAYNE WIKE

No. 9325SC990

(Filed 7 June 1994)

Partnership § 8 (NCI4th)— former husband and wife as business partners—existence of partnership—sufficiency of evidence

The evidence was sufficient to support the verdict that plaintiff and defendant were equal partners in a landscape business where it tended to show that the business was run from the parties' home; it was through plaintiff's efforts that the business was able to be initially capitalized; plaintiff handled most of the financial affairs of the business; plaintiff purchased equipment used in the landscaping business with funds from her personal account and paid for some of the debts of the business from her personal account; and plaintiff never received a salary for her services but systematically wrote checks from the business account for her personal as well as joint debts. N.C.G.S. § 59-36.

Am Jur 2d, Partnership §§ 43 et seq.

Appeal by defendant from order entered 15 June 1993 *nunc pro tunc* for 13 April 1993 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 23 May 1994.

Todd A. Cline for plaintiff-appellee.

Wilson, Palmer, Lackey and Starnes, P. A., by W. C. Palmer, for defendant-appellant.

JOHNSON, Judge.

Plaintiff Teresa T. Wike filed a verified complaint against defendant Edwin Wayne Wike on 25 September 1991 seeking a decree of dissolution of a partnership she contended existed between the parties or, in the alternative, a judgment for $36,913.15 against defendant for monies due and owing. Defendant filed an answer on 26 September 1991 denying the allegations of plaintiff. The matter came on for hearing before a jury on 12 April 1993.

Evidence presented at trial showed that plaintiff and defendant were married on 21 July 1967 and were divorced on 4 August 1982. However, plaintiff and defendant continued to have a relationship

and began to reside together in 1984 or early 1985. After plaintiff and defendant lived together for some time, defendant discussed with plaintiff the idea of starting a landscaping business; at the time, defendant was employed as a truck driver operating a business known as "Bug Tussle." Plaintiff never shared in the income derived from Bug Tussle, or had independent signature authority to sign checks for the Bug Tussle account.

After the parties moved in together, they purchased a home in their joint names. At the time the parties decided to start this landscaping business, Wayne Wike Landscaping (WWL), defendant owed money to the Internal Revenue Service (IRS) as well as other parties. Defendant's indebtedness prohibited the parties from going into business immediately. However, plaintiff obtained two loans totalling $13,614.84 to satisfy the existing indebtedness to the IRS. Plaintiff repaid these loans from her own personal account.

The business was formed and operated from their home. Plaintiff handled most of the financial affairs of the business which consisted of writing checks, preparing and sending out bills, general banking, preparation of invoices, and preparation of the books for the bookkeeper. Defendant had little knowledge of the financial transactions of the business. Plaintiff executed promissory notes with defendant for monies which were used to acquire assets of the business. Plaintiff assisted with manual labor involved in the business by putting up straw, combining, setting up yards and shrubbery and blowing straw.

Plaintiff purchased equipment used in the landscaping business with funds from her personal account, and also paid for some of the debts of the business from her personal account. Plaintiff never received a salary for her services but systematically wrote checks from the WWL account for her personal as well as joint debts. Defendant never objected to plaintiff withdrawing funds from the WWL account for her own personal use. The parties ended their relationship in 1991.

During the course of the trial, defendant made a motion for a directed verdict at the close of plaintiff's evidence which the trial judge denied. Defendant also made a motion for a directed verdict at the close of all the evidence, which the trial court denied. The jury found that a partnership existed between plaintiff and defendant, and that plaintiff had a 50% interest in the partnership. The trial court entered a judgment declaring the parties to be equal partners in the business known as WWL, dissolving the partnership, and appointing

a receiver. From this order, defendant entered notice of appeal to our Court.

Defendant argues on appeal that the trial court erred in that the evidence as a matter of law was insufficient to support the verdict. We disagree.

North Carolina General Statutes § 59-36 (1989) states that "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." To prove existence of a partnership, an express agreement is not required; the intent of the parties can be inferred by their conduct and an examination of all of the circumstances. *Peed v. Peed*, 72 N.C. App. 549, 325 S.E.2d 275, *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). "A partnership is a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business." *Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 133, 298 S.E.2d 208, 211 (1982), *citing Johnson v. Gill*, 235 N.C. 40, 68 S.E.2d 788 (1952). "Our appellate courts have clearly held that co-ownership and sharing of any actual profits are indispensable requisites for a partnership." *Wilder v. Hobson*, 101 N.C. App. 199, 202, 398 S.E.2d 625, 627 (1990), *citing Sturm v. Goss*, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

The evidence presented herein shows that plaintiff certainly contributed her "property, effects, labor, [and] skill" to the business known as WWL; indeed, the testimony indicates that it was through her efforts the business was able to be initially capitalized. We also find persuasive the evidence that WWL operated from the home which was owned by both of the parties; that plaintiff handled most of the financial affairs of the business; that plaintiff purchased equipment used in the landscaping business with funds from her personal account and also paid for some of the debts of the business from her personal account; and that plaintiff never received a salary for her services but systematically wrote checks from the WWL account for her personal as well as joint debts. Therefore, we find defendant's contention that the trial court erred in finding the evidence as a matter of law sufficient to support the verdict without merit.

Defendant next argues that the trial court erred in that plaintiff's claim is barred as against public policy. Defendant contends that "[t]he 'partnership' proposed by the plaintiff was against public poli-

cy because it would allow her to escape the effects of the prior divorce decree and because the illicit relationship of the parties was the basis for the agreement." We disagree with defendant. The actions presented in the instant case all took place after the parties were divorced. Additionally, we find no evidence that the "illicit relationship" has formed a part of the consideration of any binding contract. This argument is meritless.

No error.

Judges ORR and WYNN concur.

RONALD D. PATTERSON AND WIFE, ROBIN PATTERSON, PLAINTIFFS v. CURTIS PIERCE, ADMINISTRATOR OF THE ESTATE OF ELMER RAY PIERCE, DEFENDANT

No. 9311SC923

(Filed 7 June 1994)

Automobiles and Other Vehicles § 464 (NCI4th)— onrushing truck—failure to take evasive action—no actionable negligence

The trial court properly granted summary judgment for defendant in plaintiff's action to recover for injuries sustained in an automobile accident where the evidence tended to show that plaintiff was a passenger in a truck which went out of control during heavy rain; the truck veered into the path of defendant's vehicle; though another vehicle in front of defendant's avoided the truck in the less than five seconds available to react, defendant, who had less than one second more to react, failed to take evasive action; and even if defendant made an error of judgment in failing to react to the onrushing truck, no reasonable mind could conclude that such an error of judgment rose to the level of actionable negligence.

Am Jur 2d, Automobiles and Highway Traffic § 420.

Appeal by plaintiffs from judgment signed 29 July 1993 in Lee County Superior Court by Judge Narley L. Cashwell. Heard in the Court of Appeals 9 May 1994.

Plaintiffs brought this action seeking to recover damages for personal injuries to plaintiff Ronald Patterson and loss of consortium by

plaintiff Robin Patterson. In their complaint, plaintiffs alleged Ronald Patterson's injuries were caused by the negligent operation of an automobile operated by defendant's intestate Elmer Pierce. Defendant answered with general denials. Following discovery, the trial court heard and allowed defendant's motion for summary judgment, from which order plaintiffs have appealed.

J. Douglas Moretz, P.A., by Beverly D. Basden, for plaintiffs-appellants.

Russ, Worth, Cheatwood & Guthrie, by Philip H. Cheatwood, for defendant-appellee.

WELLS, Judge.

Although our appellate courts have consistently held that summary judgment is rarely appropriate in negligence actions, *see Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); nevertheless, summary judgment should be entered where the forecast of evidence before the trial court demonstrates that a plaintiff cannot support an essential element of his claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992).

The materials before the trial court in this case consisted of the parties' pleadings, the depositions of Ronald Patterson, Frankie Wicker, and James Oakley, and the affidavit of Richard Edwards. The depositions we refer to reflect the following pertinent events and circumstances.

On the morning of 17 July 1989, plaintiff Ronald Patterson was riding as a passenger in a pickup truck being driven by Frankie Wicker in a southerly direction near Vass on U.S. Highway 1. It was raining very heavily. As he was driving at a speed of about 50-55 miles per hour, Wicker lost control of his truck. The truck suddenly skidded across the center line of U.S. Highway 1 and struck an automobile driven in the opposite direction by defendant's intestate, Elmer Pierce, who was killed in the collision. The other occupant of the Pierce vehicle, Pierce's wife, was also killed in the collision.

James Oakley was driving his truck in a northerly direction along U.S. Highway 1 at a speed of about 40 miles per hour. The Pierce car was approximately two car lengths behind Oakley when Oakley observed the truck Wicker was operating skidding out of control across the center line toward his truck. Oakley then veered to his right and thereby avoided the Wicker truck. Almost immediately, the

Wicker truck struck the front of the Pierce car, resulting in the total demolition of the Pierce car and the death of its occupants.

Both Wicker and Oakley described the weather conditions at the time as terrible, resulting in severely reduced visibility. They both stated that once Wicker began to lose control of his truck, it veered quickly into the opposite lane of travel. Due to his evasive movement, Oakley was able to avoid the collision. Pierce did not make an evasive move prior to the collision of the Wicker truck with his car.

In his affidavit, Richard Edwards stated that he had nine years of experience in accident reconstruction and had testified approximately 24 times as an expert witness concerning reconstruction of vehicular accidents. Based on his interview with James Oakley, Edwards stated that (1) the Wicker truck was out of control at the point of impact resulting from hydroplaning on excess water on the roadway; (2) based on the speed of the Wicker truck at 45-48 miles per hour and the Pierce car at about 40 miles per hour, Oakley's evasion of the Wicker truck required at least 2.5 to 4.5 seconds; and (3) based on a "reasonable" following distance, Pierce would have had an additional 1.5 to 2.5 seconds to evade the collision. From these observations, Edwards stated that in his opinion Pierce had the opportunity to avoid the collision and that the reason he did not was because he was looking somewhere other than in the forward direction.

In light of this forecast of evidence, considered in the light most favorable to plaintiffs, we hold that the trial court properly entered summary judgment for defendant.

Actionable negligence requires a showing that (1) there has been a failure to exercise proper care in the performance of some legal duty which a defendant owed to the plaintiff under the circumstances in which they were placed and (2) such breach of duty was a proximate cause of the plaintiff's injury. *See Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559 (1984). It is this threshold requirement which plaintiffs have not shown in this case. *Forgy v. Schwartz*, 262 N.C. 185, 136 S.E.2d 668 (1964) contains a thorough discussion and analysis of the duty of a motorist, though traveling at a lawful speed and in his proper lane, to avoid colliding with another vehicle which comes into his path from the opposite direction.

In *Forgy*, Justice (later Chief Justice) Sharp aptly stated the principle that when a motorist is *suddenly* (emphasis supplied) confronted with such circumstances, without opportunity to reason or reflect, he is not held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence similarly situated would have made. *Id.* Some allowance must be made for the exigencies of the moment, and time must be allowed for the driver put in such peril without his fault to comprehend the danger and form a judgment as to how to meet it. *Id.* "In applying the doctrine of sudden emergency, the courts have not been inclined to weigh in 'golden scales' the conduct of the motorist who has acted under the excited impulse of sudden panic induced by the negligence of the other motorist." *Id.*

In the case now before us, the Wicker vehicle was traveling at a speed of approximately 50 miles per hour, covering a distance of 73.3 feet per second, while the Pierce vehicle was traveling at a speed of 40 miles per hour, covering a distance of 58.7 feet per second. Hence, taking the median speeds, the closing speed between the two vehicles prior to the collision was approximately 132 feet per second. Assuming, as plaintiffs' evidence tended to show, that the Pierce vehicle was two car lengths (approximately 24 feet) behind the Oakley vehicle, Mr. Pierce had a maximum of .18 seconds more than Mr. Oakley in which to form a judgment and take evasive action. Given these circumstances, if we were to accept *arguendo* that Mr. Pierce made any error of judgment in failing to react to the onrush of the Wicker truck toward him, no reasonable mind could conclude that such an error of judgment rose to the level of actionable negligence.

For the reasons stated, the judgment below is

Affirmed.

Judges JOHNSON and JOHN concur.

ANGELO PURVIS, PLAINTIFF/APPELLANT v. BRYSON'S JEWELERS, INC., DEFENDANT/APPELLEE

No. 9318SC838

(Filed 7 June 1994)

Negligence § 108 (NCI4th)— armed robbery of store customer—insufficiency of evidence of foreseeability

In an action to recover for injuries sustained by plaintiff customer during an armed robbery at defendant's store, the evidence was insufficient to create a triable issue on the question of foreseeability where there was evidence of only one crime on defendant's premises, and that was a non-violent property crime; evidence of crime away from defendant's store was of criminal activity within an approximately three-block area around the store; there were no instances of armed robbery of jewelry stores in evidence; and these facts were not sufficient to give defendant reason to believe that there was a likelihood that third persons would endanger the safety of its invitees.

Am Jur 2d, Premises Liability § 29.

Appeal by plaintiff from order filed 20 July 1993 by Judge James A. Beaty, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 19 April 1994.

Egerton, Hodgman & Brenner, by Lawrence J. D'Amelio, III and Lawrence Egerton, Jr., for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for defendant-appellee.

LEWIS, Judge.

Plaintiff commenced this negligence action against defendant's jewelry store to recover for the injuries he sustained during an armed robbery of the store. Plaintiff alleged that his injuries were the result of defendant's failure to provide adequate security or to warn of potential danger. The trial court granted summary judgment for defendant, and plaintiff appeals.

The evidence tended to show that on 1 June 1991, plaintiff entered the jewelry store, located on Summit Avenue in Greensboro, to pick up a ring he had brought in for sizing. Two men, who were already in the store when plaintiff arrived, then proceeded to rob the

store. In the course of the robbery, one of the men shot plaintiff and two store employees. As a result of the shooting, plaintiff was paralyzed from the waist down.

On appeal, the sole question is whether defendant owed a duty to plaintiff to protect or warn him. It is well established that one who enters a store as a customer during business hours is considered a business invitee. *Abernethy v. Spartan Food Sys., Inc.*, 103 N.C. App. 154, 155, 404 S.E.2d 710, 712 (1991). Ordinarily, the store owner is not liable to his invitees for injuries which result from the intentional, criminal acts of third persons. *Id.* at 155-56, 404 S.E.2d at 712. However, where circumstances exist which give the owner reason to know that there is a likelihood of conduct on the part of third persons which endangers the safety of the invitees, a duty to protect or warn the invitees can be imposed. *Id.* at 156, 404 S.E.2d at 712. Thus, the test for determining when this duty arises is one of foreseeability. *Murrow v. Daniels*, 321 N.C. 494, 501, 364 S.E.2d 392, 397 (1988). Plaintiff argues that the forecast of evidence in the present case was sufficient to raise a triable issue as to whether the armed robbery was reasonably foreseeable. We disagree.

The affidavits and other evidence presented by plaintiff tended to show that during the years 1986 through 1989, there were 937 incidents of criminal activity, ranging from minor to serious offenses, in the approximately three-block area in which the jewelry store is located. Of those offenses, twenty-four were armed robberies. Approximately half of those armed robberies occurred at food or grocery stores, with the next most common sites being banks, department stores, and parking lots. The only prior criminal activity at the jewelry store occurred in December 1990. On that occasion, a person broke in after hours and stole a small amount of merchandise.

The most probative evidence on the question of foreseeability is evidence of similar prior criminal activity committed on the defendant's premises. *Sawyer v. Carter*, 71 N.C. App. 556, 561, 322 S.E.2d 813, 817 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E.2d 393 (1985). Moreover, while evidence of crimes away from the premises may be relevant, courts are reluctant to impose liability absent evidence of prior criminal activity on the premises. *Id.* at 561, 322 S.E.2d at 816. Indeed, the cases in which our courts have held the evidence sufficient to go to the jury on the issue of foreseeability have generally involved numerous incidents of prior criminal activity on the premises. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636,

281 S.E.2d 36 (1981); *Urbano v. Days Inn of America, Inc.*, 58 N.C. App. 795, 295 S.E.2d 240 (1982). One exception to the general rule is found in *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988), where our Supreme Court held that the criminal activity in the area immediately surrounding defendants' premises was sufficient to raise issues of fact concerning foreseeability. *Id.* at 502-03, 364 S.E.2d at 398.

In that case, the plaintiff was sexually assaulted and robbed in her room at defendants' motel. The evidence showed that the motel was located at the intersection of Interstate 95 and Highway 70, which was known to be a high-crime intersection. In fact, at the motel next door to defendants', there had been five armed robberies in the preceding four years. Other reported incidents at the intersection included one kidnapping, three assaults, one vehicle theft, and sixty-three instances of breaking and entering and larceny. *Id.* at 502, 364 S.E.2d at 398. There was also evidence of various property crimes at defendants' motel. *Id.* The Court concluded that in light of the criminal activity that had occurred in such close proximity to defendants' motel, the issue of foreseeability was for the jury to decide. *Id.* at 502-03, 364 S.E.2d at 398.

In the case at hand, there was evidence of only one crime on defendant's premises, and that crime was a non-violent property crime. In addition, the evidence of crime away from defendant's store was of criminal activity within an approximately three-block area around the store. There were no instances of armed robbery of jewelry stores in evidence. These facts were not sufficient to give defendant reason to believe that there was a likelihood that third persons would endanger the safety of its invitees. Accordingly, we conclude that the evidence was not sufficient to create a triable issue on the question of foreseeability, and the trial court properly granted summary judgment for defendant.

For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Judges EAGLES and WYNN concur.

MARIE G. SMITH AND MIRANDA BLAINE SMITH v. MICHAEL R. BUMGARNER AND ROBIN BRUCE SMITH

No. 9325DC552

(Filed 7 June 1994)

1. Illegitimate Children § 4 (NCI4th)— paternity action—no guardian ad litem for minor child—dismissal error—appointment of new guardian required

Dismissal of a paternity action due to the non-appointment of a guardian ad litem for the minor child is clearly error, since the proper practice where there is a fatal defect of the parties is for the court to refuse to deal with the merits of the case until the absent parties are brought into the action. In this case, the trial court should have, *ex mero motu*, appointed a new guardian ad litem for the minor child.

Am Jur 2d, Bastards §§ 77, 84-86, 89.

Necessity or propriety of appointment of independent guardian for child who is subject of paternity proceedings. 70 ALR4th 1033.

2. Illegitimate Children § 4 (NCI4th)— paternity action—child not a necessary party—action dismissed—error

The minor child is not a necessary party in a paternity action pursuant to N.C.G.S. § 49-14 or an action for custody and support; moreover, N.C.G.S. § 49-16 allows either the mother, the father, or the child to bring the action. Therefore, the trial court erred in dismissing this action brought pursuant to N.C.G.S. § 49-14 because the child was not a party to the action.

Am Jur 2d, Bastards §§ 77, 84-86, 89.

Necessity or propriety of appointment of independent guardian for child who is subject of paternity proceedings. 70 ALR4th 1033.

Appeal by plaintiff from order entered 18 March 1993 by Judge Nancy Einstein in Catawba County District Court. Heard in the Court of Appeals 3 March 1994.

Plaintiff Marie G. Smith commenced this action alleging that defendant Michael R. Bumgarner is the biological father of her minor

child Miranda Blaine Smith ("Miranda"), who was born 14 March 1981. Plaintiff sought an order granting her permanent custody of Miranda and requiring defendant Bumgarner to pay child support.

At the time of Miranda's birth, Marie G. Smith was married to Robin Bruce Smith, who was listed on Miranda's birth certificate as her father. Upon motion of defendant Bumgarner, Robin Bruce Smith was joined as a necessary party defendant; by consent of the parties, Miranda was joined as a necessary party plaintiff. A guardian ad litem was appointed for Miranda; however the guardian ad litem was subsequently permitted to withdraw and no other guardian ad litem was ever appointed.

When the matter was called for trial, defendant Bumgarner moved to dismiss the entire action on the grounds that Miranda had not been properly made a party to the action since she was not represented by a guardian ad litem. The trial court allowed the motion and dismissed the action. Plaintiff Marie G. Smith appealed.

Sherwood Carter for plaintiff-appellant.

Sigmon, Sigmon and Isenhower, by W. Gene Sigmon, for defendant-appellee Bumgarner.

MARTIN, Judge.

In a civil action to establish paternity of an alleged illegitimate child pursuant to G.S. § 49-14 *et seq.*, does the failure to properly join that child justify dismissal of the action? We conclude, for two reasons, that the order of the trial court dismissing this action must be reversed.

[1] Initially, we observe that dismissal of this action due to the non-appointment of a guardian ad litem for Miranda Smith is clearly error. Even where there is a fatal defect of the parties, as defendant Bumgarner apparently convinced the trial court here, dismissal of the action is not warranted. Rather, "the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court." *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978). (Citations omitted.) Infants are particularly entitled to the protection of the courts; in order to protect Miranda's interests, the trial court should have, *ex mero motu*, appointed a new guardian ad litem for her.

[2] We do not believe, however, that Miranda is a necessary party to this action. Chapter 49, Article 3 of the North Carolina General Statutes, entitled "Civil Actions Regarding Illegitimate Children," sets forth the statutory provisions applicable to this case. G.S. § 49-14(a) provides:

> The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation. (Emphasis added.)

G.S. § 49-16 provides:

> Proceedings under this Article may be brought by:
>
> (1) The mother, the father, the child, or the personal representative of the mother or the child.

A child born to a married woman but begotten by one other than her husband is a child "born out of wedlock." *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985) (interpreting G.S. § 49-10); *Wright v. Gann*, 27 N.C. App. 45, 217 S.E.2d 761, *cert. denied*, 288 N.C. 513, 219 S.E.2d 348 (1975) (interpreting G.S. § 49-14). The legislative purpose of an action under G.S. § 49-14 is to provide the basis or means of establishing the identity of the biological father so that the child's right to support may be enforced and the child will not become a public charge. *Becton v. George*, 90 N.C. App. 607, 369 S.E.2d 366 (1988). In actions for custody and support of a minor child in North Carolina, the minor child is not a necessary party. Moreover, G.S. § 49-16 allows **either** the mother, the father, or the child (or the representative of either the mother or child) to bring the action. A statute's words should be given their natural and ordinary meaning, *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993), and need not be interpreted when they speak for themselves. *Abeyounis v. Town of Wrightsville Beach*, 102 N.C. App. 341, 401 S.E.2d 847 (1991). A court must presume that the legislature, in enacting law, acted with full knowledge of prior and existing law. *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 398 S.E.2d 40 (1990). Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive "or," application of the statute is not limited to cases falling within both clauses but applies to cases falling within either. *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E.2d 335 (1963).

Those persons who may bring a proceeding pursuant to G.S. § 49-14, et seq., are specifically enumerated in G.S. § 49-16, separated by commas and the disjunctive "or." The provision is not ambiguous and its natural and ordinary meaning indicates that either of the listed persons may bring an action pursuant to G.S. § 49-14. Conversely, a child is expressly required as a necessary party to a legitimation proceeding pursuant to G.S. § 49-10. *In re Legitimation of Locklear, supra.* If the legislature had intended to require the child to be joined as a necessary party in an action under G.S. § 49-14, then it would have specifically stated such, as it did in G.S. § 49-10. G.S. § 49-14 expressly states that an establishment of paternity under that section does **not** have the effect of legitimation. Accordingly, we conclude that the minor Miranda Blaine Smith was not a "necessary party" to this action, and that dismissal of plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(7) was error.

Reversed and Remanded.

Judges EAGLES and McCRODDEN concur.

METROPOLITAN LIFE INSURANCE CO., PLAINTIFF v. C. E. ROWELL, DEFENDANT

No. 9226SC877

(Filed 7 June 1994)

1. **Liens § 40 (NCI4th)— beneficiary of deed of trust—not party to prior action—beneficiary not precluded from challenging lien which has been reduced to judgment**

A beneficiary of a deed of trust is not precluded, based on the doctrine of *res judicata*, from challenging the enforceability and priority of a claim of lien for labor and materials that has been reduced to judgment where the beneficiary was not a party to the prior action.

Am Jur 2d, Mechanics' Liens §§ 386, 387.

2. **Liens § 40 (NCI4th)— materialmen's lien—substantial compliance with statute—priority**

Defendant contractor's lien for labor and materials had priority over the deed of trust held by plaintiff where defendant's

claim of lien was in substantial compliance with N.C.G.S. § 44A-12; defects in the claim of lien were not found in defendant's judgment; the judgment awards defendant $267,700 with interest and properly orders a sale of the property to enforce the lien; the judgment is for less than the total amount asserted in the claim of lien; and the judgment properly refers to the date when labor and materials were first furnished to the site.

Am Jur 2d, Mechanics' Liens §§ 263-283.

Appeal by defendant from judgment entered 2 July 1992 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 1993.

Petree Stockton, L.L.P., by David B. Hamilton and B. David Carson, for plaintiff-appellee.

William G. Robinson for defendant-appellant.

JOHNSON, Judge.

Plaintiff Metropolitan Life Insurance Company (hereafter, Metropolitan) timely petitioned for rehearing in this matter. We have granted this petition.

The facts of this appeal are set out in *Metropolitan Life Insurance Co. v. Rowell*, 113 N.C. App. 779, 440 S.E.2d 283 (1994). In this opinion, we address the basis for plaintiff's petition for rehearing. Plaintiff contends that in our previous opinion, we

> held that a beneficiary of a deed of trust such as Metropolitan is precluded, based on the doctrine of *res judicata*, from challenging the enforceability and priority of a claim of lien that has been reduced to judgment, where that beneficiary was not a party to the prior lien enforcement action.

Plaintiff points out that our Court recognized and examined defects in defendant's claim of lien against Tantilla Associates, but went on to opine, "[h]owever, we do not now question whether these concerns we have cited were properly or improperly considered by the trial court because this judgment, having not been appealed, is *res judicata*." *Id.* at 784, 440 S.E.2d at 285.

[1] Plaintiff argues that "a beneficiary of a deed of trust is not precluded, based on the doctrine of *res judicata*, from challenging the enforceability and priority of a claim of lien that has been reduced to

judgment where the beneficiary was not a party to the prior action." Plaintiff cites *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951), *Childers v. Powell*, 243 N.C. 711, 92 S.E.2d 65 (1956) and *Miller v. Lemon Tree Inn*, 32 N.C. App. 524, 233 S.E.2d 69 (1977) in support of its position. Our Court in *Miller*, 32 N.C. App. 524, 527-28, 233 S.E.2d 69, 72 stated:

> The law does not place upon the materialman the burden to join in the action to enforce his lien all parties who have acquired liens upon the property subsequent to the time the materialman first furnished labor and materials in order that the materialmen's lien will relate back prior to the effective dates of the other liens. Only the owner of the property subject to the materialmen's lien is required to be a party to an action to enforce the claim of lien. [Citations omitted.] However, it is axiomatic that a judgment cannot be binding upon persons who were not party or privy to an action. [Citation omitted.] [Trustees and beneficiary of the deed of trust] were not parties to the action by [the materialman] to enforce its materialmen's lien. *Therefore, they were free to challenge the default judgment purporting to enforce [the materialmen's] lien in this action to foreclose their deed of trust in order to have the priority of the liens determined.* (Emphasis added.)

Accordingly, plaintiff is "free to challenge the . . . judgment purporting to enforce [defendant's] lien in this action . . . to have the priority of the liens determined."

[2] Therefore, we once again examine defendant's judgment. In our previous opinion, we noted:

> [T]he evidence indicates that the claim of lien which defendant filed includes items that appear to be questionably lienable. For example, one item in the claim of lien states defendant was hired "as an employee to work on the Tantilla Apartments[.] . . . The general description of the employment contract . . . provid[ed] for $44,000 per year, plus $150 per week for gas expenses in using . . . [defendant's] truck for the owners." Another item states that "[o]wners also promised to pay [defendant's] bill at Myrtle Beach Lumber in the amount of $20,000 plus accumulated interest. This was an additional amount of [defendant's] employment contract." The judgment entered by the trial court resulting in defendant obtaining the statutory lien does not specifically address these questionable items; evidently, these items were

> resolved in determining the damages as to the breach of the contract to build and construct the project between defendant and Tantilla.
>
> We further note that the amounts awarded in the judgment for specific items vary from the amounts set forth in the claim of lien; that the judgment contains two items which were not listed in the claim of lien; and that the total judgment award differs but does not exceed the total amount asserted in the claim of lien.

Rowell, 113 N.C. App. at 783, 440 S.E.2d at 285.

In *Lowery v. Haithcock*, 239 N.C. 67, 73, 79 S.E.2d 204, 208 (1953), our Supreme Court stated that although individual items in a claim of lien failed to comply with the materialmen's lien statute, "[t]he notice of claim, generally speaking, is in substantial compliance with the statute and . . . must be upheld." (*See also Conner Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E.2d 785 (1978), where the plaintiff timely filed a claim of lien under North Carolina General Statutes § 44A in the amount of $543,919.58 due under a construction contract, and a panel of arbitrators determined the amount of the lien on the property to be $195,936.00; and *Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 78 N.C. App. 664, 338 S.E.2d 135, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 398 (1986), where although the plaintiff filed a blanket materialmen's lien on a condominium complex, our Court instructed the trial court to apportion the lien so that it was in the amount of the value of labor and materials provided by the plaintiff as to a particular unit.)

In the case *sub judice*, defendant's claim of lien was in substantial compliance with North Carolina General Statutes § 44A-12 (1989). The defects in the claim of lien which we recognized and examined in our earlier opinion are not found in defendant's judgment. Defendant's "judgment properly awards a total of $267,700.00 to defendant, with interest at the legal rate from 29 January 1989, and properly orders a sale of the property to enforce the lien." *Metropolitan*, 113 N.C. App. at 784, 440 S.E.2d at 285. Nor does the trial court's omission of the effective date of the lien from the judgment bar defendant's lien. *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 52, 362 S.E.2d 578, 583 (1987), *disc. review denied*, 321 N.C. 473, 364 S.E.2d 921 (1988). Finally, we again note that the trial court's judgment award ($267,700.00 with interest) did not exceed the total amount asserted in the claim of lien ($345,805.00). *See* North Carolina General Statutes § 44A-13(b) (1989).

Therefore, we find defendant properly met the requirements of North Carolina General Statutes § 44A, and the judgment signed by the trial judge properly referred to the site upon which defendant wanted a lien declared and related the lien back to the date when labor and materials were first furnished at the site. Defendant's lien has priority over the deed of trust held by plaintiff.

The decision of the trial judge is reversed.

Judges WYNN and JOHN concur.

CUSTOM MOLDERS, INC., PLAINTIFF v. AMERICAN YARD PRODUCTS, INC., FORMERLY KNOWN AS ROPER CORPORATION, DEFENDANT

No. 9314SC392

(Filed 7 June 1994)

1. **Judgments § 651 (NCI4th)— treble damages awarded—no post-judgment interest**

Pursuant to N.C.G.S. § 24-5(b) and *Love v. Keith*, 95 N.C.App. 549, plaintiff was not entitled to post-judgment interest on the treble damages portion of its judgment from the date of judgment until paid.

Am Jur 2d, Interest and Usury §§ 59 et seq.

2. **Costs § 7 (NCI4th)— plaintiff not prevailing party—no right to attorney's fees**

Although N.C.G.S. § 75-16.1 includes fees for services rendered at all stages of litigation, including appeals, and should be construed liberally, plaintiff was not the prevailing party in this case and therefore was not entitled to attorneys' fees in bringing a motion to protect its judgment and in bringing the present appeal.

Am Jur 2d, Costs §§ 26 et seq.

Appeal by plaintiff from order entered 5 January 1993 by Judge Jack A. Thompson in Durham County Superior Court. Heard in the Court of Appeals 3 February 1994.

A trial on the matter of *Custom Molders, Inc. v. Roper Corporation* was held in February 1988. The jury awarded plaintiff compensatory damages of $249,016 for breach of contract. The trial court thereafter concluded that defendant's actions were unfair and deceptive under N.C. Gen. Stat. § 75-1.1 (1988) and trebled the damages against defendant to $747,048 pursuant to N.C. Gen. Stat. § 75-16. The court also awarded plaintiff $49,000 as its reasonable attorneys' fees. The judgment provided in pertinent part as follows:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff Custom Molders, Inc. shall have and recover from the defendant Roper Corporation the sum of $747,048, together with reasonable attorneys' fees in the amount of $49,000 and interest as provided by law from the date of entry of this judgment.

To stay execution of the judgment pending appeal, defendant's surety, The Aetna Casualty and Surety Company, executed and filed a supersedeas bond in the amount of $1,003,020.48. On 19 February 1991, the Court of Appeals affirmed the judgment. *Custom Molders, Inc. v. Roper Corp.*, 101 N.C. App. 606, 401 S.E.2d 96 (1991). By order dated 7 November 1991, the Supreme Court affirmed the decision of the Court of Appeals. *Custom Molders, Inc. v. Roper Corp.*, 330 N.C. 191, 410 S.E.2d 55 (1991) (per curiam).

On 14 February 1992, defendant tendered payment in the amount of $940,447.53 to the Clerk of Durham County Superior Court as payment of the judgment. This sum was calculated as follows:

Judgment of $249,016 Trebled	$747,048.00
Pre-appeal Attorneys' Fees	49,000.00
Post-judgment Attorneys' Fees	70,300.00
Post-judgment Interest on Compensatory Award through 2-14-92 [54.58 per day]	74,053.53
Court Costs	46.00
	$940,447.53

The Clerk of Superior Court designated defendant's payment as a partial payment.

Based on the calculation of the Clerk of Superior Court that the payment by defendant was a partial payment, plaintiff filed a Motion for Judgment Against Defendant's Surety on 14 October 1992 for the remaining amount owed on plaintiff's judgment, plus additional attorneys' fees for protecting its judgment in these proceedings.

A hearing was held on 16 November 1992 on plaintiff's motions. By order dated 4 January 1993, the trial court denied plaintiff's motion, finding that plaintiff was not entitled to post-judgment interest on the trebled portion of its judgment. The court accordingly denied plaintiff's motion for additional attorneys' fees in connection with its motion against the surety. Plaintiff appeals the denial of its motions.

Charles A. Bentley, Jr. & Associates, P.A., by Charles A. Bentley, Jr. and Susan B. Kilzer, for plaintiff appellant.

Brown & Bunch, by M. LeAnn Nease, for defendant appellee.

ARNOLD, Chief Judge.

[1] Plaintiff's first assignment of error is that the trial court erred by denying plaintiff's motion for post-judgment interest on the treble damages portion of its judgment from the date of judgment until paid. Plaintiff bases its argument on an exhaustive review of the legislative history of N.C. Gen. Stat. § 24-5(b) (1991). We, however, do not find it necessary to examine the statute in such detail because the plain language of G.S. § 24-5(b), as well as a recent decision of this Court, squarely rebut plaintiff's argument.

N.C. Gen. Stat. § 24-5, entitled *Contracts, except penal bonds, and judgments to bear interest*, provides in pertinent part:

> (b) Other Actions.—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

This Court addressed the application of G.S. § 24-5(b) to verdicts trebled pursuant to G.S. § 75-16 in *Love v. Keith*, 95 N.C. App. 549, 383 S.E.2d 674 (1989). We held in *Love*:

> The defendants finally argue the trial judge erred in imposing interest on the portion of the judgment in excess of $3,400. We agree. Since the defendants' conduct violated N.C.G.S. Sec. 75-1.1 *et seq.*, the trial judge properly trebled the jury's $3,400 verdict. N.C.G.S. Sec. 75-16. The trial judge then ordered interest on the full $10,200. In this the trial judge erred since *N.C.G.S. Sec. 24-5(b) (1986) only provides for interest on compensatory damages as designated by the fact finder.* The fact finder here, the jury, specified compensatory damages of only $3,400. The

plaintiffs may receive interest only on $3,400, calculated as specified in N.C.G.S. Sec. 24-5(b).

Id. at 557-58, 383 S.E.2d at 679 (emphasis added).

The applicable portion of G.S. § 24-5(b) in effect when *Love* was decided is identical to the statutory language applicable in this case. Plaintiff argues that according to Section 2 of the 1985 Session Laws, the current language of the statute does not affect the law as it existed before the enactment of Chapter 327 of the 1981 Session Laws, which provided in pertinent part that "the amount of any judgment . . . in any kind of action, . . . shall bear interest till paid . . . ." G.S. § 24-5 (1965). Therefore, plaintiff contends, North Carolina law provides for post-judgment interest on *any* judgment, including a judgment for treble damages, in any kind of action until paid. We disagree.

In the case at bar, the trial court properly trebled the jury's $249,016 verdict pursuant to G.S. § 75-16. Under the plain language of G.S. § 24-5(b), and the holding in *Love*, only the portion of the judgment designated by the fact finder as "compensatory" accrues post-judgment interest.

[2] Plaintiff next contends that in addition to its attorneys' fees of $49,000 for services rendered through the time of entry of the judgment, and $70,300 for services rendered by plaintiff's counsel in defending against the first appeal, plaintiff is entitled to additional attorneys' fees in bringing a motion to protect its judgment and in bringing the present appeal pursuant to G.S. § 75-16.1. G.S. § 75-16.1 states that "the presiding judge may, in his discretion, allow a reasonable attorney fee to the . . . attorney representing the *prevailing party* . . . ." Although G.S. § 75-16.1 includes fees for services rendered at all stages of litigation, including appeals, *see Cotton v. Stanley*, 94 N.C. App. 367, 380 S.E.2d 419 (1989), and should be constructed liberally, *see City Finance Co. v. Boykin*, 86 N.C. App. 446, 358 S.E.2d 83 (1987), plaintiff is not the prevailing party in this case. Therefore, it is not entitled to attorneys' fees with regards to its motion or this appeal.

Affirmed.

Judges WYNN and McCRODDEN concur.

CHARLES H. WEBER, PLAINTIFF v. RICHARD H. HOLLAND, JR., AND HOLLAND GLASS COMPANY, INC., A CORPORATION, DEFENDANTS

No. 9325SC994

(Filed 7 June 1994)

Evidence and Witnesses § 1994 (NCI4th)— refund of deposits for stock purchase—summary judgment proper—evidence of oral agreement inadmissible to vary terms of writing

In an action to recover sums which plaintiff had deposited with defendant company in anticipation of the purchase of stock, the trial court did not err in entering summary judgment for plaintiff, since the written documents serving as receipts contained in the record stated in express terms that each of the deposits was immediately refundable upon demand; one document expressly stated that if no formal purchase agreement were executed, all deposit sums plus accrued interest would be returned to plaintiff; these documents were signed by defendant; and parol evidence of a verbal agreement as to the sale of company stock could not be admitted to vary or contradict the terms of the parties' final writing.

Am Jur 2d, Contracts §§ 260-263.

Appeal by defendants from order entered 15 July 1993 by Judge J. Marlene Hyatt in Catawba County Superior Court. Heard in the Court of Appeals 23 May 1994.

Bryce O. Thomas, Jr. for plaintiff-appellee.

Tate, Young, Morphis, Bach & Farthing, by Thomas C. Morphis, for defendants-appellants.

JOHNSON, Judge.

This is an action brought by plaintiff Charles H. Weber against defendant Richard B. Holland, Jr. (Holland) and Holland Glass Company, Inc. (Company) alleging that plaintiff was entitled to the return of $65,000.00 which plaintiff had deposited with the Company in anticipation of the purchase of stock. Defendants denied any liability on the $65,000.00 deposit because defendants alleged an oral agreement had been reached with plaintiff for the sale of fifteen percent (15%) of the Company stock for $90,000.00.

The record indicates that plaintiff, who worked for the Company, first deposited $50,000.00 for the purchase of Company stock. A receipt is contained in the record which reads:

May 29, 1991

Received from Charles H. Weber, the sum of Fifty Thousand dollars ($50,000.00) as deposit for purchase of Holland Glass Company Inc. corporate stock.

Refund of this deposit shall be immediate upon demand.

Richard H. Holland, Jr.
/s/

A second receipt is contained in the record showing a further deposit:

July 19, 1991

Received from Charles H. Weber, the sum of Fifteen Thousand Dollars ($15,000.00) as deposit for purchase of Holland Glass Company, Inc. corporate stock.

Refund of this deposit shall be immediate upon demand.

I further agree that should no formal purchase agreement be executed, all deposit sums ($50,000.00 received May 29, 1991 and $15,000.00 received July 19, 1991) shall be fully refunded including an amount equal to 8% annual interest accrued from date of receipt until final payment.

/s/
Richard H. Holland, Jr.

Finally, the record contains a letter from plaintiff to Holland, dated 10 June 1992, stating:

Dear Richard:

On May 29, 1991 you received fifty thousand dollars ($50,000.00) and on July 19, 1991, another fifteen thousand dollars ($15,000.00) from me as deposit towards the purchase of stock in Holland Glass Company.

To this date, no formal agreement has been executed or transfer of stock taken place.

Per our signed note, refund of this deposit shall be immediate upon demand. I have verbally requested that refund be made.

Written notice is hereby made that refund of this deposit is due not later than June 19, 1992.

Sincerely,
/s/
Charles H. Weber

No refund of the deposit was ever made by defendants to plaintiff. Plaintiff then commenced the instant action. After various pleadings were filed, plaintiff filed a motion for summary judgment which the trial court granted on 16 July 1993, finding that "judgment is granted in favor of plaintiff against the defendant[s] and that the plaintiff have and recover of the defendants the sum of $65,000 plus interest at the rate of 8% per annum on $50,000 from May 29, 1991 and on $15,000 from July 19, 1991 plus court costs." Defendants filed timely notice of appeal to our Court.

Defendants argue that the trial court committed reversible error by granting plaintiff's motion for summary judgment because there was a genuine issue of material fact. Specifically, defendants argue that there is an issue of fact to be resolved by a jury because depositions in the record indicate the two parties reached an oral agreement as to the sale of Company stock. Defendants further argue that the 29 May 1991 writing "cannot be interpreted without reference to subsequent collateral evidence." We disagree.

Summary judgment is appropriate where there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56; *Burton v. NCNB*, 85 N.C. App. 702, 355 S.E.2d 800 (1987). The goal of summary judgment is to allow the disposition before trial of an unfounded claim or defense. *Cutchin v. Pledger*, 71 N.C. App. 279, 321 S.E.2d 462 (1984).

The written documents serving as receipts contained in the record state in express terms that each of the deposits were immediately refundable upon demand. Additionally, the latter of these documents, dated 19 July 1991, expressly stated that if no formal purchase agreement was executed, all deposit sums plus accrued interest would be returned to plaintiff. These documents were signed by defendant. Parol evidence of verbal agreements cannot be admitted to vary or contradict the terms of a final writing. *See Borden, Inc. v.*

Brower, 284 N.C. 54, 199 S.E.2d 414 (1973). We find the trial court did not err in granting plaintiff's motion for summary judgment.

Affirmed.

Judges ORR and WYNN concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, COMPLAINANT v. N.C. DEPARTMENT OF TRANSPORTATION, IREDELL COUNTY ROAD MAINTENANCE, P.O. BOX 1107, STATESVILLE, N.C. 28677, RESPONDENT

No. 9310SC962

(Filed 7 June 1994)

State § 22 (NCI4th)— violations of OSHA—citations against State and agencies—sovereign immunity no defense

Based on the terms of the Occupational Safety and Health Act prior to its amendment in 1992, the General Assembly determined that the State and its agencies can be issued citations for violations of the Occupational Safety and Health Act which are enforceable by proceedings before the Safety and Health Review Board.

Am Jur 2d, State, Territories, and Dependencies §§ 104-107.

Appeal by respondent from order signed 13 July 1993 in Wake County Superior Court by Judge Gregory A. Weeks. Heard in the Court of Appeals 11 May 1994.

On 9 July 1990, respondent began repairing a portion of Perch Church Road in Mooresville, North Carolina. The project consisted of laying a drainage pipe beneath the road. Respondent's employees dug a trench approximately 15 feet deep, 8 to 9 feet wide, and 30 feet long. The sides of the trench were vertical and were neither sloped nor shored. A trench box was not utilized, and no materials to shore or brace the trench walls were present at the site. On 13 July 1990, the trench collapsed, killing one of respondent's employees and injuring three others. The Occupational Safety and Health Division of the North Carolina Department of Labor cited respondent for 11 "willful-serious" violations of the Occupational Safety and Health Act.

On 27 September 1990, respondent notified complainant of its intent to contest the violations. Pursuant to the procedures adopted by the Safety and Health Review Board, complainant filed a complaint with the Safety and Health Review Board seeking to have it affirm all of the violations contained in the citation issued to respondent. Respondent's answer contained motions to dismiss the complaint based on lack of subject matter and personal jurisdiction. Respondent also moved to dismiss the complaint for failure to state a claim upon which relief could be granted. On 26 June 1991, a hearing examiner for the Safety and Health Review Board entered an order denying respondent's motions. Respondent petitioned the Safety and Health Review Board to review the order of the hearing examiner, and, on 13 July 1992, the Safety and Health Review Board entered an order unanimously affirming the order of the hearing examiner. Respondent petitioned the Superior Court of Wake County to review the order of the Safety and Health Review Board, and, on 13 July 1993, the trial court entered an order dismissing as interlocutory respondent's petition for review. Respondent appeals.

Attorney General Michael F. Easley, by Associate Attorney General Linda Kimbell, for complainant-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley and Assistant Attorney General David R. Minges, for respondent-appellant.

WELLS, Judge.

In its first assignment of error, respondent argues that the trial court erred in dismissing the petition for judicial review because the order appealed from was not interlocutory. Respondent based his motion to dismiss on the defenses of sovereign and statutory immunity and contends, because the doctrine of sovereign immunity presents a question of personal jurisdiction, that the denial of a motion to dismiss on the grounds of sovereign immunity is immediately appealable. We agree and permit respondent to pursue its appeal. *Zimmer v. N.C. Dept. of Transportation*, 87 N.C. App. 132, 360 S.E.2d 115 (1987).

In its final assignment of error, respondent argues that the trial court erred in failing to dismiss the complaint because respondent is immune from suit. Respondent asserts the defense of sovereign immunity and contends that complainant is barred from having the citations affirmed by the Safety and Health Review Board. We disagree.

According to the doctrine of sovereign immunity, the State is immune from suit unless and until it consents to be sued. *Bailey v. State of North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), *cert. denied*, 118 L.Ed.2d 547 (1992). Respondent does not dispute that it and its employees are subject to the Occupational Safety and Health Act. Rather, respondent contends that complainant is prohibited from issuing citations to state agencies and enforcing those citations through proceedings before the Safety and Health Review Board. Respondent asserts that complainant can enforce the Occupational Safety and Health Act in the public sector only by issuing notices and consulting and negotiating with public entities.

Under the Occupational Safety and Health Act of North Carolina, the definition of employer includes any state, N.C. Gen. Stat. § 95-127(10), and the Occupational Safety and Health Act applies to all employers. N.C. Gen. Stat. § 95-128. According to G.S. § 95-137(a), an employer is subject to citation for violations of any standard, regulation, rule, or order promulgated under the Occupational Safety and Health Act. The employer is permitted to contest the citation by giving notice within 15 working days from the receipt of the citation to the Division of Occupational Safety and Health. N.C. Gen. Stat. § 95-137(b). Respondent is correct when it points out that prior to the 1992 amendments G.S. § 95-137 did permit the director of Occupational Safety and Health to prescribe procedures for the issuance of a notice in lieu of a citation for violations by state agencies. However, we believe the issuance of a notice was an additional method of enforcement not a substitute for the issuance of citations. Based on the terms of the Occupational Safety and Health Act prior to its amendment in 1992, we hold that the General Assembly determined that the State and its agencies can be issued citations for violations of the Occupational Safety and Health Act which are enforceable by proceedings before the Safety and Health Review Board. It is therefore apparent that the next appropriate step in these proceedings is a hearing on the disputed citations before the Safety and Health Review Board.

For the reasons stated, we have determined that respondent's petition for review to the Superior Court should have been dimissed.

As modified herein, the order appealed from is

Affirmed.

Judges JOHNSON and JOHN concur.

CLYDE E. DENEGAR, D/B/A QUALITY SANITATION SERVICE, PLAINTIFF-APPELLEE v. THE CITY OF CHARLOTTE, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT-APPELLANT

No. 9326SC612

(Filed 7 June 1994)

Eminent Domain § 231 (NCI4th)— taking pursuant to annexation—compensation not paid—actionable negligence—governmental immunity no defense

The defense of governmental immunity was not available to defendant city where plaintiff, who operated a solid waste collection service, alleged that the city negligently prevented plaintiff's receipt of just compensation for a taking of its property lost when the city annexed the area in which plaintiff did business. Therefore, the trial court's denial of defendant city's motion for summary judgment was not immediately appealable.

Am Jur 2d, Eminent Domain § 397.

Appeal by defendant from order entered 11 March 1993 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 March 1994.

Wells and Porter, P.A., by Jameson P. Wells, for plaintiff-appellee.

Office of the City Attorney, by Deputy City Attorney H. Michael Boyd, for defendant-appellant.

LEWIS, Judge.

Plaintiff operated a private solid waste collection firm in an area of Mecklenburg County until the area was annexed by defendant, the City of Charlotte, in February 1991. Plaintiff filed a complaint against defendant on 28 January 1992, alleging that defendant negligently failed to fully inform plaintiff of his statutory rights in connection with the annexation and that defendant improperly withheld just compensation and economic loss payments. Defendant now appeals from the trial court's denial of its motions for summary judgment, dismissal and judgment on the pleadings. Our disposition of this appeal renders a recitation of the facts unnecessary.

The denial of a motion for summary judgment is interlocutory and nonappealable unless a substantial right of one of the parties is

involved. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, *appeal dismissed*, 301 N.C. 92 (1980). Defendant is asserting the defense of governmental immunity, and it is well settled that the question of governmental immunity affects a substantial right and therefore renders an interlocutory order immediately appealable. *Dickens v. Thorne*, 110 N.C. App. 39, 429 S.E.2d 176 (1993); *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). According to defendant, annexation is a governmental function invoking the protection of governmental immunity. *Thrash v. City of Asheville*, 95 N.C. App. 457, 473-74, 383 S.E.2d 657, 666-67 (1989) (stating that annexation is a governmental function), *rev'd on other grounds*, 327 N.C. 251, 393 S.E.2d 842 (1990).

Plaintiff, on the other hand, argues that governmental immunity is not an available defense in this case, and that the appeal is interlocutory and subject to dismissal. Plaintiff contends that defendant's actions amounted to a taking of plaintiff's property, and asserts that governmental immunity is not a defense to takings of private property for public use. *Long v. City of Charlotte*, 306 N.C. 187, 203, 293 S.E.2d 101, 111-12 (1982). The fact that the taking occurred as part of an annexation process is irrelevant, according to plaintiff.

Plaintiff contends that *Thrash*, which indicated that annexation is a governmental function, provides no support for defendant's argument that it is entitled to governmental immunity in this case, because *Thrash* did not discuss the taking aspect of annexation. Instead, that case involved a direct challenge to an annexation ordinance. 95 N.C. App. at 461, 383 S.E.2d at 659. In the case at hand plaintiff is not attempting to invalidate the annexation in any way. Plaintiff is simply seeking compensation to which he was statutorily entitled and would have received were it not for defendant's alleged negligence.

We find that *Long* is dispositive of the issue at hand. The general rule from *Long* is that a taking is compensable, whether the governmental authority was acting in a governmental or proprietary capacity. 306 N.C. at 203, 293 S.E.2d at 111. The Supreme Court in *Long* noted that the "fundamental right to just compensation" is "part of the fundamental law of this State" and "imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken." *Id.* at 196, 293 S.E.2d at 107. The Court stated, "[i]f a 'taking' has occurred,

it is compensable though it results from a function which is governmental in nature. Governmental immunity is not a defense where there is a 'taking' of private property for public use whether that use be propriety or governmental in nature." *Id.* at 203, 293 S.E.2d at 111-12.

Thus, if a governmental authority negligently prevented the receipt of just compensation for a taking, that negligence would be actionable and would not be subject to the defense of governmental immunity. This is true even if the taking occurred as part of a governmental function, such as annexation.

Because we conclude that governmental immunity is not an available defense in this case, we find that this appeal does not affect a substantial right and that the trial court's order is interlocutory and unappealable.

Appeal dismissed.

Chief Judge ARNOLD and Judge COZORT concur.

BRANDON J. ADAMS v. KIM ELAINE ADAMS

No. 939DC908

(Filed 7 June 1994)

Divorce and Separation § 119 (NCI4th)— equitable distribution—reduction of separate debt with marital property—distributional factor

A reduction in the separate debt of a party to a marriage, caused by the expenditure of marital funds, is, in the absence of an agreement to repay the marital estate, neither an asset nor a debt of the marital estate; rather, such reduction is properly considered as a distributional factor within the context of N.C.G.S. § 50-20(c)(12).

Am Jur 2d, Divorce and Separation §§ 879, 880.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by plaintiff from order filed 29 July 1993 in Person County District Court by Judge J. Larry Senter. Heard in the Court of Appeals 10 May 1994.

Ronnie P. King, P.A., by Ronnie P. King, for plaintiff-appellant.

Farmer & Watlington, by R. Lee Farmer and W. Richard Anderson, for defendant-appellee.

GREENE, Judge.

Appeal by Brandon J. Adams (plaintiff) from an equitable distribution "order" filed 29 July 1993 by the District Court of Person County.

Plaintiff and Kim Elaine Adams (defendant) were married on 23 February 1991 and separated on 28 October 1991. At the time of the marriage, plaintiff owed numerous personal debts, including: $683.05 to J.C. Penney Company, $920.00 on a First Bank Master Card, $560.00 to Lowe's, $600.00 to Sears, $282.00 to Person County Memorial Hospital, two debts totalling $17,502.00 to American National Bank, $1,642.00 to the Internal Revenue Service, and $174.00 to the North Carolina Department of Revenue. These debts totalled $22,914.92. On the date of separation, plaintiff's separate debts had been reduced in the amount of $12,484.00 by the expenditure of marital funds as follows: the debts to J.C. Penney Company, Lowe's, Sears, the Internal Revenue Service, and the North Carolina Department of Revenue were paid in full; the debt on the First Bank Master Card had been reduced to $195.00; the debt to Person County Memorial Hospital had been reduced to $82.69; and the debts to American National Bank had been reduced to $9,571.31.

At the equitable distribution trial, the trial court classified the $12,484.00 reduction in plaintiff's separate debt as marital property.

The issue presented is whether the value of a reduction in a party's separate debt through the expenditure of marital funds may be classified as marital property.

Defendant argues that the value of the reduction in the plaintiff's separate debt is properly classified as marital because the net value of the marital estate would have been larger "[i]f these debts had not been paid." While it is true that the martial estate may very well have been larger had marital funds not been used to reduce plaintiff's sep-

arate debts, it does not, however, follow that the value of the reduction is properly classified as marital property.

Under our equitable distribution statute, only assets and debts are subject to classification as marital property. *See Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994); N.C.G.S. § 50-20(b)(1) (Supp. 1993). A reduction in the separate debt of a party to a marriage, caused by the expenditure of marital funds, is, in the absence of an agreement to repay the marital estate, neither an asset nor a debt of the marital estate. Such a reduction is properly considered as a distributional factor within the context of N.C. Gen. Stat. § 50-20(c)(12) (Supp. 1993).

In this case, there is no evidence of any agreement that plaintiff would repay the marital estate for the marital funds used to reduce his separate debts. Therefore, the trial court erred in classifying the value of the reduction of plaintiff's separate debt as marital property. Accordingly, the judgment of the trial court must be reversed and the case remanded for entry of a new judgment based upon the evidence presented at the 1 June 1993 hearing. In entering the new judgment, the trial court is not bound by the findings and conclusions made in its 29 July 1993 "order."

Reversed and remanded.

Chief Judge ARNOLD and Judge McCRODDEN concur.

JOHN S. MORRISON, ADMINISTRATOR C.T.A. OF THE ESTATE OF BYRAN O. GRANDY, PLAINTIFF v. MELVIN GRANDY, ARLENE GRANDY, FRANKLIN GRANDY, BETTY GRANDY LYNN, CHARLES GRANDY, PAUL GRANDY, MARGARET NICHOLSON, CLINTON GRANDY, CAROLINE JO WALLACE, PATRICIA DAVIS AND MARY GRANDY SCHWARGA, DEFENDANTS

No. 931SC433

(Filed 7 June 1994)

Wills § 165 (NCI4th)— executory agreement to sell real estate—devise of property not adeemed

A devise of property in testator's will did not adeem because of an agreement by the testator to sell the property since, at the time of testator's death, he retained legal title to the real estate;

following his death that legal title passed to the devisees, two of his children, subject to the executory agreement; and when the purchaser withdrew from the agreement, the devisees acquired complete title to the real estate. N.C.G.S. § 31-41.

Am Jur 2d, Wills §§ 1701 et seq.

Appeal by defendant, Melvin Grandy, from judgment entered 25 January 1993 by Judge Thomas S. Watts in Currituck County Superior Court. Heard in the Court of Appeals 8 February 1994.

Bryan O. Grandy (testator) died testate on 18 September 1989. Item VII of testator's will devised all real property to his son, Melvin Grandy, for life, then to his daughter, Arlene, in fee simple absolute at the expiration of Melvin's life estate. At the time of his death, testator owned real property in Currituck County.

After he executed the will, testator entered into a valid purchase and sale agreement (agreement) to sell the Currituck County property for $160,000.00. Closing was scheduled for 1 December 1989. Following testator's death, several months before closing, the Administrator determined, in light of the agreement, that the devise in Item VII had adeemed and proceeds of the sale would pass under Item VI, not Item VII, of the will. Item VI called for a distribution of all personal property between six of testator's eleven children.

Prior to closing, however, the purchaser validly withdrew his offer and the devise remained in the estate. The Administrator then determined that the devise was no longer adeemed and would now pass under Item VII. Melvin and Arlene Grandy, beneficiaries under Item VII, agreed. Testator's other children, beneficiaries under Item VI, disagreed. The Administrator filed this declaratory judgment action for a determination of whether (1) the property had adeemed, and (2) if so, the property should be sold and the proceeds distributed under Item VI.

The trial court concluded that (1) testator, and thus his estate, was bound by a valid agreement to sell the real property at the time of his death, (2) the existence of the contract converted the real estate to personal property to the estate and real property to the buyer, (3) at the time of his death, testator had placed the real property out of his control so that it did not pass under Item VII, and (4) the acts of others, occurring some time after testator's death, cannot

reverse the prior ademption. Thus, the trial court concluded that the real property should be sold and divided per Item VI of the will.

John J. Flora, III, for defendant appellant Melvin Grandy.

Aycock, Spence & Butler, by W. Mark Spence, for defendant appellee Charles Grandy.

D. Keith Teague, P.A., by D. Keith Teague (withdrew after filing brief), for defendant appellee Franklin Grandy.

ARNOLD, Chief Judge.

The question here presented is whether the devise in Item VII adeemed because of the agreement to sell. The answer is no, ademption simply does not apply. Legal fiction should not be considered when there are relevant statutes, such as N.C. Gen. Stat. § 31-41 (1984), which apply. G.S. § 31-41 states "[e]very will shall be construed . . . to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

At the time of the testator's death, he retained legal title to the real estate. Following his death, that legal title passed to the devisees, Melvin and Arlene Grandy, per Item VII of the will, subject, of course, to the executory agreement. When the purchaser withdrew from the agreement, the devisees named in Item VII acquired complete title to the real estate.

The order of the trial court concluding that the devise adeemed is

Reversed.

Judges WYNN and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 7 JUNE 1994

AFFIRMATIVE SOLUTIONS+, INC. v. RITSEMA No. 9325SC796	Catawba (91CVS916)	Affirmed
ARETAKIS v. ARETAKIS No. 935DC852	New Hanover (91CVD02628)	Affirmed
BD. OF DRAINAGE COMRS. OF CORE CREEK DRAINAGE DIST. v. WHITE No. 923DC1148	Craven (97CVD694)	Dismissed
BRYANT v. K-MART CORP. No. 937SC723	Nash (92CVS1601)	Affirmed
BURTON v. SEABOLT No. 9319DC972	Randolph (89CVD886)	No Error
CARLISLE v. BINDER No. 9310DC623	Wake (91CVD13317)	Appeal Dismissed
CHALK & MASSEY REALTY v. RON'S AUCTION & REALTY CO. No. 9210SC1300	Wake (91CVS12548)	Affirmed
CONE MILLS CORP. v. ALLSTATE INS. CO. No. 9318SC416	Guilford (92CVS10655)	Dismissed
DUNN v. JONES No. 933SC481	Craven (91CVS335)	Reversed
FLY v. FLY No. 9321SC662	Forsyth (92CVS1221)	Affirmed
HACKNEY BROTHERS, INC. v. ARNDS No. 937SC706	Wilson (90CVS1083)	Affirmed
JONES v. HELMS No. 9326SC876	Mecklenburg (92CVS14696)	Appeal Dismissed
McGIRT v. McGIRT No. 9316DC964	Robeson (92CVD1948)	Dismissed
NATIONWIDE MUT. INS. CO. v. HENDERSON No. 932SC434	Washington (91CVS161)	Affirmed

RAMSEY v. RAMSEY No. 9324SC877	Madison (92CVS231)	Vacated
SPALDING v. HODGES No. 9321SC913	Forsyth (92CVS5038)	Reversed & Remanded
STATE v. COLE No. 9318SC1166	Guilford (93CRS40566)	No Error
STATE v. JOEL No. 9326SC1050	Mecklenburg (93CRS16340) (93CRS16341)	No Error
STATE v. MALIK No. 937SC953	Nash (92CRS2444) (92CRS2445) (92CRS2446)	Affirmed
STATE v. MONEY No. 9318SC1061	Guilford (92CRS70239) (92CRS20526)	No Error
STATE v. SMITH No. 9321SC1054	Forsyth (92CRS29519)	No Error
STATE v. SOWELL No. 9320SC1193	Union (91CRS5128) (91CRS5129)	No Error
STATE AUTO. MUT. INS. CO. v. UNIVERSAL UNDERWRITERS INS. CO. No. 9318SC933	Guilford (91CVS5956)	Affirmed
STOLZ v. BREWER No. 9219DC1229	Rowan (88CVD708)	Affirmed
TABRON v. WILSON No. 937SC830	Nash (92CVS699)	Affirmed

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, PLAINTIFF v. CENTURY INDEMNITY COMPANY, DEFENDANT

No. 9310SC677

(Filed 21 June 1994)

1. Insurance § 43 (NCI4th)— automobile accident—primary insurer insolvent—commercial umbrella policy not required to drop down

The trial court properly granted summary judgment for defendant where a suit was filed against Long Manufacturing as a result of an automobile accident; Long was insured by AMLIC under a comprehensive general liability policy and by Century under a commercial umbrella liability policy; AMLIC was declared insolvent; a dispute developed between the Insurance Guaranty Association and Century as to whether Century's commercial umbrella policy was required to drop down and become primary; a settlement was reached in the underlying case to which both the Association and Century contributed; the Association filed a complaint against Century seeking recovery of the amounts it had expended; Century counterclaimed for the difference between the amount the Association had paid and its statutory coverage limit, that sum being less than Century had contributed to the settlement; and the trial court entered summary judgment for Century. Century's commercial umbrella policy was clear and unambiguous. Interpreting the policy's coverage agreements as written and according to their plain meaning, the phrase "amount recoverable" does not mean the amount actually recoverable and collectible from the primary insurer; that interpretation would render language on underlying limits meaningless, and it is assumed that the parties to insurance contracts do not create meaningless provisions. The loss payable condition in the contract serves to reinforce the coverage agreement by making it clear that a loss arising from an occurrence is not payable by Century unless the limit of the underlying insurance is exhausted by payment. The fundamental purpose of excess insurance is to protect the insured against excess liability claims, not to insure against the underlying insurer's insolvency.

Am Jur 2d, Insurance § 874.

2. Insurance § 963 (NCI4th)— auto accident—insolvent primary insurer—Insurance Guaranty Association and umbrella insurer—equitable subrogation

The trial court did not err by granting summary judgment for defendant Century on its counterclaim where Century was a commercial umbrella insurer; the insured's primary insurer became insolvent; there was a claim as a result of an automobile accident; there was a dispute between the Insurance Guaranty Association and Century as to which would provide primary coverage; the underlying action was settled, with both the Association and Century contributing; the Association filed an action against Century for the amounts it had expended; and Century counterclaimed against the Association for the difference between the Association's contribution to the settlement and its statutory limits. The determinative factor in assessing whether a party presents a valid claim of equitable subrogation is whether that party acted in good faith in seeking to protect its interests. Century reasonably acted to protect its own interest and acted in good faith; absent a statutory prohibition, Century is entitled to recover from the Association the statutory limits of the Association's coverage under the doctrine of equitable subrogation.

Am Jur 2d, Insurance §§ 2051 et seq.

3. Insurance § 42 (NCI4th)— auto accident—insolvent primary insurer—Insurance Guaranty Association and umbrella insurer—equitable subrogation—"claimant" and "covered claim"

There was no statutory prohibition against recovery by a commercial umbrella insurer against the Insurance Guaranty Association on the grounds of equitable subrogation where Century was the umbrella insurer; the primary insurer became insolvent; the Insurance Guaranty Association and Century could not agree on which was to provide primary coverage; the underlying action arising from an auto accident was settled; both the Association and Century contributed to the settlement; the Association brought an action for the amounts it had paid; Century counterclaimed for the difference between the Association's contribution to the settlement and its statutory limits; and summary judgment was granted for Century. Although the Association argued that Century's claim was barred by statutory language defining "covered claim" as excluding amounts due as subrogation or otherwise, the General Assembly did not intend for the

term "subrogation" to encompass equitable subrogation, particularly in a context in which the Association failed to fulfill its statutory obligation. Finally, the Association's interpretation is inconsistent with the goal of timely proper payments of legitimate claims and could encourage arbitrary and capricious settlement offers, leaving excess insurers with no remedy. N.C.G.S. § 58-48-5; N.C.G.S. § 58-48-20(4).

Am Jur 2d, Insurance § 874.

Appeal by plaintiff from judgment entered 22 April 1993 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 March 1994.

North Carolina Insurance Guaranty Association (hereinafter "plaintiff-Association") is an unincorporated legal entity established pursuant to the North Carolina Insurance Guaranty Act (hereinafter "the Act"), G.S. 58-48-1 *et seq.* Under the Act, the maximum amount which may be paid by plaintiff-Association in the event of an insurer's insolvency is $300,000.00 (hereinafter "statutory cap"). G.S. 58-48-35(a)(1). Defendant Century Indemnity Company (hereinafter "defendant-Century") is a Connecticut corporation licensed and admitted to transact insurance business in North Carolina and writing policies of insurance in North Carolina.

As the result of an 8 June 1985 automobile accident, William Brooks and Betty Brooks (hereinafter "the Brooks") filed suit against Long Manufacturing N.C., Inc. (hereinafter "Long"), American Mutual Liability Insurance Company's (hereinafter "AMLIC") insured, in a Texas court on 19 September 1985. During this time, two policies issued to Long were in effect: (1) AMLIC insured Long under a comprehensive general liability insurance policy with limits of $1,000,000.00, and (2) defendant-Century insured Long under a commercial "umbrella liability policy" with limits of $5,000,000.00. AMLIC was an insurer admitted and licensed to transact insurance business in North Carolina and wrote policies of insurance in North Carolina until 9 March 1989, when AMLIC was declared insolvent by a Massachusetts court.

After plaintiff-Association was activated pursuant to the Act as a result of AMLIC's insolvency, a dispute developed between plaintiff-Association and defendant-Century as to whether defendant-Century's commercial umbrella policy (issued to Long) was required to "drop-down" and become primary liability insurance for Long as a

result of AMLIC's insolvency. By letter dated 10 April 1989, plaintiff-Association demanded that defendant-Century provide Long with a defense and indemnify Long for any judgment or settlement arising from the Brooks' lawsuit. By letter dated 20 April 1989, defendant-Century denied plaintiff-Association's demand. By letter dated 5 May 1989, plaintiff-Association, while reserving its rights, agreed to pay Long's defense costs through trial.

On 17 August 1989, a settlement was reached in the underlying action; the Brooks received a payment of $400,000.00 in full settlement of all their claims against Long. Defendant-Century advanced $200,000.00 to the Brooks, while plaintiff-Association paid the remaining $200,000.00 to Long and its attorneys, subject to a reservation of rights, for disbursement to the Brooks. Long then executed a proof of claim assigning to plaintiff-Association all rights of action that it (Long) had against AMLIC or defendant-Century to the extent of any payment made to or on behalf of Long.

On 17 April 1991, plaintiff-Association filed a complaint against defendant-Century, seeking recovery of the $200,000.00 paid in the settlement plus $59,249.00 expended in plaintiff-Association's defense of Long in the underlying action. Defendant-Century filed an answer and counterclaim, seeking $100,000.00, an amount which represented the $300,000.00 statutory cap, G.S. 58-48-35(a)(1), of plaintiff-Association's obligation minus the $200,000.00 previously advanced by plaintiff-Association to Long to settle the Brooks' lawsuit.

In November 1992, plaintiff-Association and defendant-Century each moved for summary judgment. After a hearing, the trial court entered a 22 April 1993 order finding that "defendant[-Century] is entitled to judgment as a matter of law declaring that its policy of excess liability insurance is not required to 'drop down' and become primary liability insurance with respect to the underlying action; that defendant did not breach its contract with plaintiff and is not obligated to indemnify plaintiff for damages, prejudgment interest, defense or other costs or expenses in the underlying action; and that defendant is entitled to recover from plaintiff the sum of $100,000.00 on defendant's counterclaim." Plaintiff-Association appeals.

Moore & Van Allen, by Joseph W. Eason, Christopher J. Blake, & Louis S. Watson, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by Robert W. Sumner and Susan K. Burkhart, for defendant-appellee.

EAGLES, JUDGE.

Plaintiff-Association brings forth two assignments of error. After careful review, we affirm.

I.

[1] The first issue presented by plaintiff-Association is whether defendant-Century's commercial umbrella policy must "drop down" and serve as primary insurance as a result of the insolvency of Long's primary liability carrier (AMLIC). *See* Annotation, "Primary Insurer's Solvency as Affecting Excess Insurer's Liability," 85 ALR 4th 729, 734 n.4 (1991) ("Drop down coverage occurs when an insurance carrier of a higher level of coverage is obligated to provide the coverage that the carrier of the immediately underlying level of coverage had agreed to provide"). At stake is defendant-Century's liability to plaintiff-Association for the $200,000.00 that plaintiff-Association paid in settlement of the Brooks' lawsuit.

In urging the reversal of the trial court's order, plaintiff-Association argues that the trial court erred because the language of defendant-Century's commercial umbrella policy requires it to "drop down" and provide primary coverage to Long. Plaintiff-Association contends that: 1) defendant-Century is required to drop down because the amount recoverable from the underlying insurance is zero; 2) the loss payable condition further supports defendant-Century's obligation to drop down; 3) the occurrence requiring coverage by defendant-Century is the accident in the underlying action, and; 4) because defendant-Century was obligated to drop down, defendant-Century must also pay the costs incurred by plaintiff-Association in defending Long in the underlying action.

There are several well established principles governing the construction of insurance policies. "In North Carolina, it is well settled that when construing an insurance policy a court must enforce the policy as written, 'without rewriting the contract or disregarding the express language used.' " *Newton v. United States Fire Ins. Co.*, 98 N.C. App. 619, 623, 391 S.E.2d 837, 839, *disc. review denied*, 327 N.C. 637, 399 S.E.2d 329 (1990) (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)); *Industrial Center v. Liability Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967). " '[R]esolution of [an insurance policy's scope] involves construing the language of the coverage . . . and determining whether events as alleged in the pleadings and papers before the court are covered by the poli-

cies. As such, it is an appropriate subject for summary judgment.' " *C. D. Spangler Constr. Co. v. Indus. Crankshaft & Eng. Co.*, 326 N.C. 133, 141, 388 S.E.2d 557, 562 (1990) (alterations in original) (*quoting Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986)). Regarding the construction of policy language containing allegedly ambiguous terms, our Supreme Court has stated:

> Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. A difference of judicial opinion regarding proper construction of policy language is some evidence calling for application of this rule. *See Maddox v. Insurance Co.*, 303 N.C. 648, 654, 280 S.E.2d 907, 910 (1981); *Electric Co. v. Insurance Co.*, 229 N.C. 518, 521, 50 S.E.2d 295, 297 (1948); Annot., "Insurance—Ambiguity—Split Court Opinions," 4 A.L.R. 4th 1253, 1255 (1981). While "[t]he fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is at best, ambiguous," *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988); *accord Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E.2d 217, 223 (1984), "ambiguity . . . is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).
>
> "All parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something." *Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986). *See also Williams v. Insurance Co.*, 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1967) ("each clause and word must be . . . given effect if possible by any reasonable construction"); *Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E.2d 438, 440-41 (1960).
>
> > The terms of a contract must, if possible, be construed to mean something, rather than nothing at all, and where it is possible to do so by a construction in accordance with the fair intendment of a contract, the tendency of the courts is to give it life, virility, and effect, rather than to nullify or destroy it.
>
> 17 Am. Jur. 2d *Contracts* § 254, at 648-49 (1964).

Brown v. Lumbermans Mut. Casualty Co., 326 N.C. 387, 392-93, 390 S.E.2d 150, 153 (1990).

The pertinent provisions of the commercial umbrella policy at issue here provide as follows:

COVERAGE AGREEMENTS

I. COVERAGE. The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of liability

(a) imposed upon the Insured by law, or

(b) assumed under contract or agreement by the Named Insured and/or any officer, director, stockholder, partner or employee of the Named Insured, while acting in his capacity as such,

for damages, direct or consequential, and expenses, all as more fully defined by the term "ultimate net loss" on account of

(1) personal injury, (2) property damage, (3) advertising liability,

caused by or arising out of an occurrence occurring anywhere in the world.

II. LIMIT OF LIABILITY. The company shall only be liable for the ultimate net loss the excess of either

(a) the amount recoverable under the underlying insurances as set out in Item 7 of the Declarations, or

(b) the amount of the retained limit stated in Item 4 of the Declarations in respect of each occurrence not covered by said underlying insurances,

(hereinafter called the "underlying limits"):

and then only up to a further limit as stated in Item 5 of the Declarations in respect of each occurrence—subject to a limit as stated in Item 6 of the Declarations in the aggregate for each annual period during the currency of this policy, commencing from the effective date and arising out of any hazard for which an aggregate limit of liability applies in the underlying policies scheduled or listed herein. In the event of reduction or exhaus-

tion of the aggregate limits of liability under said underlying insurances by reason of payment of claims in respect of occurrences occurring during the period of this policy, this policy, subject to all the terms, conditions and definitions hereof, shall

(1) in the event of reduction pay the excess of the reduced underlying limit;

(2) in the event of exhaustion continue in force as underlying insurance.

. . . .

DEFINITIONS

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:

. . . .

5. OCCURENCE. The term "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one location shall be deemed one occurrence.

. . . .

CONDITIONS

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS:

. . . .

J. LOSS PAYABLE. Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within 12 months after the Insured shall have paid an amount of ultimate net loss in excess of the underlying limits or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured,

> the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within 30 days after they are respectively claimed and proven in conformity with this policy.

We find the policy clear and unambiguous and interpret the policy as written and according to its plain meaning. *Barbee v. Hartford Mutual Insurance Co.*, 330 N.C. 100, 408 S.E.2d 840 (1991); *Fidelity Bankers Life Ins. Co.*, 318 N.C. 378, 348 S.E.2d 794. The policy provisions recited *supra* are identical to the provisions at issue in *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or. 464, 836 P.2d 703 (1992). Plaintiff argues that the phrase "amount recoverable" appearing in the Coverage Agreements means "that amount actually recoverable and collectible from the primary insurer. . . . Because AMLIC is now insolvent, no amount is recoverable from the primary insurer, and Century is required to drop down to provide primary coverage." (Emphasis in original.) Presented with a similar proposed interpretation of the meaning of the phrase "amount recoverable," in *Hoffman Construction Co.* the Supreme Court of Oregon stated:

> Plaintiffs argue that "amount recoverable" means the amount "able to be recovered," *i.e.*, the amount that plaintiffs actually were able to get from their primary insurance carriers.
>
> . . . .
>
> The policy defines "underlying limits" as the "*amount recoverable* under the underlying insurances." (Emphasis added.) The difficulty with plaintiffs' theory (*viz.*, that "amount recoverable" means "the amount able to be recovered") is that, under such an interpretation, the portion of the "LIMIT OF LIABILITY" section that specifically identifies the circumstances in which defendant will provide "drop down" coverage would be rendered meaningless. That portion reads:
>
> > "In the event of reduction or exhaustion of the aggregate limits of liability under said underlying *insurances by reason of payment of claims in respect of occurrences occurring during the period of this policy*, this policy, subject to all the terms, conditions and definitions hereof, shall
> >
> > > "(1) in the event of reduction pay the excess of the reduced underlying limit[.]"

(Emphasis added.) Substituting "the amount able to be recovered from the underlying insurances" for "underlying limit," the phrase will read:

> "In the event of reduction . . . of the aggregate limits of liability under said underlying insurances by reason of payment of claims . . . this policy . . . shall
>
> > "(1) . . . pay the excess of the reduced [amount able to be recovered from the underlying insurances.]"

Under plaintiffs' interpretation of "amount recoverable," there was no need for the parties to agree that, if the limit of an underlying policy were reduced, then the defendant would pay the excess of that reduced limit. Defendant *already would have* an obligation to pay the excess of that reduced limit, because that reduced limit would be the amount that plaintiffs were "able to recover" under the underlying policy.

In contrast to that reading of the "drop down" provision of the "LIMIT OF LIABILITY" section, defendant's suggested interpretation gives the provision meaning. Under defendant's interpretation, the "amount recoverable" refers to the amount of the underlying insurances *as they are written.* The "drop down" provision is an exception: the "drop down" provision extends umbrella coverage to those situations in which there is reduced primary insurance due to the fact that the primary is partially or wholly exhausted on account of the payment of claims. That is precisely what that provision says. Defendant's interpretation lets all provisions have meaning; plaintiffs' would not. We assume that parties to an insurance contract do not create meaningless provisions.

Hoffman Construction Co., 313 Or. at 469, 471-72, 836 P.2d at 706-07 (alterations in original). *See Bolton Corp.*, 317 N.C. 623, 347 S.E.2d 369 (presumption that each part of the contract means something); *Williams*, 269 N.C. 235, 152 S.E.2d 102; *Robbins*, 253 N.C. 474, 117 S.E.2d 438. We agree with the *Hoffman Construction Co.* court's reasoning and reject plaintiff-Association's proposed definition of "amount recoverable." Similarly, we reject plaintiff-Association's argument regarding the policy's "Loss Payable" condition. Plaintiff-Association's argument again is grounded largely in its interpretation of the term "amount recoverable." Plaintiff-Association argues:

> [T]he Loss Payable condition provides that Century's obligation ripens when the "amount of the underlying limits" shall have been paid. Century ignores the fact that the phrase "underlying limits" is defined in the Limit of Liability coverage clause of the Century policy by referencing the "amount recoverable" language. As discussed above, no amount was recoverable from AMLIC as a result of its insolvency. Therefore, consistent with the Loss Payable condition, Century's obligation attached with the first dollar of coverage.

(Emphasis in original.) (Citation omitted.) We disagree. As *Hoffman Construction Co.* stated:

> Under plaintiffs' interpretation of "amount recoverable," that portion of the "Loss Payable" condition would read:
>
> > "Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount [able to be recovered on the underlying insurances, if any] on account of such occurrence."
>
> It is clear that the effect of plaintiffs' suggested interpretation of "amount recoverable" is to create a meaningless redundancy under the "LOSS PAYABLE" condition, because the underlying insurer *always* will pay the amount that the insured was "able to recover" from the underlying insurer—that is why the insured was able to recover it. It is not reasonable to assume that the parties intended that that portion of the "LOSS PAYABLE" condition be meaningless.

Hoffman Construction Co., 313 Or. at 472-73, 836 P.2d at 708 (emphasis in original) (citation omitted). We conclude that the Loss Payable condition serves to reinforce the coverage agreement by making it clear that a loss arising from an occurrence is not payable by defendant-Century unless the limit of the underlying insurance is exhausted by payment, coming either from the insured or from the insured's underlying carrier. *See Radiator Specialty Co. v. First State Ins. Co.*, 651 F.Supp. 439 (W.D.N.C. 1987), *aff'd per curiam*, 836 F.2d 193 (4th Cir. 1987); *Morbark Industries, Inc. v. Western Employees Ins. Co.*, 170 Mich. App. 603, 429 N.W.2d 213 (1988).

The straightforward language of the contract is buttressed by the observation that the fundamental purpose of excess insurance is to protect the insured against excess liability claims, not to insure

against the underlying insurer's insolvency, *Playtex FP, Inc., v. Columbia Cas. Co.*, 622 A.2d 1074, 1078 (Del. Super. 1992), *Morbark Industries, Inc.*, 170 Mich App. at 608, 429 N.W.2d at 216, unless of course the policy expressly provides otherwise. *Alaska Rural Elec. Co-op v. INSCO Ltd.*, 785 P.2d 1193, 1195 (Alaska 1990). *See also Globe Indem. Co. v. Jordan*, 634 A.2d 1279, 1283 (Me. 1993) ("The purpose of an umbrella policy is to protect the insured in the event of catastrophic circumstances when the insurer's liability would exceed the limits of its underlying policy. It is designed to expand the amount, but not the scope of coverage"). *See generally* 8A J. Appleman and J. Appleman, *Insurance Law and Practice*, § 4909.85, p. 452 (1981 & Supp. 1993) (defining excess policies as "policies of insurance sold at comparatively modest cost to pick up where primary coverages end, in order to provide extended protection"); 16 G. Couch, R. Anderson, and M. Rhodes, *Couch On Insurance*, § 62:48 (2d ed. 1983 & Supp. 1993). Our Supreme Court has described the general principles of construction applicable to disputed terms in an insurance policy as follows:

> Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or *impose liabilities on the parties not bargained for and found therein.*

Woods, 295 N.C. at 505-06, 246 S.E.2d at 777 (emphasis added). Here, we find no ambiguity as to the term "amount recoverable" or as to the scope of coverage: the primary insurer's insolvency does not constitute an "occurrence" as that term is defined in the policy. We note that the primary insurer was solvent on the date of the loss, here the automobile accident which occurred on 8 June 1985. *See* G.S. 58-48-35(a)("The Association shall: (1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency . . . This obligation includes only the amount of each covered claim

that is in excess of fifty dollars ($50.00) and is less than three hundred thousand dollars ($300,000)").

We find the reasoning of *Hoffman Construction Co.*, 313 Or. 464, 836 P.2d 703, persuasive and we adopt its interpretation of the policy language. Accordingly, we conclude that no ambiguity in the policy exists. We note that our holding is in accord with numerous other jurisdictions. "The financial vicissitudes of the insurance industry in recent years have spawned numerous similar cases . . . . Though there have been some differences in the language of the various insurance contracts construed in such cases, the result in most jurisdictions has been to reject the so-called 'drop-down' theory." *Morbark Industries, Inc.*, 170 Mich. App. at 608-09, 429 N.W.2d at 216 (and cases cited therein). *See also Playtex FP, Inc.*, 622 A.2d at 1082 (and cases cited therein); *Alaska Rural Elec. Co-op*, 785 P.2d at 1195. *See generally*, Annotation, "Primary Insurer's Solvency as Affecting Excess Insurer's Liability," 85 ALR 4th 729 (1991).

Our review of defendant-Century's policy leads us to the conclusion that defendant-Century's coverage does not "drop down" to become primary coverage. We have reviewed plaintiff-Association's remaining arguments, including the argument regarding its payment of defense costs on behalf of the insured in the underlying action, and have found them to be without merit. Therefore, the trial court's entry of summary judgment in favor of defendant-Century on this issue was proper. Accordingly, this assignment of error is overruled.

II.

[2] Plaintiff-Association next argues that the trial court erred in granting summary judgment for defendant-Century on the counterclaim because "[defendant-]Century cannot, as a matter of law, possess a 'covered claim' against [plaintiff-]Association under the Act." We disagree and affirm.

Plaintiff-Association argues that: 1) defendant-Century is not entitled to any recovery because it does not possess a "covered claim," G.S. 58-48-20(4), under the Act, and 2) "no separate agreement exists between [defendant-]Century and [plaintiff-]Association under which [plaintiff-]Association agreed to reimburse [defendant-]Century if it were determined that [defendant-]Century's policy does not 'drop down.' " In its appellate brief, defendant-Century concedes that it did not "obtain an assignment or other contract from the insured, Long, transferring a right of subrogation against [plaintiff-]

Association." Instead, defendant-Century argues that its right to recovery is based on the doctrine of equitable subrogation.

"Equitable subrogation is 'a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it' and 'arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable.' " *Harris-Teeter Super Markets v. Watts*, 97 N.C. App. 101, 103, 387 S.E.2d 203, 205 (1990) (*quoting Beam v. Wright*, 224 N.C. 677, 683, 32 S.E.2d 213, 218 (1944)). In the insurance context, our Supreme Court has described the doctrine as follows:

> Generally, the doctrine of equitable subrogation may be invoked if the obligation of another is paid by the plaintiff for the purpose of protecting some real or supposed right or interest of his own. *Boney v. Central Mutual Ins. Co. of Chicago*, 213 N.C. 563, 197 S.E. 122; *Moring v. Privott*, 146 N.C. 558, 60 S.E. 509; *Davison v. Gregory*, 132 N.C. 389, 43 S.E. 916; 22 N.C. L. Rev. 167 (1944). In *Boney*, the Home Insurance Agency took an order for an automobile liability policy from Thomas-Howard Company and confirmed placement with the Central Mutual Insurance Company of Chicago. Later, when Thomas-Howard Company had a liability claim made against it, Central Mutual denied coverage and Home Insurance Agency stepped in and provided a defense. It later turned out that Central Mutual had coverage and on appeal the Court asked this question: "Was claimant such a pure volunteer as to be deprived of the right of subrogation?" In answer, the Court said:
>
> > " 'Cases in our own reports illustrate the doctrine that though the party who makes the payment may, in fact, have no real or valid legal interest to protect, he may yet be subrogated when he acts in good faith, in the belief that he had such interest.' *Publishing Co. v. Barber, supra* [165 N.C. 478, 81 S.E. 694]. . . .
> >
> > * * *
> >
> > "It is sufficient to invoke the doctrine of subrogation if (1) the obligation of another is paid; (2) 'for the purpose of protecting some real or supposed right or interest of his own.' 60 C.J., Subrogation, Sec. 113."

In the instant case Jamestown defended because Nationwide refused to do so. Jamestown defended in good faith as

> Jamestown would have been liable had it been adjudged that Nationwide's policy did not provide coverage for William. Under these circumstances, Jamestown was not such a pure volunteer as to be deprived of the right of subrogation. *Boney v. Central Mutual Ins. Co. of Chicago, supra; Publishing Co. v. Barber,* 165 N.C. 478, 81 S.E. 694.

Insurance Co. v. Insurance Co., 277 N.C. 216, 221-22, 176 S.E.2d 751, 755-56 (1970). As *Publishing Co.*, *Boney*, and *Insurance Co.* illustrate, the determinative factor in assessing whether a party presents a valid claim of equitable subrogation is whether that party (the payor) has acted in good faith in seeking to protect its interests. Here, defendant-Century (the payor) would have been obligated to pay the $100,000.00 had it been contractually required to "drop down," as plaintiff-Association has consistently contended that defendant-Century was required to do. Accordingly, defendant-Century reasonably acted to protect its own interest. We conclude that defendant-Century has acted in good faith: we note that there is no allegation to the contrary. Accordingly, absent a statutory prohibition defendant-Century is entitled to recover the $100,000.00 from plaintiff-Association under the doctrine of equitable subrogation.

[3] Plaintiff-Association argues that defendant-Century is not entitled to recovery from its counterclaim because it neither qualifies as a "claimant" nor possesses a "covered claim" under the Act. According to the Act, its purposes are "to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer . . ." G.S. 58-48-5. The terms "claimant" and "covered claim" are defined under the Act as follows:

> (2a) "Claimant" means any insured making a first party claim or any person instituting a liability claim; provided that no person who is an affiliate of the insolvent insurer may be a claimant.
>
> . . . .
>
> (4) "Covered claim" means an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies . . . "Covered claim" shall not include any amount awarded as punitive or exemplary damages; sought as a return of pre-

> mium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation or contribution recoveries or otherwise.

G.S. 58-48-20. Plaintiff-Association points to the last sentence of 58-48-20(4) and argues that defendant-Century's claim is barred, if not by the term "subrogation" then by the catchall phrase "or otherwise." Defendant-Century contends that a claim based upon equitable subrogation is not barred by the statute:

> An insurer asserting a subrogation claim rightfully paid damages for its insured, in the first instance, under its policy, but contends that another party is primarily liable for the damages. By contrast, an insurer asserting an equitable subrogation claim did not owe the claim, in the first instance; it was owed by another insurer who wrongfully refused to pay the claim. For example, in the conventional subrogation situation, A's automobile collides with B's automobile; A's insurer pays a property damage claim for A under its policy and then pursues recovery against B. If B's insurer were insolvent, A's insurer would have no right to recover against the Association because it would be advancing a "subrogation" claim of an "insurer." That case, however, is not present here. Century's right to recover arises from principles of equity because the Association refused to pay, in full, a first party claim for an insured [of an insolvent insurer, AMLIC]. If the Century policy was not required to drop down [*supra*], then Century had no contractual obligation to pay the first $300,000.00, while the Association had a statutory obligation to do so.

(Emphasis in original.) (Alterations added.)

This Court has stated that while conventional subrogation "arises from an express agreement of the parties," equitable subrogation "rests not on contract but on principles of equity." *NCNB v. Western Surety Co.*, 88 N.C. App. 705, 708, 364 S.E.2d 675, 677 (1988) (*citing Journal Publishing Co. v. Barber*, 165 N.C. 478, 81 S.E. 694 (1914); *Powell v. Wake Water Co.*, 171 N.C. 290, 88 S.E. 426 (1916)). Furthermore, this Court has held that equitable subrogation is a "remedy [which] is highly favored and liberally applied." *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders*, 78 N.C. App. 108, 114, 336 S.E.2d 694, 698 (1985) (emphasis added). We conclude that our General Assembly did not intend for the term "subrogation" to encompass equitable subrogation, particularly in a context in which plaintiff-Association failed to fulfill its statutory obligation, G.S.

58-48-35(a)(1), based upon its misreading of the insurance contract at issue.

We now turn our attention to the phrase "or otherwise" appearing at the end of 58-48-20(4). We interpret the general catchall phrase "or otherwise" by reference to the doctrine of *ejusdem generis*, a well established rule of statutory construction providing that " 'where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including *only things of the same kind, character and nature* as those specifically enumerated.' " *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citations omitted) (emphasis added). *See also State v. Craig*, 176 N.C. 740, 744, 97 S.E. 400, 401 (1918) ("when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind"). Here, the terms immediately preceding the phrase "or otherwise" in G.S. 58-48-20(4) are "subrogation" and "contribution." These two items are contractual or tort based forms of remedies. *See Squires v. Sorahan*, 252 N.C. 589, 591, 114 S.E.2d 277, 279 (1960) ("subrogation . . . arises by reason of contract, . . . contribution . . . arises by reason of participation in the tort"); *NCNB*, 88 N.C. App. 705, 364 S.E.2d 675. On the other hand, equitable subrogation is a judicially imposed remedy grounded in equity. We conclude that in this context the phrase "or otherwise" does not encompass the purely equitable remedy applicable here.

Finally, our interpretation of G.S. 58-48-20(4), *supra*, addresses a potential inequity alluded to by defendant-Century in its brief:

> In considering the purposes of the Guaranty Act, it is clear that our Legislature intended that insureds, such as Long, would have the full benefit of the statutory cap under the Guaranty Act, $300,000.00, when their insurer becomes insolvent. It could not have intended that the Association could use the statutory reference to "subrogation" as a shield against fulfillment of its statutory obligations. Principles of equity require the Association to reimburse Century for monies owed by the Association as the insurer for Long. This result would effectuate the purposes of the Act by encouraging the Association to promptly settle claims within its statutory limit. It would also prevent the Association from being rewarded for refusing to meet its statutory obligations.

(Emphasis in original.)

We are left with the question: what rational basis led plaintiff-Association to pay $200,000.00, an amount which was $100,000.00 less than its statutory cap under G.S. 58-48-35(a)(1)? Hypothetically, if plaintiff-Association had decided, for whatever reason, to pay only a small fraction of its statutory cap, for example $25,000.00, using plaintiff-Association's flawed interpretation of G.S. 58-48-20, plaintiff-Association would have been under no obligation to pay defendant the remaining $275,000.00. If plaintiff-Association's logic were to prevail, there would be no incentive for plaintiff-Association to fulfill its statutory mandate. The less plaintiff-Association offered to contribute to the settlement of a claim, the more plaintiff-Association would stand to gain since under plaintiff-Association's argument the excess carrier would have no recourse. Plaintiff-Association's proposed interpretation of the statute is inconsistent with the goal of timely proper payments of legitimate claims, G.S. 58-48-5, and could encourage arbitrary and capricious settlement offers, leaving excess insurers with no remedy. We conclude that our General Assembly did not intend to encourage plaintiff-Association to use this type of hard bargaining technique against innocent excess insurers through the Act.

In sum, our decisions have been uniform in distinguishing between conventional subrogation and equitable subrogation. The dictates of *ejusdem generis* lead us to conclude that defendant-Century's recovery based upon equitable subrogation is not barred by G.S. 58-48-20(4). "If and when the lawmaking body wishes to amend the statute, a few words will suffice. This Court must forego the opportunity to amend here." *Insurance Co. v. Bynum*, 267 N.C. 289, 292, 148 S.E.2d 114, 117 (1966). Accordingly, this assignment of error fails.

III.

We hold that defendant-Century's commercial umbrella liability policy is not required to "drop down" and become primary coverage notwithstanding the insolvency of AMLIC. We further hold that defendant-Century is entitled to be paid $100,000.00 in light of plaintiff-Association's $300,000.00 statutory cap, G.S. 58-48-35(a)(1). For the reasons stated, the trial court's 22 April 1993 judgment is affirmed.

Affirmed.

Judges MARTIN and McCRODDEN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. BRENDA KAY MABE, ET AL, DEFENDANTS

JESSE WILLARD SCOTT, JR., INDIVIDUALLY, AS THE PARENT OF LUCINDA SUE SCOTT, AND AS THE ADMINISTRATOR OF THE ESTATE OF CAROLYN MABE SCOTT, AND LUCINDA SUE SCOTT, BY HER GUARDIAN AD LITEM, ANNE CONNOLLY, THIRD-PARTY PLAINTIFFS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, THIRD-PARTY DEFENDANT

BRENDA KAY MABE, ROGER LEE MABE, KIMBERLY HOPE MABE, A MINOR B/H/G/A/L S. MARK RABIL AND HEATHER DORA MABE, A MINOR B/H/G/A/L GREGORY W. SCHIRO, PLAINTIFFS v. ROBERT LEONARD GREGORY, AND MARY ELIZABETH WILSON, DEFENDANTS

JESSE WILLARD SCOTT, JR., INDIVIDUALLY AS THE PARENT OF LUCINDA SUE SCOTT AND AS THE ADMINISTRATOR OF THE ESTATE OF CAROLYN MABE SCOTT, AND LUCINDA SUE SCOTT, B/H/G/A/L ANNE CONNOLLY, PLAINTIFFS v. ROBERT LEONARD GREGORY, MARY ELIZABETH WILSON, AND JODY RAY BULLINS, DEFENDANTS

No. 9317SC40

(Filed 21 June 1994)

1. Insurance § 690 (NCI4th)— automobile accident—limit of liability—prejudgment interest

The trial court erred in an action arising from an automobile accident by ordering that Nationwide pay prejudgment interest where Nationwide had tendered its policy limits to the court, mediation ensued, the parties consented to judgments, and Nationwide agreed to pay its policy limits pro rata to the claimants. There is no statutory duty which requires a liability insurance carrier to pay prejudgment interest in addition to its limit of liability under the policy and a liability carrier's obligation to pay prejudgment interest in addition to its stated limits is governed solely by the language in the policy. Although the claimants assert that prejudgment interest was included in a policy provision governing payment of costs, the policy contains a clause defining prejudgment interest as part of damages and that clause is controlling. Moreover, prejudgment interest here would require Nationwide to pay an additional $300,000 over and above its policy limit of $300,000, an obviously absurd result which is

clearly not what the parties intended. Nationwide was obligated to pay prejudgment interest as part of damages up to its liability limit of $300,000, but since the total judgments exceed the policy's limit of liability, the individual claimants were not entitled to any prejudgment interest.

Am Jur 2d, Automobile Insurance § 428.

2. Insurance § 532 (NCI4th)— automobile accident—UIM coverage—owned vehicle exclusion—contrary to statutory terms

The trial court in an automobile accident case correctly held that an "owned vehicle" exclusion in the UIM section of a Farm Bureau automobile insurance policy was not enforceable where, but for the owned vehicle exclusion, the claimants would be first class insured persons. An owned vehicle exclusion is contrary to the terms of N.C.G.S. § 20-279.21(b)(4) whether it is judicially imposed or contained in the UIM portion of the policy. As long as an individual is a first classed insured person, he or she is covered.

Am Jur 2d, Automobile Insurance § 322.

3. Insurance § 528 (NCI4th)— automobile accident—UIM coverage—private passenger motor vehicle—low boy trailer

The claimants were not entitled to intrapolicy stacking in an action arising from an automobile accident where there was no dispute that this was a nonfleet policy and the two vehicles involved were a Mack truck and a low boy trailer. Under the version of N.C.G.S. § 58-40-10(1) in effect at the time of the accident, it is more than obvious that the low boy trailer is not a private passenger motor vehicle. Although the claimants argue that N.C.G.S. § 20-4.01(23) would include the trailer within the definition of motor vehicle, N.C.G.S. § 20-279.21(b)(4) explicitly provides that we look to the definitions in Chapter 58.

Am Jur 2d, Automobile Insurance § 322.

Appeal by plaintiff, Nationwide Mutual Insurance Company; appeal by plaintiffs, Brenda Kay Mabe, Roger Lee Mabe, Kimberly Hope Mabe, a minor b/h/g/a/l S. Mark Rabil, Heather Dora Mabe, b/h/g/a/l Gregory W. Schiro; appeal by third-party plaintiffs, Jesse Willard Scott, Jr., as the Administrator of the Estate of Carolyn Mabe

Scott and Lucinda Sue Scott, by her guardian ad litem, Anne Connolly; and appeal by third-party defendant, North Carolina Farm Bureau Mutual Insurance Company from Order and Judgment filed 28 September 1992 by Judge James C. Davis in Stokes County Superior Court. Heard in the Court of Appeals 18 November 1993.

Petree Stockton, by James H. Kelly, Jr. and Edwin W. Bowden, for plaintiff-Nationwide.

Theodore M. Molitoris for defendants and third-party plaintiffs-Jesse Willard Scott, Jr., Individually and as the Parent of Lucinda Sue Scott and for Lucinda Sue Scott.

John E. Gehring for defendant and third-party plaintiff-Jesse Willard Scott, Jr., as the Administrator of the Estate of Carolyn Mabe Scott.

Metcalf, Vrsecky & Beal, by Anthony J. Vrsecky, for defendants-Brenda Kay Mabe, Roger Lee Mabe, Kimberly Hope Mabe and Heather Dora Mabe.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and David L. Brown, for defendant-North Carolina Farm Bureau Mutual Insurance Company.

Lewis, Judge.

The facts of this case arise out of an automobile accident, but due to the numerous parties and issues involved, its resolution has become more than complex. On 16 February 1990, Lucinda Sue Scott, Brenda Kay Mabe, Kimberly Hope Mabe, and Heather Dora Mabe were all passengers in a vehicle operated by Carolyn Mabe Scott traveling along North Carolina Highway 89 when it was struck head-on by a 1989 Toyota truck. As a result of the accident, Carolyn Mabe Scott was killed and the remaining passengers all suffered extensive injuries. The occupants of the Toyota truck were Robert Leonard Gregory ("Gregory") and Jody Ray Bullins ("Bullins"). It was unclear who was driving the Toyota truck, but the parties consented that judgment would be entered against Gregory. At the time of the accident, the Toyota truck was titled in the name of Gregory's mother, Mary Elizabeth Wilson ("Wilson"), and it was alleged that Gregory was driving the truck with his mother's permission. Nationwide Mutual Insurance Company ("Nationwide") had in effect a liability policy on the Toyota truck providing coverage in the amount of $100,000 per person and $300,000 per accident. In addition, North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") had in effect a business automobile policy issued to Jesse Willard

Scott which provided underinsured motorist coverage (UIM) of $100,000.

On 4 May 1990, a complaint was filed on behalf of Brenda Kay Mabe, Roger Lee Mabe, Kimberly Hope Mabe and Heather Dora Mabe (hereafter "the Mabes") against Gregory and Wilson. The complaint alleged that Gregory had driven the Toyota truck in a negligent manner while intoxicated and that his use of the truck fell within the family purpose doctrine. Thereafter, on 24 September 1990, Jesse Willard Scott, Jr., and his daughter, Lucinda Sue Scott (hereafter "the Scotts"), filed suit against Gregory and Wilson alleging the same causes of action as in the Mabes' complaint. The Mabes and the Scotts will be referred to collectively as "the claimants."

On 14 March 1991, Nationwide, in an attempt to settle the claims arising out of the accident, offered to pay its policy limits to the claimants. Believing that the potential claims exceeded the extent of its liability coverage, Nationwide proposed a pro rata distribution in the following amounts and conditioned settlement upon concurrent acceptance by all of the claimants:

Estate of Carolyn Mabe Scott—	$ 35,050.00
Lucinda Sue Scott—	$ 42,600.00
Heather Dora Mabe—	$ 18,380.00
Kimberly Hope Mabe—	$100,000.00
Brenda Kay Mabe—	$100,000.00.

The Scotts, however, were unable to give their unconditional acceptance, because if they were unable to obtain UIM coverage from other sources, they felt they were entitled to a larger portion of Nationwide's liability coverage. On 5 July 1991, after the claimants had refused to unconditionally accept the offer, Nationwide filed an interpleader action and named all of the claimants as defendants. Nationwide then tendered its $300,000 policy limits to the court and asked for an order declaring that it had satisfied its policy obligations.

In lieu of trial, mediation followed and the parties consented that judgments would be entered against Gregory in the following amounts:

Lucinda Sue Scott	$125,000.00
Carolyn Mabe Scott Estate	$400,000.00
Brenda Kay Mabe	$500,000.00
Kimberly Hope Mabe	$600,000.00
Heather Dora Mabe	$ 40,000.00
Roger Lee Mabe	$ 15,000.00.

Based on these judgments, Nationwide agreed to pay its $300,000.00 policy limits pro rata in the following amount:

Lucinda Sue Scott	$ 29,280.00
Carolyn Mabe Scott Estate	$ 55,040.00
Brenda Kay Mabe	$100,000.00
Kimberly Hope Mabe	$100,000.00
Heather Dora Mabe	$ 11,000.00
Roger Lee Mabe	$ 3,900.00.

The entry of the consent judgment and the subsequent pro rata distribution of Nationwide's coverage left only two issues to be determined by the trial court: (1) whether Nationwide owed prejudgment interest, and (2) the extent of Farm Bureau's UIM coverage. All parties moved for summary judgment and a hearing was held on 8 September 1992. The trial court ordered that Nationwide owed prejudgment interest to each of the claimants based on their respective pro rata shares of the $300,000 liability coverage. The trial court further ordered that Farm Bureau's UIM liability to the Scott's was $200,000. All parties gave timely notice of appeal and this matter is properly before this Court.

Prejudgment Interest

[1] The first issue we address is the extent, if any, to which Nationwide must pay prejudgment interest. There are three possible outcomes to this issue. The first, argued by the claimants, is that Nationwide must pay prejudgment interest on the total amount of the consent judgments. The second option, urged by Nationwide, is that $300,000 is the extent of its liability since the combined judgments exceed this amount. The last option, and the one chosen by the trial court, is that Nationwide is required to pay prejudgment interest on the respective pro rata shares of the claimants. We find the second option advanced by Nationwide to be the better reasoned position, and reverse the ruling of the trial court.

Prejudgment interest is governed by N.C.G.S. § 24-5 which provides in pertinent part:

> In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C.G.S. § 24-5(b) (1991). There is no statutory duty which requires a liability insurance carrier to pay prejudgment interest in addition to its limit of liability under the policy. *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991). Nor is N.C.G.S. § 24-5 a part of the Financial Responsibility Act so as to require that it be written into every liability policy. *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). Accordingly, a liability carrier's obligation to pay prejudgment interest in addition to its stated limits is governed solely by the language of the policy.

In interpreting insurance policies, our appellate courts have established several rules of construction. Of these, the most fundamental rule is that the language of the policy controls. *See Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991). Other rules include: if a policy is not ambiguous, then the court must enforce the policy as written and may not reconstruct the policy under the guise of interpreting an ambiguous provision. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). If a policy defines a term, then that definition is to be applied. *Id.* It does not matter that a broader or narrower meaning is normally given to the term. *York Indus. Center, Inc. v. Michigan Mut. Liab. Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967). In addition, all parts of an insurance policy are to be construed harmoniously so as to give effect to each of the policy's provisions. *See Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978).

As originally issued, the Nationwide policy contained the following relevant provisions:

> **PART B**
>
> **SUPPLEMENTARY PAYMENTS**
>
> In addition to our limit of liability, we will pay on behalf of a **covered person**:
>
> 3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay

that part of the judgment which does not exceed our limit of liability for this coverage. (Emphasis added).

LIMIT OF LIABILITY

The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. Subject to this limit for "each person", the limit of liability shown in the Declarations for "each accident" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident. . . . This is the most we will pay as a result of any one auto accident regardless of the number of:

1. **Covered persons**;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the auto accident.

The Declarations page of the policy reveals that Nationwide's limit of liability is $300,000 per accident. In January 1984, the Nationwide policy was amended by endorsement 1948 which provided:

II. LIABILITY COVERAGE

Part B is amended as follows:

A. Supplementary Payments provision is amended to read:

In addition to our limit of liability, we will pay on behalf of a covered person:

3. Interest accruing after any suit we defend is instituted. Our duty to pay interest ends when we pay our part of the judgment which does not exceed our limit of liability for this coverage. (Emphasis added).

Thereafter, the Nationwide policy was again amended by endorsement 2096. This amendment was presumably prompted by the Supreme Court's decision in *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), and embodies all of the changes which are relevant to this appeal. Specifically, the wording of **Part B** of the **LIABILITY COVERAGE** section was modified as follows:

A. The first paragraph of the Insuring Agreement is replaced by the following:

> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the insured. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy. (Emphasis added).

B. Section 3. of the Supplementary Payments provision is replaced by the following:

> In addition to our limit of liability, we will pay on behalf of an insured:
>
> 3. all costs taxed against the insured and interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage. (Emphasis added).

The claimants assert that under the policy Nationwide owes prejudgment interest on the entire amount. In support of this position, the claimants rely almost exclusively on the language in Part B of endorsement 2096 that Nationwide "[i]n addition to [its] limit of liability, . . . will pay on behalf of an insured . . . all costs taxed against the insured." (Emphasis added). The claimants argue that this language is dispositive because in *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), the Supreme Court interpreted identical language to mean that an insurance company was liable for prejudgment interest. The specific terms of the policy at issue in Lowe provided that the insurance company would "[p]ay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon." *Id.* at 463, 329 S.E.2d at 651 (emphasis added). The Supreme Court held that under the above language, prejudgment interest was a cost which the insurer was obligated to pay.

As stated previously, when interpreting any insurance policy it is the language of the policy which controls. This is evidenced by the

specific holding in *Lowe* where the Supreme Court stated "we hold that prejudgment interest provided for by N.C.G.S. 24-5 is a cost within the meaning of the contract which, under the contract in the present case, the insurer is obligated to pay." *Id.* at 464, 329 S.E.2d at 651 (emphasis added). The "present case" language demonstrates a clear intent on the part of the Supreme Court to decide the issue based on the specific policy before it and not to make a blanket statement that prejudgment interest is always a cost. This fact is further evidenced by the recent decision in *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991). There the Supreme Court addressed an almost identical set of facts as those in *Lowe*, but reached an entirely different result. Instead of using the language "all costs taxed against the insured," the policy in *Sproles* contained the language "all defense costs." On appeal the Supreme Court held *Lowe* was inapplicable because only the relevant language of the policy in *Lowe* was at issue. *Id.* at 611, 407 S.E.2d at 502. The Supreme Court further held that the language "all defense costs" was not as broad as "all costs taxed against the insured," because "all defense costs" included only such things as attorney fees, deposition expenses, and court costs, but not prejudgment interest. *Id.*

Therefore, *Lowe* and *Sproles* clearly establish that our courts will look to the specific terms of a policy in deciding whether or not a liability carrier is required to pay prejudgment interest in addition to its limit of liability. The Nationwide policy in the present case contains an additional clause defining prejudgment interest as part of damages. We find that it is this clause which is controlling and not the language in *Lowe*. Even without this clause defining prejudgment interest as an element of damages, we would still reach the same conclusion because our Supreme Court has recently held that prejudgment interest is an element of damages because it compensates an individual for the loss of the use of his money. *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993) (citing *Hartford Accident & Indem. Co. v. U.S. Fire Ins. Co.*, 710 F. Supp. 164 (E.D.N.C. 1989), *aff'd*, 918 F.2d 955 (4th Cir. 1990)). Prejudgment interest on the total amount of the judgments here would obligate Nationwide to pay an additional $300,000 over and above its policy limit of $300,000 for a total of $600,000. This is an obviously absurd result. This is clearly not what the parties intended, nor is it the type of risk which Nationwide contemplated when it established the premium to be paid.

The claimants have articulated several sound policy arguments in their favor, but policy alone is not sufficient to overcome the plain and unambiguous language of the policy. Therefore, we find that Nationwide is obligated to pay prejudgment interest as part of the total of any damages up to its liability limit of $300,000. In this case, since the total judgments exceed the policy's limit of liability, $300,000 is the extent of Nationwide's liability and the individual claimants are not entitled to any prejudgment interest.

UIM Coverage

The second issue which we address is the extent of Farm Bureau's UIM coverage. At the time of the accident, Farm Bureau had in effect a business policy issued to Jesse Willard Scott ("Scott") which provided UIM coverage of $100,000 per accident. Listed on the policy as insured vehicles were a 1964 Mack truck and a 1978 low boy trailer. The Mack truck and the low boy trailer were used together to transport a tractor which Scott used in his farming operations.

When Nationwide filed its interpleader action, the Scotts filed a third-party complaint against Farm Bureau seeking a declaratory judgment as to Farm Bureau's obligations under the policy. Farm Bureau denied coverage arguing that the Scotts were not entitled to any UIM coverage on a vehicle owned by the Scotts but not listed on the policy. The trial court disagreed and held that Farm Bureau had a limit of liability to the estate of Carolyn Mabe Scott and to Lucinda Sue Scott of $200,000 less the amount of primary coverage less Nationwide's UIM coverage. Farm Bureau has appealed, but for the reasons discussed below, we affirm the trial court's judgment as modified.

Farm Bureau's argument in denying coverage is two-part. First, Farm Bureau argues that it does not provide coverage on a vehicle owned by the Scotts but not listed on the policy because the risk involved in being in an accident while in an owned vehicle is greater than being in an accident while in a nonowned vehicle. Farm Bureau argues that it should have been allowed to charge a higher premium for this additional risk and the fact that it did not shows that UIM coverage for an owned vehicle not listed on the policy was not contemplated by the parties. Secondly, Farm Bureau contends that neither the 1964 Mack truck nor the 1978 low boy trailer fits within the definition of private passenger motor vehicles so as to allow stacking. We address the owned vehicle exclusion first.

A.

Owned Vehicle Exclusion

[2] An "owned vehicle," or "household-owned" or "family-owned" vehicle, exclusion in the UIM section of a policy is one which purports to deny UIM coverage to a family member injured while in a family-owned vehicle not listed in the policy at issue. Farm Bureau's argument for an owned vehicle exclusion stems from the "covered autos" portion of the policy. Under this section numerical symbols are used to describe the type of vehicles that may be covered under the policy. The symbol beside the UIM coverage in Scott's policy is "07" relating to SPECIFICALLY DESCRIBED "AUTOS." Symbol 07 applies only to those autos listed on the Declarations page for which a premium has been charged, and the Declarations page of Scott's policy lists only the Mack truck and the low boy trailer, but not the vehicle Carolyn Mabe Scott was driving at the time of her death. Thus, Farm Bureau argues that the plain language of the policy controls and that the Scotts are not entitled to any UIM coverage.

Section 20-279.21(b)(4) of the Financial Responsibility Act governs UIM coverage, *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47 (1991), and therefore, its provisions are terms of the Farm Bureau policy to the same extent as if they had been written into the policy. *See Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). If the terms of Farm Bureau's policy conflict with N.C.G.S. § 20-279.21(b)(4), then the statute controls. *Id.* As stated in *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989),

> "[t]he cardinal principle of statutory construction is that the intent of the legislature is controlling." Legislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other. "The Court will not adopt an interpretation which results in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences."

(Citations omitted). The purpose of the Financial Responsibility Act is to compensate innocent victims of financially irresponsible motorists. *Id.* The specific issue we address is whether Farm

Bureau's policy, which imposes an owned vehicle exclusion, is inconsistent with the terms of N.C.G.S. § 20-279.21(b)(4). This is a question which our Supreme Court specifically left open in *Smith*, recognizing that even the commentators disagree as to whether such an exclusion is valid. *Smith*, 328 N.C. at 149, 400 S.E.2d at 51.

At the outset we note that Farm Bureau has cited several cases supporting the owned vehicle exclusion. *See N.C. Farm Bureau Mut. Ins. Co. v. Walton*, 107 N.C. App. 207, 418 S.E.2d 837 (1992); *Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 403 S.E.2d 571 (1991). We do not believe these cases are dispositive, because they concern liability coverage and not UIM coverage. As our Supreme Court has stated on several occasions, there is a difference between liability coverage and UM/UIM coverage, because UM/UIM coverage follows the person, not the vehicle. *Smith*, 328 N.C. at 149, 400 S.E.2d at 50.

The beginning point of any discussion of UIM coverage is the Supreme Court's exhaustive opinion in *Smith v. Nationwide Mutual Insurance Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991). In *Smith*, the issue was whether a judicially created owned vehicle exclusion existed for purposes of UM/UIM coverage. In making this determination the Court looked to the definition of "persons insured" in N.C.G.S. § 20-279.21(b)(3) and incorporated by reference into N.C.G.S. § 20-279.21(b)(4), which provided:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

N.C.G.S. § 20-279.21(b)(3) (1989). This definition essentially established two classes of insured persons: " '(1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.' " *Smith*, 328 N.C. at 143, 400 S.E.2d at 47 (quoting *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129, *disc. review denied*, 316 N.C. 731,

345 S.E.2d 387 (1986)). In *Smith*, the Supreme Court held that there was no judicially created owned vehicle exclusion and that members of the first class are persons insured even if the insured vehicle is not involved in the accident. *Id.* at 150, 400 S.E.2d at 51. Farm Bureau has admitted in its brief that, but for the owned vehicle exclusion imposed by the policy, Carolyn Mabe Scott and Lucinda Sue Scott would be first class insured persons.

Based on *Smith* and other decisions by our Supreme Court we find that an owned vehicle exclusion is contrary to the terms of N.C.G.S. § 20-279.21(b)(4), whether it is judicially imposed or whether it is contained in the UIM portion of the policy. To hold otherwise would allow insurance companies to write into N.C.G.S. § 20-279.21(b)(4) and into their policies a restriction which we do not believe the legislature intended. Since *Smith*, the Supreme Court has made even broader statements about the extent of UIM coverage. In *Bass v. North Carolina Farm Bureau Mutual Insurance Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992), the defendant argued that "*Smith* [was] limited to its facts so that an insured injured while riding in an owned vehicle not included in a policy insuring other vehicles, can recover UIM benefits from that policy only if the owned vehicle is covered by a policy which also contains UIM coverage." *Id.* at 111, 418 S.E.2d at 222. The Supreme Court criticized the defendant as reading Smith too narrowly and stated that its decision rested simply on whether the plaintiff was a person insured. *Id.* Further, in *Harris v. Nationwide Mutual Insurance Co*, 332 N.C. 184, 420 S.E.2d 124 (1992), when Nationwide attempted to argue that intrapolicy stacking was available only to an owner of a vehicle or to a vehicle listed on a policy, the Supreme Court disagreed, holding that

> [w]hen one member of a household purchases first-party UIM coverage, it may fairly be said that he or she intends to protect all members of the family unit within the household. The legislature recognized this family unit for purposes of UIM coverage when it defined "persons insured" of the first class as "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . . ." These persons insured of the first class are protected, based on their relationship, whether they are injured while riding in one of the covered vehicles or otherwise.

Harris, 332 N.C. at 193-94, 420 S.E.2d at 130 (citations omitted).

We find that these statements evidence a clear intent on the part of the Supreme Court that as long as an individual is a first class insured person, he or she is covered. To hold otherwise would defeat the intention of individuals who purchase UIM coverage to protect all of their family members and would abrogate the distinctions between liability coverage and UM/UIM coverage. Farm Bureau argues that this result will encourage individuals to obtain a single policy containing UIM coverage to protect the entire family unit. We see nothing wrong with this outcome because the same individual who takes out a single policy will also be limited in the extent to which he can stack to fully recover if his injuries exceed the amount of liability insurance. Finding that the owned vehicle exclusion is unenforceable is also consistent with the remedial nature and the liberal construction to be afforded the Financial Responsibility Act so as to accomplish its purposes. *Sutton v. Aetna Casualty & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759 (1989). Although Farm Bureau has cited *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991), in favor of the owned vehicle exclusion, we find that Farm Bureau's reliance on Sproles is misplaced because that case dealt with second class insureds and not first class insureds as is the case here. Accordingly, we hold that Farm Bureau's owned vehicle exclusion is unenforceable and the Scotts are entitled to stack their UIM coverage if the vehicles listed in the policy are private passenger motor vehicles.

B.

Private Passenger Vehicles

[3] Farm Bureau argues that the trial court erred in concluding that the Scotts were entitled to $200,000 in UIM coverage. Instead, Farm Bureau argues that the extent of its liability is $100,000 because neither the 1964 Mack truck nor the 1978 low boy trailer is a private passenger vehicle. Farm Bureau asserts this point because intrapolicy stacking is available only when the coverage is non-fleet and the vehicle covered is a private passenger motor vehicle. *Aetna Casualty & Sur. Co. v. Fields*, 105 N.C. App. 563, 414 S.E.2d 69, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 788 (1992). This requirement comes directly from N.C.G.S. § 20-279.21(b)(4) (1989) which, at the time of the accident in this case, provided in pertinent part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's

underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: *Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-40-15(9) and (10).* (Emphasis added).

Farm Bureau does not dispute that this is a nonfleet policy. Thus, the only issue is whether or not the Mack truck and the low boy trailer are private passenger motor vehicles.

While section 20-279.21(b)(4) references sections 58-40-15(9) and (10), we note that the definition of private passenger motor vehicle is found in section 58-40-10(1). Since Carolyn Mabe Scott's death, N.C.G.S. § 58-40-10(1) has been amended. However, we must determine whether the Scotts were entitled to intrapolicy stacking at the time of the accident, not at the time of this appeal. At the time of the accident, N.C.G.S. § 58-40-10(1) (1989) defined private passenger motor vehicles as:

(a) A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver; or

(b) A motor vehicle with a pick-up body, a delivery sedan or a panel truck that is owned by an individual or by husband and wife or individuals who are residents of the same household and that is not customarily used in the occupation, profession, or business of the insured other than farming or ranching. Such vehicles owned by a family farm copartnership or corporation shall be considered owned by an individual for purposes of this Article.

From these definitions, it seems more than obvious that the low boy trailer is not a private passenger motor vehicle. It has no motor and it has no place for passengers. The low boy trailer resembles neither a station wagon nor a pick-up truck. Thus, we find that the low boy trailer is not a private passenger motor vehicle within the meaning of N.C.G.S. § 20-279.21(b)(4).

The Scotts argue that despite the language in N.C.G.S. § 58-40-10(1), we should look to the definition of a motor vehicle in N.C.G.S. § 20-4.01(23) to find that the low boy trailer is a private passenger motor vehicle. N.C.G.S. § 20-4.01(23) includes within the definition of motor vehicles "[e]very vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle." The Scotts argue that since the low boy trailer is designed to be pulled by a truck, it is a motor vehicle within the definition of Chapter 20. Although we agree that the low boy trailer may be a motor vehicle within the definition of Chapter 20, we see no reason to even look to Chapter 20. N.C.G.S. § 20-279.21(b)(4) explicitly provides that we look to the definitions in Chapter 58, and under those definitions we find the low boy trailer is not a private passenger motor vehicle. We hold the Scotts are not entitled to intrapolicy stacking and the extent of Farm Bureau's coverage is $100,000.

The last issue raised by Farm Bureau is that the trial court erred in failing to grant its motion for a new trial or in the alternative to reopen the evidence so that additional evidence could be introduced. The essence of Farm Bureau's motion was that it wanted to introduce additional evidence as to the character of the Mack truck to prove that it was not a private passenger motor vehicle. We have carefully considered the issue and see no reason to address it further. Motions for new trials are directed to the discretion of the trial court and we find no abuse of discretion. *See Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). On the issue of Farm Bureau's UIM coverage, the judgment of the trial court is modified and affirmed.

The complete disposition of this matter is as follows: On the issue of prejudgment interest the judgment of the trial court is reversed. On the issue of UIM coverage, the judgment of the trial court is affirmed as modified.

Reversed in part; and affirmed in part as modified.

Judges JOHN and McCRODDEN concur.

DUBLIN v. UCR, INC.

[115 N.C. App. 209 (1994)]

ROSALIND DUBLIN, HARRY EARP, JOSEPHINE WALL GODWIN, GUADALUPE IBARRA, ALICE WARREN AND JULIA F. STOREY, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS v. UCR, INC. AND U-CAN RENT, INC., JAMES S. ARCHER, AND JANICE ARCHER, CHRYSLER FIRST COMMERCIAL CORPORATION AND U-CAN RENT, INC. (U-CAN II), DEFENDANTS v. VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY AND AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, THIRD-PARTY DEFENDANTS

No. 9311SC958

(Filed 21 June 1994)

1. Parties § 70 (NCI4th); Courts § 87 (NCI4th)— class certification order—review by second judge—modification—changed circumstances

A second judge was not authorized by N.C.G.S. § 1A-1, Rule 23 to review and modify another judge's prior order for class certification. However, the class certification order was interlocutory in the sense that it was made in the progress of the cause and directed a further proceeding preliminary to the final decree, and a subsequent judge could thus modify the order for circumstances which changed the legal foundation for the prior order.

Am Jur 2d, Courts §§ 87 et seq.; Parties §§ 43 et seq.

2. Parties § 70 (NCI4th)— class certification order—erroneous decertification by second judge

The trial court erred by vacating another judge's order of class certification as to the original defendants and by decertifying the class against those defendants based on the addition of new defendants and purported new claims against them where the new defendants and purported new claims in no way affected the nature of the claims asserted against the original defendants, and there were thus no changed circumstances on the issue of class certification as to the original defendants.

Am Jur 2d, Parties §§ 43 et seq.

3. Appeal and Error § 89 (NCI4th)— denial of class certification—immediate appeal

An order denying a motion for class certification, although interlocutory, is immediately appealable because it affects a substantial right.

Am Jur 2d, Appeal and Error § 62.

4. Parties § 70 (NCI4th)— class certification—erroneous denial as to third-party defendant

The trial court erred by denying class certification as to the third-party defendant insurer where plaintiffs alleged that insurance premiums provided by rent-to-own contracts with the original defendants exceeded amounts permitted by law and constituted unfair and deceptive practices; the original defendants impleaded the third-party defendant insurer seeking indemnity for any sums for which they may be found liable based on plaintiffs' claim that they charged excessive insurance fees; plaintiffs then asserted a crossclaim against the insurer alleging that it charged excessive insurance premiums and that this conduct constituted an unfair and deceptive practice; and the class of plaintiffs was entitled as a matter of law to proceed against the insurer because plaintiffs' crossclaim related to the subject matter of the action between the original defendants and the insurer and because the crossclaim merely realleged claims which another judge had found to be appropriate for class action procedure.

Am Jur 2d, Parties §§ 43 et seq.

5. Parties § 70 (NCI4th); Corporations § 208 (NCI4th); Fraudulent Conveyances § 39 (NCI4th)— class action certification—extension to successor corporation—equity—bulk transfer law

The trial court erred by refusing to extend class action certification as to defendant U-Can Rent II in an action based upon alleged excessive finance charges, insurance premiums and default charges provided in rent-to-own contracts with the original corporate defendants, UCR and U-Can Rent I, where UCR defaulted on a debt to defendant Chrysler; all of the assets of UCR and U-Can Rent I were transferred to Chrysler, which simultaneously transferred the assets to U-Can Rent II, a newly formed corporation; and U-Can Rent II, as transferee of those assets, obtained the rights to the contracts which were the subject matter of plaintiffs' original complaint and continued to operate the U-Can Rent I store using the same offices, employees, equipment and forms previously used by U-Can Rent I. Plaintiffs are entitled to proceed as a class against U-Can Rent II on the claims asserted in the original complaint because (1) it would be inequitable to permit a transfer of all of the assets of a corporation defending a class action to a newly formed corporation so as to make

the original corporation judgment proof and to allow the successor corporation to escape the class action claims; and (2) plaintiffs are creditors of UCR and U-Can Rent I since they held claims against those corporations before the transfer of their assets to U-Can Rent II, and the transfer was ineffective as to plaintiffs' class action claims because UCR and U-Can Rent II failed to comply with the notice to creditors requirements of the bulk transfer provisions of the U.C.C. set forth in N.C.G.S. §§ 25-6-104 and 25-6-109.

Am Jur 2d, Corporations §§ 2862-2870; Fraudulent Conveyances §§ 267-270; Parties §§ 43 et seq.

6. Parties § 70 (NCI4th)— additional defendants—refusal to extend class action certification—no abuse of discretion

In this class action based on alleged excessive finance charges, insurance premiums and default charges in rent-to-own contracts, the trial court could properly exercise its discretionary authority by refusing to extend class action certification to a lender who transferred the original corporate defendants' assets to a newly formed corporation and to the individual defendants who were officers and the sole shareholder of the original corporate defendants, since there was no basis which would entitle plaintiffs as a matter of right to proceed against these defendants on the claims contained in the original complaint.

Am Jur 2d, Parties §§ 43 et seq.

7. Appeal and Error § 118 (NCI4th)— denial of summary judgment—no right of appeal

An interlocutory order denying a motion for summary judgment did not affect a substantial right and thus was not immediately appealable.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

Appeal by plaintiffs from order signed 3 June 1993 in Johnston County Superior Court by Judge William C. Gore, Jr., and cross-appeal by third-party defendant Voyager Property and Casualty Insurance Company from order entered 26 February 1992 in Johnston County Superior Court by Judge Robert L. Farmer. Heard in the Court of Appeals 11 May 1994.

On 22 February 1990, plaintiffs filed a class action complaint against UCR, Incorporated (UCR) and U-Can Rent, Incorporated (U-Can Rent I). UCR and U-Can Rent I were corporations organized under the laws of Georgia and were authorized to do business in North Carolina. The named plaintiffs and the members of the class they purported to represent were customers of U-Can Rent I, a rent-to-own store located in Selma, North Carolina. The named plaintiffs and the class they sought to represent entered into contracts for the rental of consumer goods at U-Can Rent I. The rental contracts contained options to purchase the property during or at the end of the lease period. Plaintiffs alleged in the class action complaint that: (1) the contracts violated the North Carolina Retail Installment Sales Act (RISA) and the Racketeer Influenced and Corrupt Organizations Act (RICO); (2) defendants engaged in unfair and deceptive trade practices; and (3) the insurance premiums provided by the rent-to-own contracts exceeded amounts permitted by law. UCR and U-Can Rent I answered by denying the material allegations of the complaint and asserting affirmative defenses.

On 19 October 1990, plaintiffs filed a motion seeking to certify the case as a class action. On 29 November 1990, UCR and U-Can Rent I moved to add Voyager Property and Casualty Insurance Company (Voyager) and American Bankers Insurance Company of Florida (American) as third-party defendants. Voyager and American insured the property which was the subject of the lease-purchase contracts entered into by plaintiffs.

On 3 December 1990, Judge Wiley F. Bowen entered an order granting plaintiffs' motion for class certification. Defendants James and Janice Archer were officers of UCR and U-Can Rent I, and James Archer was the sole shareholder of UCR and U-Can Rent I. The Archers, who resided outside of North Carolina, had not been served with process at the time Judge Bowen certified the case as a class action; therefore, Judge Bowen reserved decision on the question of class certification with respect to James and Janice Archer.

On 31 December 1990, Judge Bowen granted the original defendants' (UCR and U-Can Rent I) motion to add Voyager and American as third-party defendants, and third-party complaints were served on Voyager and American. Plaintiffs filed a crossclaim against Voyager, and Voyager asserted a counterclaim against the original defendants. On 9 September 1991, all parties to the action consented to the entry

of an order which fixed 31 December 1990 as the date for the closing of the class of plaintiffs.

On 4 October 1991, Voyager moved pursuant to Rule 56 of the North Carolina Rules of Civil Procedure for summary judgment as to the third-party complaint and plaintiffs' crossclaim. This motion was denied by Judge Farmer on 26 February 1992. On 17 February 1992, Judge Farmer approved a settlement between the plaintiffs and American. By the terms of the settlement agreement, all claims against American were dismissed with prejudice.

On 31 July 1991, plaintiffs moved to amend their complaint to add Chrysler First Commercial Corporation (Chrysler) and U-Can Rent, Incorporated (U-Can Rent II) as defendants. Chrysler provided financing to the original defendants. In May of 1991, Chrysler, because of a default by UCR, foreclosed on the debt instruments issued by UCR and transferred UCR's assets to U-Can Rent II, a newly formed corporation organized under the laws of Georgia, which continued to operate the Selma store. In consideration for his consulting services, a covenant not to compete, and a guarantee to cooperate in the operation of U-Can Rent II, U-Can Rent II paid James Archer $645,000. On 9 September 1991, Judge Anthony M. Brannon granted plaintiffs' motion to add Chrysler and U-Can Rent II as defendants. Plaintiffs' amended complaint asserted claims against Chrysler and U-Can Rent II under RISA based on the same contracts described in the complaint filed against the original defendants. In addition, plaintiffs alleged that the transfer of assets from UCR through Chrysler to U-Can Rent II was a transfer in fraud of creditors. Plaintiffs also alleged that Chrysler and U-Can Rent II, as successors in interest to UCR, were subject to all the claims previously asserted against the original defendants. On 24 August 1992, plaintiffs filed a motion in which they sought to add James and Janice Archer as defendants. On 12 October 1992, Judge Jenkins granted the motion, and plaintiffs filed a supplementary complaint against the Archers which alleged a claim for transfer in fraud of creditors. On 14 January 1993, defendants James and Janice Archer moved, pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, to dismiss the claim. On 8 February 1993, Judge Gore denied the Archers' motion.

On 23 February 1993, plaintiffs filed a motion to extend the previously granted class certification order entered by Judge Bowen on 3 December 1990 to Voyager, Chrysler, U-Can Rent II, and James and Janice Archer. Judge Gore denied plaintiffs' motion to extend class

certification to the new defendants. Judge Gore vacated the 3 December 1990 order entered by Judge Bowen, decertified the class previously certified by Judge Bowen, and denied plaintiffs' motion for class certification as to the original defendants. Plaintiffs appeal from the 3 June 1993 order entered by Judge Gore, and Voyager cross-appeals from the 26 February 1992 order entered by Judge Farmer.

East Central Community Legal Services, by Leonard G. Green; and Gulley and Calhoun, by Michael D. Calhoun; for plaintiffs-appellants.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison and Brian P. Gavigan, for defendants-appellees UCR, Inc., U-Can Rent I, James S. Archer, and Janice Archer.

Smith Helms Mullis & Moore, L.L.P., by James L. Gale and Paul K. Sun, Jr., for defendant-appellee Chrysler First Commercial Corporation.

Mast, Morris, Schultz & Mast, P.A., by George B. Mast and T. Michael Lassiter, Jr., for defendant-appellee U-Can Rent II.

Hatch, Little & Bunn, by David H. Permar and Walter N. Rak, for third-party defendant Voyager Property and Casualty Insurance Company.

WELLS, Judge.

Based on the following findings contained in the 3 December 1990 order, Judge Bowen concluded that the case should be certified as a class action as to UCR and U-Can Rent I:

> BASED UPON the record herein and the arguments of counsel for the parties, the plaintiffs have established and the court finds that:
>
> (1) There exists a class of named and unnamed plaintiffs who have an interest in the same issues of law and fact, which issues include, but are not limited to:
>
> (a) Whether their contracts with defendants included finance charges in excess of those permitted under North Carolina's Retail Installment Sales Act (RISA).
>
> (b) Whether their contracts with defendants included charges for insurance premiums in excess of those permitted by RISA, or in violation of N.C. Gen. Stats., Chapter 75, N.C. Gen. Stat. § 58-57-90, other applicable laws or public policy.

(c) Whether their contracts with defendants included default charges in excess of those permitted under RISA, or in violation of Chapter 75, other applicable laws, or public policy.

(d) Whether the defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. (RICO), by charging and collecting from plaintiffs more than twice the applicable interest rate allowed.

(e) Whether the defendants' actions in charging excessive finance charges, insurance premiums and default charges constitute unfair or deceptive trade practices in violation of Chapter 75.

(f) The plaintiffs' measure of damages for the violations of the aforesaid laws.

2. The aforesaid common issues predominate over any issues affecting only individual class members.

3. The plaintiff class is composed of:

All natural persons who are current or future residents of North Carolina and who entered or do enter into a lease-purchase contract, as defined in the plaintiffs' complaint, in Johnston County, North Carolina, or had an existing contract, as defined in the plaintiffs' complaint, with any defendant, which contract:

(a) was entered into on a date within four (4) years before February 22, 1990 (the date on which the plaintiffs' Complaint was filed); or

(b) upon which a payment has been made within four (4) years before February 22, 1990; or

(c) was entered into after February 22, 1990.

4. The number of class members is so large as to make joinder of all class members impracticable. The defendants have delivered to the plaintiffs approximately 4,413 contracts. According to the defendants, these include all of the existing contracts in effect when the defendants purchased the business in October, 1987, and those contracts entered into through May 29, 1990.

5. The plaintiffs have reviewed each of these contracts, and have completed a contract data sheet for each contract. These data sheets show pertinent information taken from each contract.

6. The defendants have delivered to the plaintiffs computer printout records of approximately 3,076 customers who are plaintiff class members.

7. As used herein, the term "named plaintiffs" includes Rosalind Dublin, Harry Earp, Josephine Wall Godwin, Guadalupe Ibarra, Alice Warren and Julia Storey.

8. The named plaintiffs understand their obligation to fairly represent the interests of the class members, and have willingly and voluntarily assumed said obligation.

9. The named plaintiffs will fairly and adequately insure the representation of the interests of all class members.

10. There is no conflict of interest between the named plaintiffs and the class members.

11. The named plaintiffs have a genuine personal interest in the outcome of this action.

12. The named plaintiffs are members of the class which they seek to represent, and properly represent the class. For example, all of the named plaintiffs have paid the defendants lease-purchase payments and insurance premiums. All of the named plaintiffs except Mr. Earp have paid the defendants default charges.

13. The defendants have acted or failed to act on grounds generally applicable to the class members, thereby making final declaratory, injunctive and monetary relief appropriate with respect to the class as a whole.

14. A class action will prevent multiple lawsuits based upon these same legal and factual issues, and is superior to any other available method for the fair and efficient adjudication of the class members' claims.

15. The prosecution of separate actions by individual class members would create a risk of inconsistent or conflicting adjudications.

16. Counsel for the plaintiffs possess the requisite experience and skills with which to competently represent the plaintiff class.

The 3 June 1993 order entered by Judge Gore denied plaintiffs' motion for class certification as to the Archers, Voyager, Chrysler, and U-Can Rent II. The order also vacated Judge Bowen's order,

decertified the class, and "denied" plaintiffs' motion for class certification as to UCR and U-Can Rent I. This order provides in pertinent part:

> Because the addition of new defendants and new claims has materially changed this lawsuit, the Court must reexamine de novo, on the present record, the question of class certification. The Court has evaluated the impact of the new defendants and new claims on the balance of individual and common questions and on the propriety of the class action procedure in this case. The Court makes these findings of fact and conclusions of law and holds that this case may not proceed as a class action.
>
> . . .
>
> The Prior Order Is Not Binding
>
> 2. The December 1990 order certifying the class against UCR and U-Can Rent I is not binding on James Archer, Janice Archer, Voyager, Chrysler First, and U-Can Rent II. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967); *Kayler v. Gallimore*, 269 N.C. 405, 152 S.E.2d 518 (1967).
>
> The Prior Order Is Not Controlling
>
> 3. The December 1990 order certifying the class against UCR and U-Can Rent I was an interlocutory order. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420 (1993).
>
> 4. This Court has authority to review and modify or change the December 1990 interlocutory order on class certification as to UCR and U-Can Rent I upon a finding of changed circumstances. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972); Tridyn Industries, Inc. v. American Mutual Liability Insurance Co., 46 N.C. App. 91, 264 S.E.2d 357 (1980).
>
> 5. The addition of new parties and new claims since entry of the December 1990 interlocutory order on class certification as to UCR and U-Can Rent I constitutes a material change in the circumstances of this case.
>
> 6. Plaintiffs' addition of new parties and new claims to this action necessarily modifies the balance of common and individual questions. The prior ruling on class certification balancing those issues as to claims against only UCR and U-Can Rent I should not

and cannot control the inquiry that must be applied to this case in its current posture.

7. Plaintiffs' addition of new parties and new claims to this action therefore undermined the vitality of the prior ruling on class certification. Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 64 F.R.D. 159 (D.N.J. 1974), aff'd, 530 F.2d 508 (3d Cir.), *cert. denied*, 429 U.S. 828 (1976).

8. This Court must make a de novo determination, on the present record, whether this case should proceed as a class action. The additional discovery undertaken by the parties has added substantial, material information to the record that was unavailable in December 1990, and that is properly considered by this Court in ruling on plaintiffs' motion. Abercrombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972).

9. The December 1990 class certification order effectively consolidated for trial the claims of all members of the proposed class, and such a pre-trial order cannot be binding. Oxendine v. Catawba County Department of Social Services, 303 N.C. 699, 281 S.E.2d 370 (1981).

10. The Court concludes that it would be inefficient and unmanageable to try plaintiffs' claims as a class action against some defendants and as an individual action against other defendants.

11. On separate and independent grounds, the Court rules that it has the inherent discretionary authority under Rule 23 and Crow v. Citicorp Acceptance Co. to review and change, modify, or overrule a prior order on class certification. Cf. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), rev. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

We conclude that Judge Gore erred in vacating Judge Bowen's order and decertifying the class previously certified by Judge Bowen. We reverse that portion of Judge Gore's order which vacated the 3 December 1990 order entered by Judge Bowen and which decertified the class certified by the 3 December 1990 order. Further, we hold that Judge Gore erred in refusing to allow the named plaintiffs to represent the previously certified class on their claims against Voyager and U-Can Rent II, and we reverse Judge Gore's order as to U-Can Rent II and Voyager. As to the remaining defendants, the Archers and Chrysler, we affirm Judge Gore's order.

UCR and U-Can Rent I

Rule 23 of the North Carolina Rules of Civil Procedure, in pertinent part, provides:

> (a) *Representation.*—If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.
>
> . . .
>
> (c) *Dismissal or a Compromise.*—A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

N.C. Gen. Stat. § 1A-1, Rule 23.

[1] Substantial differences exist between the foregoing rule and its federal counterpart. G. Gray Wilson, North Carolina Civil Procedure, § 23-1 (1989). In particular, section (c)(1) of the federal rule provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Fed. R. Civ. P. 23. Clearly, the federal rule contemplates continuing review of the class certification status of an action. *See* 3B Moore's Federal Practice ¶ 23.50 at 23-410. Rule 23 of the North Carolina Rules of Civil Procedure contains no such provision, *Nobles v. First Carolina Communications*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), *rev. denied*, 333 N.C. 463, 427 S.E.2d 623 (1993), and we will not judicially legislate one. Accordingly, we hold that the trial court was not authorized by our version of Rule 23 to review and modify Judge Bowen's order.

The settled rule in North Carolina is that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972). However, in an appropriate context a superior court judge has the power to modify an interlocutory order entered by another superior court judge. *Id.* "Interlocuto-

ry orders are subject to change 'at any time to meet the justice and equity of the case, upon sufficient grounds shown for the same.' " *Id.* (*Quoting Miller v. Justice*, 86 N.C. 26 (1882)). Consequently, interlocutory orders are modifiable for changed circumstances. *State v. Duvall*, 304 N.C. 557, 284 S.E.2d 495 (1981); *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *rev. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981).

[2] The order entered by Judge Bowen was interlocutory in the sense that it was made in the progress of the cause and directed a further proceeding preliminary to the final decree. Thus, a subsequent judge could modify the order for circumstances which changed the legal foundation for the prior order. The changed circumstances relied upon by Judge Gore as a basis for modifying Judge Bowen's order were the introduction of new defendants and purported new claims against them. After plaintiffs named UCR and U-Can Rent I as defendants, Chrysler foreclosed on the debt instruments held by UCR and transferred all of the assets previously held by UCR to U-Can Rent II. In the amended complaint, plaintiffs asserted that Chrysler and U-Can Rent II, as assignees or holders of the contracts entered into by plaintiffs, were subject to the claims originally asserted against UCR and U-Can Rent I. As a further ground for subjecting Chrysler and U-Can Rent II to the claims asserted against UCR and U-Can Rent I, plaintiffs brought a successor in interest claim against Chrysler and U-Can Rent II. Plaintiffs also asserted a claim for transfer in fraud of creditors against UCR, Chrysler, and U-Can Rent II. By a supplement to the original complaint, plaintiffs alleged against the Archers a claim for transfer in fraud of creditors.

We are not persuaded that the addition of the new defendants and purported new claims in any way affected the nature of the claims asserted against the original defendants. The intervening fact and legal issues created by the addition of new defendants and purported new claims did not bear on the issues which were previously ruled on by Judge Bowen. *Cf. Calloway, supra.* (Events intervening after denial of motion for change of venue might be grounds for modification of prior order). On the issue of class certification as to the original defendants, there were no changed circumstances, and Judge Gore was bound by Judge Bowen's order. Judge Bowen's order definitively certified the class of plaintiffs. Accordingly, we reverse Judge Gore's order as to UCR and U-Can Rent I. In light of the addition of new defendants and new theories of recovery, the question presented to Judge Gore was whether this class of plaintiffs was enti-

tled to proceed on the additional claims against the additional defendants.

Voyager, Chrysler, U-Can Rent II, and the Archers

[3] An order denying a motion for class certification, although interlocutory, is immediately appealable because it affects a substantial right. *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420 (1993), *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993) (per curiam). The question as to the propriety of that portion of Judge Gore's order which "denied" plaintiffs' motion for class certification as to Voyager, Chrysler, U-Can Rent II, and James and Janice Archer is properly before us.

The decision to grant or deny class certification rests within the sound discretion of the trial court. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987). Although the trial court has broad discretion in this regard, the trial court is limited by the context of the privileges provided by Rule 23. *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223, *rev. denied*, 297 N.C. 609, 257 S.E.2d 217 (1979). Although the order entered by Judge Gore speaks in terms of denying plaintiffs' motion for class certification as to Voyager, Chrysler, U-Can Rent II, and James and Janice Archer, we do not believe that Judge Gore made a discretionary ruling as to Voyager and U-Can Rent II. Based on the reasoning enunciated below, we hold that, as a matter of law, the class of plaintiffs as certified by Judge Bowen was entitled to pursue against Voyager and U-Can Rent II the claims originally asserted against UCR and U-Can Rent I, and we reverse Judge Gore's order as to Voyager and U-Can Rent II. We affirm, finding no abuse of discretion, as to the Archers and Chrysler.

Voyager

[4] UCR and U-Can Rent I impleaded Voyager seeking indemnity for any sums for which they might be found liable based on plaintiffs' claim that they charged excessive insurance fees. Plaintiffs then asserted a crossclaim against Voyager alleging that Voyager charged excessive insurance premiums and that this conduct constituted an unfair and deceptive trade practice. Plaintiffs asserted these same claims against UCR and U-Can Rent I. The crossclaim asserted by plaintiffs is based on the same contracts which plaintiffs alleged in their original complaint were in violation of the law. The nexus between plaintiffs' crossclaim and the third-party claim against Voyager satisfied the prerequisite of Rule 13(g) which mandates that

crossclaims "aris[e] out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relat[e] to any property that is the subject matter of the original action." N.C. Gen. Stat. § 1A-1, Rule 13. The class of plaintiffs was entitled as a matter of law to proceed against Voyager because plaintiffs' crossclaim related to the subject matter of the action between UCR and U-Can Rent I and Voyager and because the crossclaim merely realleged claims which Judge Bowen found to be appropriate for class action procedure.

U-Can Rent II

[5] In May of 1991, Chrysler, finding that UCR was in default, entered into an agreement with UCR and the Archers entitled "Transfer in Lieu of Foreclosure of Assets of UCR, Inc. . . . To Chrysler First Commercial Corporation." By the terms of this agreement, Chrysler took possession of all of UCR's assets and was entitled to operate UCR's business. Chrysler simultaneously transferred all of UCR's assets to U-Can Rent II which continued to operate the Selma store using the same offices, employees, equipment, and forms previously used by U-Can Rent I. The terms of the transfer agreement expressly excluded any assumption of the liability of UCR or the Archers for conduct alleged in the complaint filed against UCR and U-Can Rent I.

The general rule is that a corporation which purchases all or substantially all of the assets of another corporation is not liable for the transferor's liabilities. *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 370 S.E.2d 267 (1988). However, when a corporation purchases all or substantially all of the assets of another corporation under circumstances indicating a purpose to avoid the claims of creditors, the transferee is liable for the claims asserted by creditors against the transferor. *Id.*

> [A] corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims.

Id. (*Quoting Everett v. Mortgage Co.*, 214 N.C. 778, 1 S.E.2d 109 (1939)). "Our case law has treated the question of a successor corporation's liability for the debts or liabilities of its predecessor as a

matter of equity, endeavoring to protect the predecessor's creditors while respecting the separateness of the corporate entities." *Id. See also* N.C. Gen. Stat. §§ 35-15 - 17.

We find that under the circumstances of this case plaintiffs are entitled to proceed as a class against U-Can Rent II on the claims contained in the original complaint. The transfer from UCR to U-Can Rent II occurred after Judge Bowen certified the action as a class action. Chrysler had knowledge of the claims being asserted against UCR and U-Can Rent I at the time the transfer was made. U-Can Rent II, as transferee of all the assets of UCR, purchased the contracts which were the subject matter of the plaintiffs' original complaint and operated the Selma store as a "mere continuation" of U-Can Rent I. We conclude, under these circumstances, that it would be inequitable to prohibit the class of plaintiffs as certified by Judge Bowen from proceeding against U-Can Rent II on the claims asserted against UCR and U-Can Rent I. To hold otherwise would sanction the transfer of assets from a corporation defending against a class action to a newly formed corporation, making the original corporation judgment proof, and allow the new corporation to escape from the claims of the class.

We find further grounds in Article 6 of Chapter 25 of the North Carolina General Statutes, the provisions of the Uniform Commercial Code regulating bulk transfers, which entitle plaintiffs, as a matter of law, to proceed against U-Can Rent II on the claims originally alleged against UCR and U-Can Rent I. A bulk transfer is ineffective against the creditors of the transferor unless, pursuant to G.S. § 25-6-104, a schedule of the property transferred and a list of creditors is furnished by the transferor and, pursuant to G.S. § 25-6-105, unless the transferee provides creditors with notice of the transfer. These provisions were designed to avoid manipulative transactions which deny payment to the transferor's creditors. N.C. Gen. Stat. § 25-6-101 (Official Comment). Creditors entitled to the protection of the bulk transfer article "are those holding claims based on transactions or events occurring before the bulk transfer." N.C. Gen. Stat. § 25-6-109. The list of creditors required by G.S. § 25-6-104(1)(a) includes "all persons who are known to the transferor to assert claims against him even though such claims are disputed." N.C. Gen. Stat. § 25-6-104(2).

We find the provisions of the Uniform Commercial Code governing bulk transfers applicable to the transfer of assets from UCR to U-Can Rent II. N.C. Gen. Stat. § 25-6-102. We also find that plaintiffs

are creditors because they held claims against UCR and U-Can Rent I before the bulk transfer. *See Chemical Bank v. Society Brand Inds., Inc.*, 624 F.Supp. 979 (S.D.N.Y. 1985) (holding that plaintiff, who commenced an action against transferee, was a creditor and transfer after initiation of the action was ineffective). Plaintiffs asserted those claims in this action, and UCR knew of them at the time of the bulk transfer. The transfer was ineffective as to the claims asserted by the class of plaintiffs because UCR and U-Can Rent II failed to comply with the requirements of the bulk transfers article. Thus, plaintiffs were entitled, as a matter of law, to proceed against U-Can Rent II.

Chrysler and the Archers

[6] We conclude that Judge Gore could properly exercise his discretionary authority by refusing to permit the plaintiffs to proceed against Chrysler and the Archers. We can find no basis which would entitle plaintiffs as a matter of right to proceed on the claims contained in the original complaint. Chrysler is not in possession of the contracts of which plaintiffs complain. The transfer in fraud of creditors claim did not alter the nature of the action. Plaintiffs did not assert this claim as an independent action. They asserted it as a means to reach the assets which had been transferred from UCR to U-Can Rent II. Based on our holding that the class of plaintiffs, as certified by Judge Bowen, is entitled to proceed against U-Can Rent II on the claims contained in their original complaint, we affirm Judge Gore's order as to Chrysler and the Archers.

[7] Voyager cross-appeals from the order denying its motion for summary judgment entered by Judge Farmer on 26 February 1992. Orders denying motions for summary judgment are interlocutory and are not appealable unless they affect a substantial right. *Hill v. Smith*, 38 N.C. App. 625, 248 S.E.2d 455 (1978). We must dismiss Voyager's cross-appeal because it is an appeal from an interlocutory order which does not affect a substantial right. *Stonestreet v. Compton Motors, Inc.*, 18 N.C. App. 527, 197 S.E.2d 579 (1973).

Reversed in part and affirmed in part.

Dismissed as to Voyager's cross-appeal.

Judges JOHNSON and JOHN concur.

REGINA ANNETTE PEAL, INCOMPETENT, BY HER GENERAL GUARDIAN, JAMES WALTER PEAL, JR., PLAINTIFF-APPELLEE v. HOWARD THOMAS SMITH, DEFENDANT, AND CIANBRO CORPORATION AND WILLIAMS BROTHERS CONSTRUCTION COMPANY, INC., A JOINT VENTURE D/B/A CIANBRO-WILLIAMS BROS., DEFENDANTS-APPELLANTS

No. 922SC272

(Filed 21 June 1994)

1. Labor and Employment § 236 (NCI4th)— automobile accident—drinking after work on premises—violation of company policy—liability of employer

The trial court did not err by denying defendants' motions for a directed verdict, judgment notwithstanding the verdict, and a new trial where plaintiff was injured as a passenger in a vehicle involved in a collision on the Albemarle Sound Bridge; the other vehicle was driven by defendant Smith, who was an employee of defendant Cianbro; defendant Cianbro's handbook included the statement that no person under the influence of alcohol would be allowed on the work site; Cianbro employees had gathered in the parking lot after work on the day of the collision to drink beer; supervisory personnel were aware of the activity and project managers came to the parking lot after work; the beer was paid for by "passing the hat"; defendant Smith had some alcohol and witnesses at the accident scene testified that he appeared obviously alcohol impaired; and the jury returned verdicts against both the individual and corporate defendants. Although defendants argue that this is a social host case and that they did not provide or furnish the alcohol, plaintiff instituted a claim based in common law negligence. While the corporate defendants' establishment and memorialization of an alcohol policy standing alone did not subject them to liability, the common law duty of a master to control his servant under circumstances as outlined in the Restatement, Second, of Torts § 317, taken together with the defendants' own written policies, established a standard of conduct that if breached could result in actionable negligence. The active violation of the policy in allowing and participating in the alcohol consumption on company premises provided evidence of the breach and the evidence presented at trial was sufficient for the jury to conclude that the plaintiff's injuries were foreseeable.

Am Jur 2d, Master and Servant § 459.

2. Negligence § 168 (NCI4th)— automobile accident—drinking on employer's premises—violation of company policy—liability of employer

The trial court correctly instructed the jury on the appropriate principles of common law negligence in an action arising from an automobile collision where the corporate defendants' had allowed workers to drink beer on the job site after work in violation of a provision in an employee policy manual and one of the workers had subsequently collided with plaintiff's car.

Am Jur 2d, Negligence §§ 149, 150.

Appeal by defendants from judgment entered 9 August 1991 by Judge Richard B. Allsbrook in Washington County Superior Court. Heard in the Court of Appeals 9 February 1993.

The corporate defendants appeal from denials of motions for directed verdict, judgment notwithstanding the verdict, and a new trial. The action arises out of an automobile accident that occurred on 17 October 1986. On that date, the plaintiff, Regina Annette Peal, was a passenger in a vehicle crossing the Albemarle Sound Bridge. Her father, sister, and niece were also travelling in the automobile. At approximately 6:40 p.m., an automobile driven by the defendant Howard T. Smith collided with the Peal vehicle. Plaintiff's father died as a result of the collision. The plaintiff is permanently neurologically damaged and will require institutional care for the remainder of her life. She was twenty-one years old at the time of the accident. She now has the mental capacity of a six-year-old. Her condition will worsen as she ages.

The corporate defendant, Cianbro, was engaged in the construction of the new Albemarle Sound bridge. The individual defendant, Howard Smith, was employed by the corporate defendant. At the time of the accident, the Cianbro Employee Information Handbook contained the following policy: "No person under the influence of alcohol, marijuana, or non-prescription drugs shall be allowed on the project work site."

After work on the day of the collision (about 4:30 p.m.), ten or twelve employees met in the parking lot to drink beer before going home. Supervisory personnel were aware of the after work activity. Other project managers also came to the parking lot after work. The beer was paid for by "passing the hat." Testimony indicated that

defendant Smith had some alcohol (although evidence did not reveal that he was impaired in the parking lot) and left the gathering. As he was proceeding across the bridge about two miles from the company site, the automobile that he was driving crossed the center line and ran head on into the vehicle driven by the plaintiff's sister. Testimony by eyewitnesses at the accident scene indicated that Smith appeared obviously alcohol-impaired. He was not seriously injured in the accident.

The plaintiff filed suit against Smith on 24 April 1987, alleging that:

(a) He operated his vehicle while under the influence of alcohol or other impairing substance, in violation of G.S. 20-138.1(a)(1);

(b) He operated his vehicle after having consumed sufficient alcohol that at the time of the accident in suit he had an alcohol concentration greater that 0.10, in violation of G.S. 20-138.1(a)(2);

(c) He drove his vehicle carelessly and heedlessly in willful or wanton disregard of the rights and safety of others, in violation of G.S. 20-140(a).

(d) He drove his vehicle without due caution and circumspection and at a speed and in a manner so as to endanger Regina or her family, in violation of G.S. 20-140(b);

(e) He drove at a speed greater that was reasonable and prudent, in violation of G.S. 20-141(a);

(f) He drove at a speed in excess of the lawful limit of 55 m.p.h. in violation of G.S. 20-141(b);

(g) He failed to reduce speed to avoid an accident, in violation of G.S. 20-141(m);

(h) He drove his vehicle on the wrong side of the road in violation of G.S. 20-146 and G.S. 20-148;

(i) He failed to have his vehicle equipped with proper brakes, in violation of G.S. 20-124, or if so equipped, he failed to apply the same seasonably; and

(j) He failed to keep a proper look out, to keep his vehicle under proper control or to pay proper attention to his driving.

On 23 November 1987, the plaintiff amended her complaint, joining Smith's employer Cianbro/Williams, and alleged, *inter alia*, that the corporation "failed to enforce or carry out their own regulations, which, on information and belief, would have prevented the defendant Smith from becoming intoxicated on their business premises and then departing to operate an automobile on the highway in that condition . . . ."

A jury trial commenced on 22 July 1991 in Washington County Superior Court. Defendants Cianbro/Williams moved for directed verdict at the close of plaintiff's evidence and at the close of all the evidence. Those motions were denied. The jury returned with verdicts against both the individual and corporate defendants, and awarded the plaintiff damages of $2,250,000.00. Cianbro/Williams filed motions for judgment notwithstanding the verdict and new trial. Both motions were denied on 29 August 1991. The corporate defendants appeal from these denials, as well as the denials of the directed verdict during trial. The individual defendant Smith did not appeal.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr. and M. H. Hood Ellis, for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by James A. Roberts, III, M. Keith Kapp and Richard N. Cook, for defendant-appellants.

ORR, Judge.

The defendants first argue that the trial court committed reversible error in denying their motions for directed verdict, judgment notwithstanding the verdict, and new trial. The basis for this argument and the authority cited therein in the defendants' brief rests exclusively on the Court of Appeals opinion in *Hart v. Ivey*, 102 N.C. App. 583, 403 S.E.2d 914 (1991), *modified and affirmed*, 332 N.C. 299, 420 S.E.2d 174 (1992), and the cases cited therein as well as *Chastain v. Litton Systems*, 694 F. 2d 957 (4th Cir.), *cert. denied*, 462 U.S. 1106, 77 L. Ed. 2d 1334 (1983). All of the applicable law cited or argument presented rests upon the theory that this is a social host case. We conclude that this is not a social host liability case but one proceeding under basic standards of common law negligence, and accordingly we affirm the trial court's denial of defendants' motions for directed verdict, judgment notwithstanding the verdict and new trial.

I.

[1] Pursuant to N.C. Gen. Stat. § 1A-1, Rule 50, a party is entitled to a directed verdict where the evidence, when viewed in the light most favorable to the plaintiff, is insufficient as a matter of law to support a verdict in his favor. A directed verdict is not properly allowed unless it appears that a recovery cannot be had by plaintiff upon any view of the facts which the evidence tends to establish. *Willis v. Russell*, 68 N.C. App. 424, 315 S.E.2d 91, *disc. review denied*, 311 N.C. 770, 321 S.E.2d 159 (1984). In a negligence case, a defendant is not entitled to a directed verdict unless the plaintiff has failed to establish the elements of negligence as a matter of law. *Felts v. Liberty Emergency Services*, 97 N.C. App. 381, 388 S.E.2d 619 (1990). "Directed verdicts in a negligence action should be granted with caution because, ordinarily, it is for the jury to determine whether the applicable standard of care has been breached." *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 17, 423 S.E.2d 444, 452 (1992). A motion for judgment notwithstanding the verdict is essentially the renewal of a prior motion for a directed verdict; therefore, the rules regarding the sufficiency of the evidence to carry the case to the jury is equally applicable. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 319 S.E.2d 290, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

The plaintiff in the instant case instituted a claim based in common law negligence against Defendant Smith and against his employer, Cianbro. In order to survive the defendants' motions,

> plaintiff was required to present some evidence that [the defendant] failed to exercise proper care in the performance of some legal duty owed [her] and that the breach of this duty was the proximate cause of [her] injury. . . . The cause producing the injurious result must be in a continuous sequence, without which the injury would not have occurred, and one from which any person of ordinary prudence would have foreseen the likelihood of the result under the circumstances as they existed. . . .

Goodman, 333 N.C. at 18, 423 S.E.2d at 452 (citations omitted).

As previously noted, the defendants argue that this is a social host case, and since there was no evidence that Cianbro provided or furnished the alcohol to the individual defendant they are therefore entitled to have their motions granted. See *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992); *Calamier v. Jeffries*, 113 N.C. App. 303, 438

S.E.2d 427 (1994); *see also Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106, 77 L. Ed. 2d 1334 (1983). In the case at bar, we agree that there is no evidence of the employer furnishing the alcohol to its employees, and that the employee gathering took place after hours. Consequently, while it is true that this case is distinguishable from *Hart*, *Calamier* and other alcohol consumption cases cited in the defendants' brief, as defendant provided no alcohol at the gathering, that fact does not insulate them from a determination that they were negligent under traditional negligence principles. As our Supreme Court responded to a similar argument in *Hart*, "[The defendants] argue that there are many implications from establishing such a claim and we should not do so. Our answer to this is that we are not recognizing a new claim. We are applying established negligence principles and under those principles the plaintiffs have stated claims." *Hart* at 305-06, 420 S.E.2d at 178.

A. The Duty and its Breach

It is a matter of hornbook law that "[a] duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." W. Page Keeton et al., *The Law of Torts*, § 53 (5th ed. 1984). The existence of a duty is "entirely a question of law . . . and it must be determined only by the court." *Id.* at § 37.

Therefore, we must determine as a matter of law, whether under the facts of this case, defendants had a duty to the plaintiff to "conform to a particular standard of care." The plaintiff advances two theories upon which a duty can be found – 1) the adoption of a specific safety rule applicable to the facts of this case and 2) the duty of a master to control the conduct of his servant while on the master's premises. This State recognizes that " '[t]he law imposes upon every person *who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm*, and calls a violation of that duty negligence.' " *Hart* at 305, 420 S.E.2d at 178 (citation omitted) (emphasis added).

We first address the adoption of the safety rule adopted by the defendants. The Cianbro employee handbook contained a drug and alcohol policy which provided that "No person under the influence of alcohol, marijuana, or non-prescription drugs shall be allowed on the project work site." Defendants argue that the safety rule standing alone does not create a duty to the plaintiff. However, it is well estab-

lished in North Carolina that the breach of a voluntarily adopted safety rule is some evidence of defendant's negligence. In *Robinson v. Seaboard System R.R. Inc.*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), this Court found that evidence presented that the employee knew of the employer's safety rule and did not enforce it, causing injury to the plaintiff, permitted a reasonable inference that the actions of the employees in ignoring safety rules "manifested 'a reckless indifference to injurious consequences probable to result' from their breach of a duty recognized by law and *by Southern's own rules as necessary to the safety of others.*" *Id.* at 522, 361 S.E.2d at 915 (emphasis added).

Likewise, in *Klassette v. Mecklenburg County Area Mental Health Center*, 88 N.C. App. 495, 500, 364 S.E.2d 179, 183 (1988), the "defendant's own written policies and procedures" were found to be evidence of a standard of care. The *Klassette* Court held, "We recognize voluntary written policies and procedures do not themselves establish a *per se* standard of due care appropriate to these circumstances; however, they represent some evidence of a reasonably prudent standard of care." *Id.* at 501, 364 S.E.2d at 183. However, the Court noted that "such evidence [of written policies and procedures] would be extremely helpful in determining what duty of care [the defendant] voluntarily assumed which in turn is relevant to the standard of reasonable care at issue." *Id.* at 505, 364 S.E.2d at 185.

Additionally, in a challenge from a patient who received negligent treatment by a physician at Moses Cone Hospital, *Blanton v. Moses H. Cone Memorial Hospital*, 319 N.C. 372, 354 S.E.2d 455 (1987), the North Carolina Supreme Court found the defendant hospital's failure to follow the standards of the Joint Commission on the Accreditation of Hospitals to be evidence of negligence on the part of the corporate defendant. The *Blanton* Court referenced *Wilson v. Lowe's Asheboro Hardware, Inc.*, 259 N.C. 660, 131 S.E.2d 501 (1963), in which the evidence showed that a ladder that injured plaintiff was not constructed in accordance with the American Standard Safety Code for Portable Wooden Ladders. The Court stated:

> If it is *some evidence* of negligence for the manufacturer of ladders to violate an industry safety standard which safety standard the manufacturer had purported to follow we believe it is some evidence of negligence for a hospital to violate a safety standard which the hospital had purported to follow. The duty of a hospi-

> tal to its patients should be at least as great as a ladder manufacturer to users of its ladders.

Blanton at 376, 354 S.E.2d at 458. In accord, we conclude that on the facts of this case the safety rule adopted in the employee handbook by the corporate defendants was some evidence of a standard of care.

Having determined that a safety regulation or policy may provide some evidence of a standard of care and its breach, we also find that the Restatement, Second, of Torts is helpful in answering the question of what duty, if any, was owed to plaintiff. Section 317 states that:

> A master is under a duty to exercise reasonable care so as to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

The defendant in the case *sub judice* argues that the North Carolina Supreme Court has specifically rejected this section of the Restatement in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), and that this rejection was reaffirmed by this Court in *King v. Durham County*, 113 N.C. App. 341, 439 S.E.2d 771 (1994). However, both *Braswell* and *King* are factually distinguishable from the instant case. In *Braswell*, plaintiff's decedent sued the sheriff of Pitt County, alleging that he and his department had failed to protect the decedent from her murder by her estranged husband, a deputy sheriff, after a domestic dispute. The Supreme Court found that the "public duty doctrine" insulated the sheriff from liability to the plaintiff under those facts. The Court further stated, quoting the Restatement, Sec-

ond, of Torts § 317, "[w]e find no case in which liability [for negligent supervision] has been imputed to an employer *solely on the basis of an employee 'using a chattel of the master.'* " *Id.* at 375, 410 S.E.2d at 904 (emphasis added).

Clearly, the use of the master's chattel is inapplicable under the facts of this case, nor is the cause of action grounded in negligent supervision. In our situation, we have an employer who could control the employee so as to prevent harm to third persons; the employee was on premises in possession of the employer; the employer knew or had reason to know that he could control the employee, and knew or should have known that there was the necessity and the opportunity to exercise that control over the employee. Thus, the elements of a common law duty in a master/servant relationship as described by the above section of the Restatement have been met.

In the case *sub judice*, evidence was presented which tended to show that Cianbro's supervisory personnel were aware of the policy and its purposes. They were also aware of its regular violation. Even without a written personnel policy governing alcohol consumption, the corporation's knowing acquiescence in allowing the afterhours beer party in the parking lot might provide some evidence of a duty and a breach of that duty.

Frank Susi and Kevin Philbrook, both supervisors, testified that they were aware that the employees commonly met immediately after work for beer in the company's leased parking area. Further, Susi and Philbrook (who joined the gathering the afternoon of the accident) both testified that the policy was intended not only to protect the employees on site, *but also to prevent accidents involving Cianbro employees and the public.*

We agree that the corporate defendants' establishment and memorialization of a alcohol policy standing alone did not subject them to liability. However, the common law duty of a master to control his servant under certain circumstances as outlined in Restatement § 317, taken together with the defendants' own written policies established a standard of conduct that if breached could result in actionable negligence. In the instant case, we find that the active violation of the policy in allowing and participating in the alcohol consumption on company premises provided evidence of the breach of the standard of care imposed on the corporate defendant. As we have stated, the affirmative course of conduct here was not merely the establishment of the policy. The conduct by the corporation, in vio-

lating its own policy, provided evidence that the corporation failed to exercise ordinary care to protect the plaintiff and her family from the very results that the policy intended to prevent. We therefore conclude that there was a duty and evidence of a breach of that duty.

B. Causation and Damages

Once we have determined that evidence of a duty and a breach of a duty was presented at trial, our next inquiry is whether there was evidence from which the jury could conclude that the defendants' actions were the proximate cause—"a cause which in natural and continuous sequence produces a plaintiff's injuries and one from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable." *Murphey v. Georgia Pacific Corp.*, 331 N.C. 702, 706, 417 S.E.2d 460, 463 (1992).

As this Court noted in *Hart v. Ivey*, 102 N.C. App. 583, 403 S.E.2d 914 (1991), with respect to proximate cause analysis,

> [a]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct. . . .
>
> . . . Moreover, "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act . . . does not prevent the actor from being liable for harm caused thereby." . . .

Id. at 592, 403 S.E.2d at 920. Furthermore, questions of foreseeability are typically left for the jury. "In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening cause, the question is for the jury." *Prosser, supra*, § 45. Our review of the record indicates that the evidence presented at trial was sufficient for the jury to conclude that the plaintiff and her resulting injuries were foreseeable. Therefore, we disagree with defendants' contentions that the trial court erred in denying their motions for directed verdict, JNOV, and new trial.

II.

[2] The second basis for defendants' appeal is that the trial court's instructions were in error. This argument is based essentially on

defendants' initial argument that there was no duty. Having already determined that as a matter of law, the defendant had a duty to the plaintiff, we find no error in the trial court's instruction. At the close of all the evidence, the jury was instructed that:

> As to plaintiff's first contention, there is evidence tending to show that Cianbro/Williams voluntarily adopted a safety policy, rule or regulation concerning the use of alcohol by employees. I instruct you that the voluntary adopting of a safety policy, rule or regulation as a guide to be followed for the protection of the employees and the public is at least some evidence that a reasonably prudent person would follow the requirement of such policy, rule, or regulation.
>
> This means that a violation of a voluntarily adopted safety policy, rule, or regulation may be considered by you together with all of the other facts and circumstances existing on the occasion in determining whether or not Defendants Cianbro/Williams were negligent. . . .

The trial court then instructed the jury on the evidence required for them to find liability, including 1) that Cianbro had a safety policy regarding alcohol consumption on company property on the day of the collision, 2) that the policy was adopted to protect employees and the public, 3) that the policy applied to the parking area where employees drank after work, 4) that the defendant Smith consumed alcohol in the parking lot on the day of the accident, 5) that Cianbro should have known through the exercise of due care that Smith was drinking beer with other employees that day, 6) that the consumption of alcohol was a substantial factor in the negligent driving of the defendant, 7) and that Cianbro knew or should have known that their failure to enforce the alcohol policy would probably result in injury to some member of the public. The court then continued:

> As to Plaintiff's second contention regarding Defendant Cianbro's alleged negligence, I instruct you that an employer is under a duty to exercise reasonable care to control its employee while acting outside of the scope of his employment so as to prevent him from so conducting himself as to create an unreasonable risk of bodily harm to others if the employee then is upon the premises, in the possession or control of the employer and the employer knows or has reason to know that it has the ability to control its employee and knows or has reason to know of the

> necessity and opportunity for exercising such control. Where this duty is found to exist, a violation of that duty is negligence. . . .

Judge Allsbrook then instructed the jury that it would have to find that 1) the defendant Smith consumed alcohol while on the premises in the possession or under the control of Cianbro, 2) that Smith's impairment was a substantial factor in the driving which caused the collision, 3) that Cianbro knew or through the exercise of reasonable care should have known that Smith had become impaired on the premises within their control or in their possession, 4) that Cianbro knew or should have known that they had the ability to control Smith while on those premises so as to prevent his impairment, 5) that Cianbro knew or should have known of the potential danger to the public from their actions in allowing employees to consume alcohol and then drive on the highway and that their failure to control Smith created an unreasonable risk of harm to the public, 6) and that Cianbro failed to exercise reasonable care to control Smith's conduct by preventing his consumption of alcohol and then driving on the highway.

With respect to causation, the court then instructed the jury:

> Furthermore, when one ordinarily has no duty to anticipate negligence on the part of others, a party seeking damages as a result of negligence has the burden of proving not only negligence, but also that such negligence was a proximate cause of the injury or damage. As I previously have instructed you, proximate cause is a real cause, a cause without which the claimed injury or damage would not have occurred and one which a reasonably careful and prudent person could foresee would probably produce injury or some similar injurious result.
>
> There may be more than one proximate cause of an injury, therefore the party seeking damages need not prove that the other party's negligence was the sole or only proximate cause of the injury or even the last act of negligence in sequence of time. She must prove by the greater weight of the evidence only that the other party's negligence was one of the proximate causes of her injury.

We find that in light of our discussion of the applicable law in Part I of this opinion, the trial court correctly instructed the jury on the appropriate principles of common law negligence. We therefore affirm the court's decision and the jury's verdict in all respects.

Affirmed.

Judge WELLS concurs in the result.

Judge MARTIN concurs.

ACE CHEMICAL CORPORATION, PLAINTIFF v. DSI TRANSPORTS, INC., DEFENDANT

No. 9326SC557

(Filed 21 June 1994)

1. Negligence § 132 (NCI4th)— delivery of contaminated tanker—contributory negligence

The trial court erred by granting plaintiff's motion for judgment notwithstanding the verdict and awarding plaintiff damages where plaintiff's president had ordered from defendant trucking company a stainless steel tanker truck to transport a corrosive cleaning compound; defendant's dispatcher called back and asked if the compound had to be in an insulated trailer; plaintiff's president responded that any kind of trailer that was clean would suffice; defendant sent an uninsulated aluminum tanker; plaintiff's employees checked the tanker to see if it was clean and loaded the compound without ascertaining that it was the proper type of tanker; the customer's employees discovered that the chemical was tainted and rejected the shipment; defendant's employees tried to filter the compound; and defendant's employees discovered during the filtering process that the compound had dissolved a gasket on a valve and spilled onto the ground. There is more than a scintilla of evidence supporting the jury's verdict that plaintiff was contributorily negligent.

Am Jur 2d, Negligence §§ 1096 et seq.

2. Contracts § 148 (NCI4th)— provision of tanker truck for shipping chemicals—contamination—existence of contract—breach of contract—directed verdict

The trial court erred by granting plaintiff's motion for a directed verdict on a breach of contract claim where plaintiff ordered a tanker truck from defendant for shipment of a cleaning compound and plaintiff's customer rejected the shipment

because the compound was contaminated. Defendant's pleadings and defendant's own order form establish that plaintiff contracted with defendant and defendant agreed to provide plaintiff a stainless steel tanker truck to deliver the cleaning compound, but, viewing the evidence in the light most favorable to plaintiff, an issue of fact exists as to whether defendant breached that contract in that plaintiff's own chemical expert testified that there was no problem in storing the compound in aluminum containers for two or three days and the compound was in defendant's tanker for less than 24 hours, and the employee of plaintiff who loaded the compound testified that the tanker looked clean to him when he visually inspected the tanker prior to loading.

Am Jur 2d, Contracts §§ 626 et seq.

3. Election of Remedies § 3 (NCI4th)— contaminated tanker truck—tort and contract claims—motion for election of remedies—improperly granted before verdict

The trial court erred by requiring plaintiff to choose its remedy before submitting the case to the jury in an action involving a contaminated tanker truck in which plaintiff brought both contract and negligence claims. When a complaint alleges a cause in contract and a cause in tort and both causes arise out of the same transaction or occurrence, a defendant's motion to require an election is properly refused. The more recent trend has been to allow an election of remedies after return of the jury verdict.

Am Jur 2d, Election of Remedies § 35.

4. Unfair Competition or Trade Practices § 39 (NCI4th)— contaminated tanker truck—unfair trade practice—summary judgment for defendant

The trial court properly granted summary judgment for defendant on an unfair practices claim which arose from contamination of plaintiff's cleaning compound in defendant's tanker truck. A plaintiff must show substantial aggravating circumstances attending a breach of contract to recover under N.C.G.S. § 75-1.1, but plaintiff did not allege or present evidence of any substantial aggravating circumstances surrounding defendant's breach of contract. Although plaintiff argued in its brief that defendant owed plaintiff the highest duty of care as a common carrier, plaintiff did not allege that defendant was a common car-

rier in its complaint or present any evidence at the hearing that defendant was a common carrier.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Appeal by defendant from judgment entered 15 December 1992 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 March 1994.

On 18 August 1990, plaintiff filed suit alleging negligence, breach of contract and unfair and deceptive practices in violation of G.S. 75-1.1. Plaintiff alleged that defendant furnished plaintiff a "contaminated" tanker that was unsuitable for delivering plaintiff's chemical product and that plaintiff suffered damages when defendant's tanker leaked plaintiff's product onto the ground at plaintiff's facility. Defendant counterclaimed for damages to its tanker and alleged that plaintiff's chemical destroyed the valves on its tanker. On 20 August 1992, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's unfair and deceptive practices claim.

The case was tried before a jury on plaintiff's breach of contract and negligence claims. The evidence at trial tended to show the following: On 7 June 1990, plaintiff's president, Robert J. Clein, placed an order by telephone with defendant trucking company for a stainless steel tanker truck to transport a corrosive cleaning compound called Hampene 100 from plaintiff's facility in Charlotte, North Carolina, to plaintiff's customer, Kay Chemical Company (hereinafter Kay Chemical) in Greensboro, North Carolina. The shipment of Hampene 100 was to be loaded at plaintiff's facility on 12 June 1990 and delivered to Kay Chemical on 13 June 1990. In the year preceding 12 June 1990, defendant's tankers had been used to deliver plaintiff's Hampene 100 to Kay Chemical approximately fourteen times.

On 12 June 1990 at 9:56 a.m., defendant's dispatcher, Scott Willman, called Clein and asked him if the "Hampene 100 [had] to be on an **insulated** trailer." Clein responded that "any kind of trailer . . . that was clean" would suffice. Pursuant to that conversation, Willman sent an uninsulated **aluminum** tanker to plaintiff's facility instead of the insulated stainless steel tanker that plaintiff originally ordered. Material Safety Data Sheets (MSDS) for Hampene 100 provide that only stainless steel, polyethylene or plastic-lined containers should be used for the handling and storage of Hampene 100.

At 2:15 p.m. on 12 June 1990, defendant's uninsulated aluminum tanker truck arrived at plaintiff's facility in Charlotte. Plaintiff's employees checked the inside of the tanker to see if it was clean and then loaded the Hampene 100. The loaded tanker was driven to defendant's terminal in Rock Hill, South Carolina, and stored overnight. At approximately 8:00 a.m. on Wednesday 13 June, defendant's driver, Delmar Blake, drove the loaded tanker to Kay Chemical's facility in Greensboro and arrived at approximately 10:00 a.m. After inspecting the Hampene 100, Kay Chemical's employees discovered that the chemical was tainted and rejected the shipment. Blake then drove the loaded tanker back to plaintiff's facility in Charlotte.

On Thursday 14 June, Blake returned to plaintiff's facility with another tanker and tried to filter the Hampene 100 while transferring it from the original tanker to the new tanker. Blake continued to try to filter the product for several hours on Friday, 15 June and on Saturday, 16 June but was unable to do so. On Tuesday 19 June, another of defendant's drivers, Billy Hinson, came to plaintiff's facility to continue the filtering operation. Hinson discovered that the Hampene 100 had dissolved a gasket on a valve near the rear of the vehicle and had spilled onto the ground. Hinson told plaintiff's employees that the chemical had leaked and returned to defendant's terminal in South Carolina.

At the close of all the evidence, the trial court required plaintiff to elect which theory it would submit to the jury, negligence or breach of contract. Plaintiff chose the negligence theory. Both plaintiff and defendant also moved for directed verdict as to plaintiff's negligence claim and defendant's counterclaim. The trial court denied defendant's motion for directed verdict but took plaintiff's motion for directed verdict under advisement.

The trial court submitted the issues of defendant's negligence and plaintiff's contributory negligence to the jury. On 18 September 1992, the jury returned a verdict finding defendant negligent and plaintiff contributorily negligent. On 25 September 1992, plaintiff moved for judgment notwithstanding the verdict on the issue of plaintiff's contributory negligence and for directed verdict on plaintiff's breach of contract claim. Plaintiff also filed a motion for a new trial in the alternative. On 15 December 1992, the trial court granted plaintiff's motion for judgment notwithstanding the verdict and directed verdict. From judgment entered for plaintiff in the amount

of $16,480.60, defendant appeals. Plaintiff cross appeals the trial court's order granting defendant's motion for summary judgment on plaintiff's unfair and deceptive practices claim.

Waggoner, Hamrick, Hasty, Monteith and Kratt, by S. Dean Hamrick, for plaintiff-appellee.

Golding, Meekins, Holden, Cosper & Stiles, by Lawrence W. Jones, for defendant-appellant.

EAGLES, Judge.

Defendant appeals from the trial court's judgment granting plaintiff's motion for judgment notwithstanding the verdict and directed verdict. Plaintiff cross appeals the trial court's order granting defendant's motion for summary judgment on plaintiff's unfair and deceptive practices claim. After careful review of the record and briefs, we reverse the trial court's judgment granting plaintiff's motion for judgment notwithstanding the verdict on the issue of plaintiff's contributory negligence and remand to the trial court to enter judgment in accordance with the jury's verdict. We also reverse the trial court's judgment granting plaintiff's motion for directed verdict on plaintiff's breach of contract claim and remand to the trial court for a new trial on that issue. Finally, we affirm the trial court's order granting defendant's motion for summary judgment on plaintiff's unfair and deceptive practices claim.

I. Defendant's Appeal

A.

[1] Defendant contends that the trial court erred in granting plaintiff's motion for judgment notwithstanding the verdict on the issue of plaintiff's contributory negligence. We agree.

A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). Like a motion for directed verdict, a motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence to take the case to the jury. *Taylor v. Walker*, 84 N.C. App. 507, 509, 353 S.E.2d 239, *rev'd on other grounds*, 320 N.C. 729, 360 S.E.2d 796 (1987). The motion for judgment notwithstanding the verdict "shall be granted if it appears that the motion for directed verdict could properly have been granted." G.S. 1A-1, Rule 50(b). Accordingly, the test for determining the sufficiency of the evidence is the same under

both motions. *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E.2d 897, 903 (1974).

In considering a motion for judgment notwithstanding the verdict, all the evidence must be considered in the light most favorable to the nonmoving party. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). The nonmovant is given the benefit of every reasonable inference that may legitimately be drawn from the evidence and all contradictions are resolved in the nonmovant's favor. *Id.* If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986); *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993).

Defendant contends that there was sufficient evidence of plaintiff's contributory negligence to support the jury's verdict. We agree. First, defendant's dispatcher, Scott Willman, testified that he telephoned plaintiff's president, Mr. Clein, on the day defendant's tanker was to be delivered to plaintiff's facility in Charlotte and asked him if the "Hampene 100 [had] to be on an insulated trailer." Willman testified that Clein answered, "[N]o, just any kind of trailer that [defendant] had available . . . that was clean was fine with him." Clein testified, however, that he knew that Hampene 100 could not be transported in "just **any** kind of trailer . . . that was clean." Clein testified that he knew that the MSDS sheets for Hampene 100 provided that only stainless steel, polyethylene, or plastic-lined containers should be used for the handling and storage of Hampene 100. A reasonable juror could conclude that Clein was negligent in not clearly specifying to Willman the type of trailer that would be suitable to transport the Hampene 100. Similarly, a reasonable juror could conclude that Clein was negligent in responding to Willman that "just any kind of trailer . . . that was clean was fine" and that Clein should have clearly specified to Willman the type of trailer that would be suitable to transport the Hampene 100.

Second, plaintiff's employee, Matthew L. Doggett, loaded the Hampene 100 into defendant's tanker without ascertaining whether it was the proper type of tanker for shipping Hampene 100. Doggett testified that he loaded the Hampene 100 into defendant's tanker on 12 June 1990 and that he checked defendant's tanker to make sure that it was clean. Doggett also testified, however, that as far as he was

concerned on 12 June 1990, his only duty was to make sure defendant's tanker was clean and that it was not his responsibility to determine whether defendant's tanker was an aluminum or stainless steel tanker. Doggett testified that he had no knowledge prior to 12 June 1990 that Hampene 100 could not be shipped in an aluminum tanker and that neither his supervisor, nor Mr. Clein, nor any other employee at plaintiff's facility told him to check and make sure that each shipment of Hampene 100 was loaded into a stainless steel tanker.

Finally, plaintiff's bill of lading, (Plaintiff's Exhibit 3) prepared by plaintiff and given to defendant's driver, states that "This certifies the above named materials and products, . . . are properly classified, described, packaged, marked and labeled and in proper condition for transportation according to the applicable regulations of the Department of Transportation." The signature line below this statement was not signed by any of plaintiff's employees. A reasonable juror could infer from this evidence that none of plaintiff's employees checked to see if defendant's tanker was a proper tanker for shipping Hampene 100. In fact, defendant's attorney attempted to make this inference in his cross-examination of plaintiff's president, Mr. Clein.

> Q. [I]s not this form prepared by [plaintiff]?
>
> A. Yes.
>
> Q. There is a signature line for an [] employee [of plaintiff]?
>
> A. That's correct.
>
> Q. And it certifies that it has been properly contained for shipment, is that correct?
>
> A. Right.
>
> Q. And no one signed it, isn't that right?
>
> A. That's correct.
>
> Q. So presumably no one bothered to check, is that right?
>
> A. I don't say that. I just say that it wasn't signed. I'm not going to go into details as to why it wasn't signed.

We conclude that there is more than a scintilla of evidence here supporting the jury's verdict that plaintiff was contributorily negligent. Accordingly, we reverse the judgment of the trial court granting plaintiff's motion for judgment notwithstanding the verdict and

awarding plaintiff damages in the amount of $16,480.60 and remand to the trial court to enter judgment on the jury's verdict.

B.

[2] Defendant also contends that the trial court erred in granting plaintiff's motion for directed verdict on plaintiff's breach of contract claim. We agree.

A directed verdict should never be granted when there is conflicting evidence on contested issues of fact. *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). Defendant first contends that the evidence at trial did not establish the existence of a contractual agreement in which plaintiff specified the type of tanker needed to transport the Hampene 100. Defendant argues that there was no written contract between plaintiff and defendant detailing how the Hampene 100 should be shipped and that defendant was under no contractual obligation to provide plaintiff with a stainless steel tanker to deliver plaintiff's Hampene 100. We disagree.

Defendant admitted in its answer that on or about 12 June 1990, "plaintiff requested from defendant a tanker truck for the purpose of transporting a chemical or related products from plaintiff's place of business in Charlotte, North Carolina, to Kay Chemical Company in Greensboro, N.C." Plaintiff's Exhibit 2 is the order form on which defendant's employee reduced plaintiff's telephone order to writing. Defendant's order form reads in pertinent part as follows:

> Ship from Ace Chemical Company, Charlotte, North Carolina. Ship to Kay Chemical, Greensboro, North Carolina. Product 40,000 pounds Hampene 100 cleaning compound. . . . Loading time and date June 12, 1990, 2:00 p.m. Delivery time and date June 13, 1990, 10:00 a.m. . . . [T]ype of equipment, 23.

Clein testified that he learned from the deposition of defendant's dispatcher, Scott Willman, that the number 23 designation beside type of equipment meant stainless steel insulated tanker. Defendant does not deny the authenticity or correctness of its order form. "Where the [movant's] controlling evidence is documentary and [the] nonmovant does not deny the authenticity or correctness of the documents," the credibility of the evidence is manifest as a matter of law. *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). Accordingly, defendant's pleadings and defendant's own order form (Plaintiff's Exhibit 2) establish that plaintiff con-

tracted with defendant and defendant agreed to provide plaintiff a stainless steel tanker truck at plaintiff's facility in Charlotte on 12 June 1990 to deliver a load of Hampene 100 to Greensboro, North Carolina.

Plaintiff is not entitled to a directed verdict, however, because we conclude that an issue of fact exists as to whether defendant breached its contract with plaintiff. We reemphasize that in passing upon a motion for directed verdict, we must resolve all conflicts in the evidence in the nonmovant's favor and give the nonmovant the benefit of every reasonable inference. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986).

Plaintiff alleges that defendant breached its contract with plaintiff by furnishing plaintiff a "contaminated and improper type" of tanker. Plaintiff contends that defendant's tanker had rust in it which contaminated plaintiff's chemical and that plaintiff's chemical leaked from defendant's tanker because defendant sent an aluminum tanker instead of a stainless steal tanker. The uncontroverted evidence shows that defendant sent plaintiff an aluminum tanker instead of the stainless steal tanker originally ordered and that the MSDS sheets for Hampene 100 indicate that Hampene 100 should only be stored in stainless steal, polyethylene or plastic-lined containers. Plaintiff contends that this evidence proves that defendant breached the contract as a matter of law. We disagree. We conclude that the following evidence raises a question of fact as to whether defendant breached the contract.

First, although the MSDS sheets for Hampene 100 state that only stainless steel containers should be used to store Hampene 100, plaintiff's own chemical expert, Mr. John Ravel, testified that there was no problem in storing Hampene 100 in aluminum containers for "periods of short duration, meaning two to three days." By the time Kay Chemical rejected the delivery, the Hampene 100 had been stored in defendant's tanker for less than 24 hours. The Hampene 100 was loaded into defendant's tanker at 2:00 p.m. on 12 June and delivered to Kay Chemical at 10:00 a.m. on 13 June. Viewing this evidence in the light most favorable to defendant, a reasonable juror could conclude that plaintiff's chemical was not contaminated by the aluminum in defendant's tanker from the time it was stored in defendant's tanker until delivery.

Second, although plaintiff contends that defendant's tanker was dirty and contaminated with rust when it arrived at plaintiff's facility,

plaintiff's employee who loaded the Hampene 100 into defendant's tanker, Mr. Matthew Doggett, testified that the inside of defendant's tanker looked clean to him when he visually inspected the tanker prior to loading the Hampene 100. Viewing this evidence in the light most favorable to defendant, a reasonable juror could conclude that plaintiff's chemical was contaminated before it was loaded into defendant's tanker. "If there is conflicting testimony that permits different inferences, one of which is favorable to the nonmoving party, a directed verdict in favor of the party with the burden of proof is improper." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 662, 370 S.E.2d 375, 387 (1988). Accordingly, the trial court erred in granting plaintiff's motion for directed verdict on plaintiff's breach of contract claim.

[3] Plaintiff cross assigns error and contends that the trial court erred in requiring plaintiff to elect between its negligence and breach of contract claims prior to submitting the case to the jury. We agree and remand for a new trial on plaintiff's breach of contract claim.

At the close of all the evidence, the trial court required plaintiff to elect which theory it would submit to the jury, negligence or breach of contract. Plaintiff chose to submit the issue of negligence. Accordingly, the jury was not instructed on breach of contract and did not decide that issue.

Defendant cites *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 79 S.E.2d 880 (1954), as precedent for the trial court's action in requiring plaintiff to elect between its tort and contract remedies prior to submission before the jury. In *Smith, supra*, the trial court, at the close of the plaintiff's evidence, required the plaintiff to elect what cause of action he relied upon in seeking damages, breach of contract or negligence. The plaintiff selected negligence. In holding that plaintiff's evidence for negligence was not sufficient to go the jury, the Court stated that "Where he has two remedies, he may choose between them and select that one which he deems the best for him; but he must abide the [sic] result of his choice." *Id.* at 369, 79 S.E.2d at 885. We conclude that *Smith* does not control here because the question of whether the trial court properly required the plaintiff to make an election between his two remedies was not squarely before the *Smith* Court and was not directly addressed. The *Smith* Court assumed the propriety of the trial court requiring an election and held that once a party makes its election of remedies, the electing party is bound.

When a complaint alleges a cause in contract and a cause in tort and both causes arise out of the same transaction or occurrence, a defendant's motion to require an election is properly refused. *Craven County v. Investment Co.*, 201 N.C. 523, 160 S.E. 753 (1931). In *Craven County v. Investment Co., supra*, our Supreme Court held that the trial court properly refused defendants' motion to require plaintiff to make an election between his remedies when his complaint set out causes of action in both contract and tort. The Court stated that the elements of contract and tort in the plaintiff's complaint were so closely related that the defendants' right to require an election was precluded. *Id.* at 530, 160 S.E. at 756. We also note that the more recent trend has been to allow an election of remedies after return of the jury verdict. *Cf. Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E.2d 297, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986) (plaintiff should be allowed to elect remedy between punitive damages or treble damages under G.S. 75-1.1 after the jury's verdict). Accordingly, we conclude that the trial court erred in requiring plaintiff to elect between its choice of remedies prior to submitting the case before the jury. We remand the case to the trial court for a new trial on plaintiff's breach of contract claim.

II. PLAINTIFF'S APPEAL

[4] Plaintiff contends in its appeal that the trial court erred in granting summary judgment in favor of defendant on plaintiff's unfair and deceptive practices claim. We disagree.

Under G.S. 75-1.1, an act or practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981); *Barbee v. Atlantic Marine Sales and Serv.*, 113 N.C. App. 80, 84, 437 S.E.2d 682, 685 (1993). An act or practice is deceptive if it "has the capacity or tendency to deceive." *Marshall, supra*, at 548, 276 S.E.2d at 403. A mere breach of contract, even if intentional, is not an unfair or deceptive act under G.S. 75-1.1. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989); *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 97 N.C. App. 511, 518, 389 S.E.2d 576, 580 (1990). "[A] plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act." *Bartolomeo* at 535.

Summary judgment is properly granted when all the evidence before the court at the time the motion is ruled on shows that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Dumouchelle v. Duke Univ.*, 69 N.C.

App. 471, 473, 317 S.E.2d 100, 102 (1984). Here, plaintiff does not allege or present evidence of any substantial aggravating circumstances surrounding defendant's breach of contract. Plaintiff's complaint does not allege any aggravating circumstances. When plaintiff was asked in an interrogatory to "state, with particularity, all facts upon which Plaintiff bases its claim against Defendant for unfair and deceptive trade practices," plaintiff answered:

> Plaintiff contends that evidence discloses that Defendant had on numerous previous occasions supplied Plaintiff with stainless steel tanker trucks to transport the Hampene 100 such as was required for the shipment referred to in the Complaint. Defendant's supplied Plaintiff an aluminum tanker which was unfit to transport the Hampene 100 and which obviously had rust in it which in turn made Plaintiff's product worthless and caused it to be rejected by Plaintiff's customer. Despite the obvious liability of Defendant for the damages sustained by Plaintiff, Defendant has failed to pay the damages and has chosen to defend this claim. Plaintiff contends under these circumstances Defendant is engaging in unfair and deceptive business practices. . . .

We conclude that these facts do not present aggravating circumstances surrounding defendant's breach of contract and are insufficient as a matter of law to raise a claim of unfair and deceptive practices pursuant to G.S. 75-1.1.

Plaintiff argues extensively in its brief that defendant is a common carrier and that as a common carrier defendant owed plaintiff the highest duty of care. However, plaintiff did not allege that defendant was a common carrier in its complaint, nor did plaintiff present any evidence at the hearing that defendant was a common carrier. Accordingly, we conclude that the trial court did not err in granting defendant's motion for summary judgment on plaintiff's unfair and deceptive practices claim.

III.

In sum, we conclude that the trial court erred in granting plaintiff's motion for judgment notwithstanding the verdict and remand to the trial court to enter judgment on the jury's verdict on the issue of plaintiff's contributory negligence. We also conclude that the trial court erred in granting plaintiff's motion for directed verdict on plaintiff's breach of contract claim and in requiring plaintiff to elect between its negligence and breach of contract claims prior to sub-

mitting the case to the jury. Accordingly, we remand to the trial court for a new trial on plaintiff's breach of contract claim. Finally, we affirm the trial court's order granting defendant's motion for summary judgment on plaintiff's unfair and deceptive practices claim. This case is remanded for a new trial on the breach of contract claim and for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges MARTIN and McCRODDEN concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE ROBERTSON

No. 9318SC743

(Filed 21 June 1994)

1. **Evidence and Witnesses § 293 (NCI4th)— attempted statutory rape and sexual offense—prior offense—acquittal—admissible**

The trial court did not err in a prosecution for attempted first-degree statutory rape and attempted first-degree sexual offense in allowing the victim to testify that defendant threatened her by saying that if she told anyone what he was going to do, he was going to hurt her like he hurt Koda. Defendant was under indictment and on pretrial release for the murder of Koda Smith at the time of these offenses and was acquitted before this trial. The trial court had previously granted a motion *in limine* to prohibit mention of defendant's arrest, indictment, and trial for the murder, but had denied defendant's motion to prohibit reference to the name Koda Smith. The probative value of defendant's statement was to show that the victim was scared of defendant as well as why she did not scream or make any noise and does not depend on the proposition that defendant in fact hurt Koda. The statement formed an integral and natural part of the victim's account of the crime and was necessary to complete the story of the crime for the jury. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence § 410.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR4th 934.

2. Evidence and Witnesses § 886 (NCI4th)— attempted statutory rape and attempted sexual offense—victim's statements to doctor—admitted as corroboration

The trial court did not err in a prosecution for attempted first-degree statutory rape and attempted first-degree sexual offense by allowing the State's medical expert to testify about statements the victim made to her during a physical examination. Whether the testimony fell within the medical diagnosis exception to the hearsay rule was not addressed because the statements corroborated the earlier testimony of the victim, defendant objected to the testimony "except for purposes of corroboration," and the trial court properly instructed the jury that the testimony was received only for the purpose of corroboration.

Am Jur 2d, Evidence §§ 661 et seq.

3. Evidence and Witnesses § 3020 (NCI4th)— attempted statutory rape and attempted sexual offense—defendant's curfew—not improper impeachment

The trial court did not err in a prosecution for attempted first-degree statutory rape and attempted first-degree sexual offense by allowing the State to ask defendant whether he had a midnight curfew where defendant initially denied having a curfew, was shown his pretrial release papers for another offense out of the presence of the jury, and testified that he had not remembered having a curfew but remembered now. No extrinsic evidence of defendant's pretrial release was admitted before the jury and there was no indication that the jury was aware of defendant's prior arrest, so that the jury could not have reasonably inferred that defendant, age 17, was under anything other than a traditional parental curfew during the night in question. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Witnesses §§ 587-590.

4. Evidence and Witnesses § 2337 (NCI4th)— attempted statutory rape and first-degree sexual offense—expert testimony—suggestibility of child witnesses—not admissible

The trial court did not err in a prosecution for attempted first-degree statutory rape and attempted first-degree sexual offense by excluding the testimony of defendant's expert psy-

chologist on the suggestibility of child witnesses where the witness had never examined or evaluated the victim or anyone else connected with this case. On these facts, the trial court could properly conclude that the probative value of the testimony was outweighed by its potential to prejudice or confuse the jury. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Expert and Opinion Evidence § 191.

Necessity and admissibility of expert testimony as to credibility of witness. 20 ALR3d 684.

5. Criminal Law § 1234 (NCI4th)— attempted statutory rape and attempted sexual offense—sentencing—immaturity not found as mitigating factor—no error

The trial court did not err when sentencing the seventeen-year-old defendant for attempted first-degree statutory rape and attempted first-degree sexual offense by not finding defendant's immaturity as a mitigating factor. Age alone is not sufficient to support this factor and defendant presented no evidence on the effect of his immaturity upon his culpability for the offense. Although defendant contended that the court erred by evaluating defendant's immaturity at the time of trial rather than the time of the offense, the trial court did not abuse its discretion in not finding this factor. N.C.G.S. § 15A-1340.4(a)(2)e.

Am Jur 2d, Criminal Law §§ 598, 599.

6. Criminal Law § 1169 (NCI4th)— attempted statutory rape and attempted sexual offense—sentencing—aggravating factor—pretrial release

The trial court did not err when sentencing defendant for attempted first-degree statutory rape and attempted first-degree sexual offense by finding in aggravation that defendant committed the offenses while on pretrial release for a felony charge where he was ultimately acquitted of the prior charge. The underlying rationale for the factor involves disdain for the law; the fact that defendant was subsequently acquitted of the prior charge does not undermine that rationale. N.C.G.S. § 15A-1340.4(a)(1)k.

Am Jur 2d, Criminal Law §§ 598, 599.

7. Criminal Law § 1079 (NCI4th)— attempted statutory rape and attempted sexual offense—sentence greater than presumptive—no abuse of discretion

The trial court did not abuse its discretion when sentencing defendant for attempted first-degree statutory rape and attempted first-degree sexual offense by imposing a sentence greater than the statutory norm. The task of weighing aggravating and mitigating factors is discretionary and is not simply a matter of mathematics.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 12 February 1993 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 8 March 1994.

On 12 February 1993, defendant, age seventeen, was convicted of attempted first degree statutory rape in violation of G.S. 14-27.6 and attempted first degree sexual offense in violation of G.S. 14-27.6. The trial court sentenced defendant to two consecutive ten year terms of imprisonment.

At trial, the State's evidence tended to show the following: On 6 June 1992, the victim, a twelve year old girl, was spending the night at the home of her fifteen year old friend, Danielle Johnson. At approximately 11:00 p.m. that night, James Christopher Creed, age nineteen, came over to visit the victim and Johnson. Creed went to the back of Johnson's house and spoke with Johnson and victim through a screened window in Johnson's bedroom. After talking with Johnson for about an hour, Creed and Johnson went to get something to eat at Burger King and left the victim in Johnson's bedroom. On their way home from Burger King, Creed and Johnson saw defendant walking down the street toward defendant's house. Johnson talked with defendant for about 5 minutes before returning home with Creed.

When Creed and Johnson returned to her house, Johnson crawled back into her bedroom through the screened window and continued talking to Creed. Defendant walked into the yard and introduced himself to Creed. Both Creed and defendant began talking to Johnson through the screened window. Eventually, Johnson and Creed left to go visit a friend of Johnson's. Creed suggested that defendant "stay and talk to [the victim]."

When Johnson and Creed returned about a half hour later, Johnson saw defendant in her bedroom with the victim. Johnson testified that when she looked in the window, she saw defendant "jumping up off of [victim] with his pants—pulling his pants up." Johnson asked defendant what he was doing in her bedroom and told him to leave. Creed testified that when defendant came out the window, defendant's shirt was unbuttoned and defendant was trying to put on his shoes as he climbed out the window.

Once defendant came outside, defendant, Johnson and Creed talked in the backyard for approximately 30 to 45 minutes, while the victim remained inside. Defendant told Creed and Johnson that he and the victim had been talking and that somehow their clothes had come off. Defendant told them that he began touching the victim's leg and inner thigh and then put his finger inside her vagina, but stopped because it had a very unpleasant smell. They discussed the incident very casually and laughed about it.

The victim testified that when Johnson and Creed left to visit friends, defendant crawled through the window, put his hand over her mouth and said that "[I]f [she] told anybody what he [defendant] was going to do, he was going to hurt [her] like he hurt Koda." The victim testified that defendant put his penis inside her vagina two times and inserted his finger into her vagina three times. The victim could not push defendant off of her and she did not scream or make any noise because she was afraid defendant would hurt her.

Defendant testified that on 6 June 1992, he had been walking to his grandmother's house when a car pulled up beside him. Johnson got out of the car and invited him to her house. Defendant knew Johnson but did not know Creed who was driving the car. Defendant walked to Johnson's house and began talking to Johnson and Creed. Defendant testified that Johnson and Creed later left to go visit friends but told him to stay and talk with the victim. Defendant stood on a bicycle under the bedroom window and talked with the victim. Defendant testified that he began to tire and asked the victim ten to twelve times if he could climb in the window. Eventually, the victim said that she did not care and defendant crawled through the window into the bedroom. Defendant testified that he did not intend to have sex with the victim when he climbed in the window and merely sat at the foot of the bed. The victim, however, "laid back on the bed and spread her legs." After talking briefly with the victim, defendant began rubbing the victim's knees and the inside of her legs. Defend-

ant pulled on the victim's shorts and asked the victim to help him take them off. The victim lifted her hips and removed her shorts and panties without resisting or saying no. Defendant testified that when the victim removed her panties, he noticed she had "an awful odor coming from her." Defendant testified that after he noticed the victim's vaginal odor, he did not want to have sex with her anymore and began looking for a way "to get out of the situation." Defendant testified that he did not touch the victim or insert his finger or his penis into her vagina. Defendant also testified that at no time had he removed his underwear.

When defendant heard Johnson and Creed talking outside, he began dressing and climbed out the window. Defendant testified that he told Johnson and Creed that he had inserted his finger into the victim's vagina because he thought that Creed and Johnson would "think a little less of me if I didn't tell them we did something." Defendant also testified that during the next week, the victim called defendant ten to twelve times and asked him to be her boyfriend. Defendant also told the investigating officer that he did not have sex with the victim and did not penetrate her in any fashion and that victim's vagina had a "strong personal odor."

After having testified for the State, Creed also testified as a defense witness. Creed expressed an opinion about the victim's character for truthfulness. Creed testified that "she tends to get carried away with things that she says at times." Creed also testified that he talked to Johnson and the victim on the night of the alleged incident before he went over to their house. Creed testified that the victim told him that she would give him oral sex if he would come and visit them.

From judgment entered and sentences imposed, defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for the State.

Neill A. Jennings, Jr. for defendant-appellant.

EAGLES, Judge.

Defendant brings forward several assignments of error. After carefully reviewing the record and briefs, we conclude that the trial court committed no error.

I.

[1] Defendant first contends that the trial court erred in allowing the victim to testify that defendant threatened her by saying, "[I]f [she] told anybody what he [defendant] was going to do, he was going to hurt [her] like he hurt Koda." The trial court allowed this testimony despite its previous ruling allowing defendant's motion in limine to prohibit reference to defendant's prior arrest, indictment, trial and acquittal of the murder of Koda Smith.

At the time of the events alleged here, defendant was under indictment and on pre-trial release for the murder of Aileen Koda Smith. Defendant was subsequently acquitted of that charge. Prior to trial here, defendant filed a motion in limine to exclude any reference to Koda Smith or her death or defendant's arrest, indictment and trial for her murder. The trial court granted defendant's motion to prohibit mention of defendant's arrest, indictment and trial for the alleged murder of Koda Smith, but denied defendant's motion to prohibit reference to the name Koda Smith. The victim testified at trial that defendant threatened her by saying, "[I]f [she] told anybody what he [defendant] was going to do, he was going to hurt [her] like he hurt Koda." Defendant contends that the trial court should have excluded the reference to "Koda" in the victim's testimony under Rule 403 of the North Carolina Rules of Evidence. We disagree.

Rule 403 provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Whether evidence should be excluded under Rule 403 is ordinarily a decision within the trial court's discretion. *State v. Meekins*, 326 N.C. 689, 700, 329 S.E.2d 346, 352 (1990). Defendant relies on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), in which the Supreme Court held that:

> [E]vidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value

> depends, as it did here, upon the proposition that defendant in fact committed the prior crime. To admit such evidence violates, as a matter of law, Evidence Rule 403.

Id. at 42, 413 S.E.2d at 788. We find *Scott* distinguishable.

In *Scott, supra*, the defendant was indicted on charges of second degree kidnapping, crime against nature, and three counts of second degree rape. The State's evidence at trial tended to show that defendant approached the victim at a convenience store and asked her for a ride home. The victim was already acquainted with the defendant and agreed to take him home. When they left the parking lot, the defendant threatened the victim with a knife and raped her.

At issue in *Scott* was the testimony of Wanda Freeman, a past acquaintance of defendant, who testified that defendant had raped her two years earlier under similar circumstances. Defendant objected on the grounds that he had been tried and acquitted of Freeman's rape by a jury. In holding that Freeman's testimony violated Rule 403 as a matter of law, the Supreme Court stated:

> When the probative value of evidence of this other conduct depends upon the proposition that defendant committed the prior crime, his earlier acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403.

Scott, 331 N.C. at 44, 413 S.E.2d at 790. The *Scott* court concluded that the probative value of Freeman's testimony depended upon the proposition that defendant had actually raped Freeman two years earlier. Defendant's acquittal of Freeman's rape so eroded its probative value that it was "substantially outweighed by the danger of unfair prejudice" as a matter of law.

Here, the probative value of defendant's statement does not depend on the proposition that defendant in fact hurt Koda. The victim testified that she did not scream or make any loud noises because defendant had threatened to hurt her. The probative value of defendant's statement was to show that the victim was scared of defendant as well as why she did not scream or make any noise. Accordingly, we conclude that *Scott* does not control here.

The State contends that defendant's statement is admissible under *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), as part of the

"chain of circumstances" establishing the context of the crime charged. We agree. "[A]dmission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, ... is admissible if it 'forms part of the history of the event or serves to enhance the natural development of the facts.' " *Id.* at 547, 391 S.E.2d at 174 (citations omitted). In *Agee*, defendant was on trial for felonious possession of LSD. The arresting officer testified that he stopped defendant's vehicle for weaving on the road. When the officer approached the car, defendant made a threatening remark. The officer called for backup and when backup arrived, the officer searched defendant's person for weapons. During the search, the officer found a bag of marijuana in defendant's pocket. After finding the marijuana, the officer searched the vehicle and found the LSD. Defendant objected to the officer's testimony about finding the marijuana in defendant's pocket because defendant had previously been acquitted of possessing that marijuana in another trial. In holding that the officer's testimony was admissible, the Supreme Court stated:

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985).

Here, the victim testified to defendant's statement during her account of the crime. In describing how she was sexually assaulted, the victim testified that defendant put his hand over her mouth and told her that "[I]f [she] told anybody what he [defendant] was going to do, he was going to hurt [her] like he hurt Koda." We conclude that defendant's statement here formed an "integral and natural part" of the victim's account of the crime and was "necessary to complete the story of the crime for the jury." *Cf. Agee*, *supra*. Accordingly, the trial court did not err in allowing defendant's statement.

II.

[2] Defendant next contends that the trial court erred in allowing the State's medical expert, Dr. Martha K. Sharpless, to testify to statements the victim made to her about the incident during a physical

examination of the victim. Defendant contends that Dr. Sharpless' testimony was inadmissible hearsay because the victim's statements to Dr. Sharpless were not made for the purposes of medical diagnosis or treatment as required by G.S. 8C-1, Rule 803(4).

We need not address whether the victim's statements to Dr. Sharpless fall within the "Statements for Purposes of Medical Diagnosis" exception to the hearsay rule because the trial court admitted Dr. Sharpless' testimony only for the limited purpose of corroborating the in-court testimony of the victim. "Evidence which is inadmissible for substantive or illustrative purposes may nevertheless be admitted as corroborative evidence in appropriate cases when it tends to enhance the credibility of a witness." *State v. Burns*, 307 N.C. 224, 229, 297 S.E.2d 384, 387 (1982). Dr. Sharpless' testimony essentially corroborated the earlier testimony of the victim, including the defendant's threat to the victim. We also note that defendant objected "except for purposes of corroboration." The trial court then properly instructed the jury that Dr. Sharpless' testimony was only to be received "for the limited and narrow purpose of corroborating the in-court testimony" of the victim. Accordingly, this assignment of error is overruled.

III.

[3] Defendant next contends that the trial court erred in permitting the State to impeach defendant by asking defendant whether he had a midnight curfew. The following exchange took place between the assistant district attorney and defendant during defendant's cross-examination:

> Q. At some point Chris [Creed] and Danielle [Johnson] left; is that right?
>
> A. Yes, sir. I don't know where they were going.
>
> Q. What time was it by then?
>
> A. I couldn't tell you what time it was. They was getting ready to go somewhere and Chris just said stay here and talk to Donna till we get back.
>
> Q. It was after midnight by then, wasn't it?
>
> A. I don't know what time it was. I'm not sure.
>
> Q. Could it have been after midnight?

MR JENNINGS: Object. Asked and answered, Your Honor.

THE COURT: Overruled.

A. It might have been. It might not have been. I do not know.

Q. You weren't concerned at all about what time it was?

A. No, sir. I don't see what reason there was to be.

Q. Well, didn't you have a midnight curfew?

A. Huh?

MR. JENNINGS: Object.

Q. Didn't you have a midnight curfew?

THE COURT: Overruled.

A. Not that I remember. I don't remember having no midnight curfew.

At the time of the incident, defendant was subject to a midnight curfew as a condition of his pre-trial release. Since defendant testified that he did not remember having a midnight curfew, the State threatened, out of the presence of the jury, to impeach defendant with his pre-trial release papers which indicated that defendant was under a "12:00 midnight curfew Friday and Saturday." The trial court conducted a voir dire out of the presence of the jury and allowed the State to show defendant the pre-trial release papers and refresh defendant's memory that he was indeed under a midnight curfew at the time of the incident. Defendant contends this constituted improper impeachment under Rule 608(b) of the North Carolina Rules of Evidence. We disagree.

Rule 608(b) provides:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence.

Here, extrinsic evidence was not used to impeach defendant before the jury. Defendant was shown his pre-trial release papers outside of the presence of the jury. Defendant's cross-examination in the presence of the jury resumed as follows:

Q. (By Mr. Neumann) [Defendant], I'll ask you again if you've had some time to reflect on it whether you were under a midnight curfew on this particular night?

A. Yes, sir. My memory is refreshed.

Q. I believe you earlier said you weren't concerned with what time it was?

A. No, sir. I had no business —-

MR. JENNINGS: Object.

A. —- no reason to.

THE COURT: Overruled.

Q. So, you didn't care if you missed your midnight curfew or not, did you?

A. I didn't remember having one.

Q. You remember now, don't you?

A. Yes, sir.

No extrinsic evidence of defendant's pre-trial release was admitted before the jury. Accordingly, we conclude that defendant was not improperly impeached under Rule 608(b). Defendant also contends that the question "Didn't you have a midnight curfew," violated the court's ruling on defendant's motion in limine to exclude references to defendant's prior arrest, indictment, trial and acquittal of the murder of Koda Smith. However, since there is no indication that the jury was aware of defendant's prior arrest, we conclude that the jury could not have reasonably inferred that defendant, at age 17, was under anything other than a traditional parental curfew during the night in question.

IV.

[4] Defendant next contends that the trial court erred in excluding the testimony of defendant's expert psychologist, Dr. John F. Warren, on the suggestibility of child witnesses. We disagree.

Dr. Warren was certified by the trial court as an expert in clinical psychology and human behavior. Defendant offered Dr. Warren's testimony on the phenomenon of suggestibility. On voir dire, Dr. Warren testified that suggestibility is the "altering or the creation of memo-

ries through questions, gestures, other stimuli that happen around the person who is doing the remembering." Dr. Warren would have also testified that suggestibility is significant in young children or intellectually impaired persons. Defendant offered Dr. Warren's testimony to show that the victim's memory may have been created or altered through suggestion.

Under Rule 702 of the North Carolina Rules of Evidence, expert testimony is admissible if it will appreciably help the jury. *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985). In applying this test, the trial court must balance the probative value of the testimony against its potential for prejudice, confusion, or delay. *Id.*; G.S. 8C-1, Rule 403. The trial court has wide discretion in determining whether expert testimony is admissible. *Knox*, 78 N.C. App. at 495, 337 S.E.2d at 156.

Here, Dr. Warren testified that he did not ever examine or evaluate the victim or anyone else connected with this case. On these facts, the trial court could properly conclude that the probative value of Dr. Warren's testimony was outweighed by its potential to prejudice or confuse the jury. Similarly, we are not persuaded that Dr. Warren's testimony would have "appreciably aided" the jury since he had never examined or evaluated the victim. Accordingly, we conclude that the trial court did not abuse its discretion in excluding Dr. Warren's testimony.

V.

[5] Defendant's next three contentions concern the sentencing phase of the trial. Defendant first contends that the trial court erred in failing to find defendant's immaturity as a mitigating factor. G.S. 15A-1340.4(a)(2)e allows a defendant's immaturity to be considered as a mitigating factor if the defendant's immaturity "at the time of commission of the offense significantly reduced his culpability for the offense." At the time of the offense, defendant was seventeen years old and a high school drop out. In refusing to find defendant's immaturity as a mitigating factor, the trial court stated, "This is a man that just went out and got married and took on the responsibilities for a wife and two children. . . . That doesn't smack of immaturity." Defendant contends that the trial court erred in evaluating defendant's immaturity at the time of trial instead of at the time of the commission of the offense. We disagree.

A trial court has wide discretion in determining the existence of mitigating factors because it "observes the demeanor of the witness and hears the testimony." *State v. Heatwole*, 333 N.C. 156, 163, 423 S.E.2d 735, 739 (1992). Immaturity as a statutory mitigating factor requires two inquiries: One as to immaturity and one as to the effect of that immaturity upon culpability. *State v. Moore*, 317 N.C. 275, 280, 345 S.E.2d 217, 221 (1986). Age alone is insufficient to support this factor. *Id.* The fact that defendant is seventeen years old, without more, does not classify defendant as immature under the statute. *Id.* As to the second inquiry, defendant presented no evidence on the effect of his immaturity upon his culpability for the offense. It is within the trial court's discretion to assess whether a defendant's immaturity significantly reduced his culpability for the offense. *Id.* at 281, 345 S.E.2d at 221. Accordingly, we conclude that the trial court did not abuse its discretion in failing to find defendant's immaturity as a mitigating factor.

[6] Second, defendant contends the trial court erred in finding as an aggravating factor that defendant committed the offenses while on pre-trial release for a felony charge. G.S. 15A-1340.4(a)(1)k. Defendant contends that since he has been acquitted of the prior charge, the fact that he was on pre-trial release during the commission of these offenses cannot be used to aggravate his sentence. Based on *State v. Webb*, 309 N.C. 549, 308 S.E.2d 252 (1983), we disagree.

The rationale underlying G.S. 15A-1340.4(a)(1)k is that, "[o]ne demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge." *Webb*, 309 N.C. at 559, 308 S.E.2d at 258.

> Whether or not one [on pre-trial release] is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence.

Id. The fact that defendant was subsequently acquitted of the prior charge does not undermine the rationale for finding as an aggravating factor that defendant committed this offense while on pre-trial release. Accordingly, the trial court did not abuse its discretion in this regard.

[7] Finally, defendant contends that the trial court erred in imposing a sentence greater than the presumptive term. Defendant contends that the trial court erred in finding that the one aggravating factor of committing the offenses while on pre-trial release outweighed the one mitigating factor that defendant had no prior record of convictions. Defendant's contention is without merit. The task of weighing aggravating and mitigating factors is discretionary and is not simply a matter of mathematics. *State v. Melton*, 307 N.C. 370, 380, 298 S.E.2d 673, 680 (1983). The trial court may properly emphasize one factor over another in weighing these factors. *Id.* We conclude that the trial court did not abuse its discretion in sentencing defendant.

VI.

For the reasons stated, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges MARTIN and McCRODDEN concur.

IN THE MATTER OF: DYLAN AUTRY

No. 935DC920

(Filed 21 June 1994)

Infants or Minors § 31 (NCI4th)— Willie M. child—treatment plan ordered by court—jurisdiction

The district court exceeded its authority in vesting legal and physical custody of Dylan Autry, a Willie M. class member, with the Division of Mental Health, Developmental Disabilities and Substance Abuse Services within the Department of Human Resources, and by directing the Division to provide a plan and implementation for Dylan, because the federal district court has continuing jurisdiction over the question of appropriate treatment of Willie M. children and because of the role of the Review Panel in evaluating the compliance of the State with the consent order.

Am Jur 2d, Infants §§ 33-41.

Judge JOHN dissenting.

Appeal by the State from order entered 18 March 1993 by Judge Elton G. Tucker in New Hanover County District Court. Heard in the Court of Appeals 9 May 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Michelle B. McPherson, for the State-appellant.

William Norton Mason, attorney for the guardian ad litem-appellee.

JOHNSON, Judge.

Dylan Autry, born 25 September 1977, was adjudicated a dependent juvenile by the New Hanover District Court and legal custody of Dylan was granted to the New Hanover County Department of Social Services on 5 August 1986. Dylan suffers from serious behavioral and emotional problems and from developmental disabilities. Because of these problems, Dylan requires specialized services; Dylan was certified a Willie M. class member on or about 4 March 1987.

The Willie M. Services Section of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services is within the North Carolina Department of Human Resources. The Division is responsible for creating, overseeing and funding all services for Willie M. class members, except educational services provided through the North Carolina Department of Public Instruction.

Judge Napoleon B. Barefoot, Jr. reviewed Dylan Autry's case during the 18 February 1993 session of New Hanover County District Court upon the motion of the guardian ad litem. The guardian ad litem was seeking an order from the court directing the North Carolina Department of Human Resources, through the Division, to develop a treatment/placement plan for Dylan and a specific time frame for implementing the plan. Those present at the hearing included Dylan's social worker, counsel for the New Hanover County Department of Social Services, the guardian ad litem represented by counsel, and Dylan's Willie M. case manager, Tommy Puckett. (Mr. Puckett is not an employee of the Division; he is employed by Southeastern Mental Health Center. The Center is operated by the Southeastern Area Mental Health, Developmental Disabilities and Substance Abuse Services Area Program. This Program is responsible for providing for the mental health, developmental disabilities

and substance abuse services needs of clients in its area. Dylan is one of its clients.)

The evidence at the hearing revealed that Dylan was a patient at the Children's Unit of Cherry Hospital in Goldsboro, North Carolina, and had been a patient there since January 1992. Cherry Hospital is a psychiatric facility operated by the North Carolina Department of Human Resources. Dylan was admitted to the hospital for assessment of his need for medication to address his behavioral problems. During his stay at Cherry Hospital, Dylan was provided treatment for behavioral problems caused by his developmental and emotional deficits. At the time of the hearing, Dylan was no longer in need of acute care and was ready for discharge to an appropriate long-term placement.

The social worker for the Cherry Hospital Children's Unit testified that she had been working closely with Mr. Puckett, who was trying to find an appropriate placement for Dylan so that he could be discharged from the hospital. Mr. Puckett testified that he was working with all of the agencies involved in Dylan's case to create a plan and submit it to the Division for consideration by the Division's Willie M. Services Section from whom the funding for the plan was being sought. However, because of Dylan's special needs, the plans he had submitted had not been accepted by the Division. One reason for the rejections was that the type of services proposed in the plans did not exist and would have to be developed. Mr. Puckett testified that two other plans that would have suited Dylan's needs called for individual residential treatment. These involved providing Dylan with a small house or an apartment with a 24-hour staff to supervise him. The cost associated with each of these plans was about $140,000 per year. Those plans were rejected by the Division but Mr. Puckett did not testify as to the reason for the rejection.

Because the Division wanted to ensure that Dylan did not continue to languish in the hospital, Mr. Puckett was instructed to develop a plan and coordinate the activities necessary to place Dylan in a "professional parenting home" as an interim placement. This would involve locating and training a couple with whom Dylan would live. The couple would be provided certain supports to ensure that Dylan's needs were met.

At the conclusion of the evidence, the trial court found that officials recommended that a plan be established for Dylan including the following criteria:

(1) That he be placed in an individual therapeutic residential center outside Cherry Hospital.

(2) That he needs to be taught in this facility life skills.

(3) That he needs an individualized education plan.

(4) That he needs speech therapy for his speech impediment which is stuttering when he is under stress.

(5) That he needs continued monitoring of the drugs he is being administered for his behavior.

Judge Barefoot then ordered the Willie M. program to provide to the court within thirty days a plan for placement that would meet Dylan's needs and ordered that an appropriate placement be implemented within sixty days. The matter was to come before the court for review within thirty days. Subsequently, on 5 March 1993, a written order was entered *nunc pro tunc* for 18 February 1993.

On 18 March 1993, Judge Elton G. Tucker presided over the review, finding "[t]hat Tommy Puckett, Willie M case manager, testified before this Court that there are plans for placement as ordered but that no firm plan or date for implementation of a plan can be given, although it is hoped that the plan will be implemented within the next several weeks." Judge Tucker concluded "[t]hat no firm plan has been presented to the Court with an implementation date as previously ordered" and "[t]hat it is in the present best interest of the juvenile that his legal and physical custody be granted to the Willie M. Program, a Division of the North Carolina Department of Human Resources." The order required two employees of the Division, Marci White, Director of the Section, and Pat Ray, Regional Service Manager, to appear before the court on 22 April 1993, and to show the court that Dylan had been placed in accordance with Judge Barefoot's findings of fact regarding Dylan's needs, or to show cause why they should not be held in contempt for failure to abide by the court's order.

On 31 March 1993, the Division asked that Judge Tucker modify or vacate his order or, in the alternative, stay his order pending appeal. Judge Tucker denied these requests. On 13 April 1993, the Division petitioned our Court to issue writs of prohibition and supersedeas and moved for a temporary stay of the order. These writs (the petition for a writ of prohibition was treated as a petition for writ of

certiorari) were granted by our Court on 4 May 1993. We turn now to the merits of this appeal.

The State first argues the district court lacked jurisdiction to order the Division to implement a specific treatment program for Dylan Autry. Specifically, the State argues that because the Division was not a party to this juvenile proceeding, the district court was without authority to direct the Division to take any particular action with respect to the juvenile.

The State cites *In the Matter of Baxley*, 74 N.C. App. 527, 328 S.E.2d 831, *disc. review denied*, 314 N.C. 330, 333 S.E.2d 483 (1985), where our Court stated:

> We agree that, as a certified Willie M. child, respondent has certain special constitutional rights to appropriate treatment by the State of North Carolina. These were established in the consent order in *Willie M. v. James B. Hunt*, No. CC79-0294 slip op. (W.D.N.C. 20 February 1981). Yet, the stipulations by the parties in that case, as adopted by the federal district court in its order, indicate that a Review Panel was established by the court and "shall be responsible to the Court and is created for the purpose of reviewing defendants' compliance with the decree entered in this action." This Review Panel has the duty of reviewing the services actually being provided for each Willie M. child and of determining whether they assure the child the rights he is accorded under the court's decree.
>
> Given the federal district court's continuing jurisdiction over the question of appropriate treatment of Willie M. children, and the role of the Review Panel in evaluating the compliance of the State of North Carolina with the consent order, which was agreed to by the parties, we believe it would be inappropriate for this tribunal to inquire into whether the respondent in the present case was denied his Willie M. rights when the juvenile judge revoked his conditional release.

In the Matter of Baxley, 74 N.C. App. at 531, 328 S.E.2d at 833.

Further, the State cites *In re Swindell*, 326 N.C. 473, 390 S.E.2d 134 (1990), where our Supreme Court held that the trial court "exceeded the scope of its authority in ordering the State of North Carolina to develop and implement a specified adolescent sex offender treatment program." The Court stated that "[t]he North Carolina Juvenile Code, N.C.G.S. § 7A-516 to § 7A-744, does not grant the

district courts the authority to order the state, through the Division of Youth Services, to develop and implement specific treatment programs and facilities for juveniles." *Swindell*, 326 N.C. at 475, 390 S.E.2d at 136.

We also note that there is no authorization in our statutes to grant legal and physical custody of a juvenile to the Willie M. Services Section of the Division, although the guardian ad litem argues that the Division of Youth Services, also a Division of the Department of Human Resources, is a "person" within the purview of North Carolina General Statutes § 7A-647 (Cum. Supp. 1993), as held in *In re Doe*, 329 N.C. 743, 407 S.E.2d 798 (1991). *Doe* distinguishes *Swindell* at 329 N.C. 750-51, 390 S.E.2d 802-03.

Based on the aforementioned holdings and reasoning, we agree with the State in the case *sub judice*. Like the Court in *Baxley*, because the federal district court has continuing jurisdiction over the question of appropriate treatment of Willie M. children, and because of the role of the Review Panel in evaluating the compliance of the State of North Carolina with the consent order which was agreed to by the parties, we believe that the district court judge exceeded his scope of authority in vesting legal and physical custody of Dylan with the Division, and by directing the Division to take any particular action with respect to Dylan, who had been certified a Willie M. class member. Therefore, we reverse the decision of the trial court.

Reversed.

Judge WELLS concurs.

Judge JOHN dissents.

Judge JOHN dissenting.

I believe Judge Tucker had authority both (1) to place legal and physical custody of Dylan Autry (Dylan) with the Willie M. Services Section, a Division of Mental Health, Developmental Disabilities and Substance Abuse Services within the North Carolina Department of Human Resources (the Section); and (2) to order the Section to arrange placement of Dylan in a living environment consistent with the criteria set forth in Judge Barefoot's earlier 18 February 1993 order.

The record reflects Dylan was adjudicated a dependent juvenile and custody was granted to the New Hanover County Department of Social Services on 5 August 1986. He was subsequently certified a Willie M. class member on or about 4 March 1987. The necessity for placement of Dylan at the conclusion of his stay in Cherry Hospital, a psychiatric facility operated by the Department of Human Resources, was known upon his hospital admission in early January, 1992. In July and October of 1992, two separate placement plans for Dylan were submitted to the Section, but were rejected.

The matter came on for review before Judge Barefoot in February of 1993. Cherry Hospital officials indicated Dylan had received and attained the maximum benefit from hospitalization and his condition was deteriorating as his discharge continued to be delayed. Judge Barefoot's order (entered 5 March 1993, *nunc pro tunc* to the hearing date of 18 February 1993) directed the Section to provide the court with a placement plan, incorporating certain criteria, within thirty (30) days.

Judge Tucker, when the matter came on for review 18 March 1993 (six years after Dylan's classification as a Willie M. juvenile, *fourteen months* after his placement at Cherry Hospital, and *one full month* after Judge Barefoot's directive), was confronted with lame excuses and vague reassurances that there were "plans for placement as [Judge Barefoot had] ordered but that no firm plan or date for implementation of a plan can be given, although it is hoped that the plan will be implemented within the next several weeks." In light of the foregoing history, Judge Tucker's apparent frustration with bureaucratic foot-dragging was quite understandable.

The appeal herein only presents questions as to whether Judge Tucker had authority: (1) to set custody of Dylan in the Section, and (2) to direct the custodian to effect treatment of Dylan consistent with Dylan's best interests. The State points to two decisions—*In re Swindell*, 326 N.C. 473, 390 S.E.2d 134 (1990) and *In the Matter of Baxley*, 74 N.C. App. 527, 328 S.E.2d 831, *disc. review denied*, 314 N.C. 330, 333 S.E.2d 483 (1985)—and argues that any cure for Dylan's predicament must be sought in federal court. I disagree and vote to affirm Judge Tucker's order.

I.

In my opinion, our Juvenile Code, N.C.G.S. §§ 7A-516 to -749 (1989), authorizes Judge Tucker's action.

First, under G.S. § 7A-523, the juvenile court has "exclusive, original jurisdiction" over a juvenile alleged to be dependent. Moreover, the Code provides this jurisdiction "*shall* continue until terminated by order of the court or until he reaches his eighteenth birthday." G.S. § 7A-524 (emphasis added). *See also In re Doe*, 329 N.C. 743, 748, 407 S.E.2d 798, 801 (1991). Nowhere within the statutory scheme is the court divested of its responsibility should a dependent juvenile subsequently be certified a Willie M. class member. Accordingly, Judge Tucker had jurisdiction over Dylan's case.

Second, the State's assertion the court's order was unauthorized because the Section was not a party is unavailing. Many alternative dispositions under the Juvenile Code involve implementation through third parties, usually state or local agencies, and the Section had full notice of Dylan's situation and of the district court's concern. No "fundamental fairness" or "due process" principles were violated by Judge Tucker's order. *See In re Jackson*, 84 N.C. App. 167, 171-72, 352 S.E.2d 449, 452-53 (1987).

Third, the Code provides that the court may set custody of a dependent juvenile with "a parent, relative, private agency offering placement services, or some other suitable person." G.S. § 7A-647(2)(b). Our Supreme Court has recently found that, as a matter of "common-sense," the Division of Youth Services (like the Section, a division of the Department of Human Resources) is a "person" within the purview of a different sub-section of this same statute. *In re Doe*, 329 N.C. at 750, 407 S.E.2d at 802 (construing G.S. § 7A-647(3)). I find no distinction between the Section and the Division of Youth Services for purposes of consideration as a "person" under the statute. Furthermore, I would hold the Section, as consisting of individuals well versed in the special needs of Willie M. children, to be a "suitable" person in which to place custody of Dylan.

Fourth, G.S. § 7A-647(3) specifically authorizes the juvenile court, if a dependent juvenile is in need of "psychiatric, psychological or other treatment," to "order the needed treatment." *See also Doe*, 329 N.C. at 750, 407 S.E.2d at 802.

Lastly, G.S. § 7A-657 mandates periodic review by the juvenile court of custody and treatment arrangements for dependent juveniles and authorizes "different placement as is deemed to be in the best interest of the juvenile." G.S. § 7A-657(d). This Code section permits the reviewing judge to order any treatment alternative authorized by G.S. § 7A-647. Within the limitations imposed by *Swindell*

discussed below, I believe these sections enabled Judge Tucker to order treatment compatible with the criteria set forth in Judge Barefoot's earlier order.

Despite the foregoing statutory provisions, the majority relies upon *Baxley* (and to a lesser extent, *Swindell*) to hold that because Dylan is a Willie M. child, Judge Tucker exceeded his authority. I disagree.

"The legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant." *State v. White*, 101 N.C. App. 593, 605, 401 S.E.2d 106, 113, *disc. review denied* and *appeal dismissed*, 329 N.C. 275, 407 S.E.2d 852 (1991). My analysis of the Juvenile Code, summarized above, indicates the juvenile court is responsible for both the proper custody and the proper treatment of dependent juveniles such as Dylan—*regardless of whether they are subsequently determined to be Willie M. children.* The Juvenile Code makes no mention of Willie M. children. In the absence of a legislative exclusion for Willie M. children, I would hold that once a child is found to be dependent, the juvenile court's "exclusive, original jurisdiction" over custody and treatment matters continues until such time as jurisdiction is "terminated by order of the [juvenile] court" or such time as the child reaches age eighteen (18). In other words, I do not feel a dependent juvenile, who is subsequently determined to be a Willie M. child, should be allowed "to slip through the cracks" of our Juvenile Code.

II.

I would further hold that neither *Baxley* nor *Swindell* operate to bar the trial court's action.

As previously noted, the Juvenile Code provides that the district court has "exclusive, original jurisdiction" over any case concerning a dependent child. G.S. § 7A-523. While the majority reads *Baxley* as imposing a limitation upon that jurisdiction, I find the holding therein inapposite. In *Baxley*, we were confronted with the question of whether the trial court denied a Willie M. juvenile his federally mandated right to treatment by revoking the juvenile's conditional release from DYS custody. *Baxley*, 74 N.C. App. at 531, 328 S.E.2d at 833. Pursuant to the consent order in *Willie M. v. James B. Hunt*, No. CC79-0294 (W.D.N.C. 20 February 1981), Willie M. children have

"certain special constitutional rights to appropriate treatment . . . ." *Baxley*, 74 N.C. App. at 531, 328 S.E.2d at 833.

Although *Baxley* indicates it is "inappropriate for this tribunal" to inquire into whether the State has denied a Willie M. child those rights guaranteed in the federal consent order, *Baxley*, 74 N.C. App. at 531, 328 S.E.2d at 833, the issue herein does not concern a Willie M. class member seeking redress for a violation of those rights secured under the federal court decree. On the contrary, this case involves the authority and responsibility of the district court to fulfill its continuing statutory obligation concerning "dependent" juveniles. *See* G.S. § 7A-657. It involves the juvenile court's repeated attempts to find Dylan, who is a "dependent" child (and who also happens to be a Willie M. child), a suitable custodian and living environment—matters within the court's jurisdiction which will repeatedly resurface until effectively resolved. Contrary to the majority's implicit holding, therefore, I do not believe the district court's "exclusive, original jurisdiction" suddenly evaporates when a dependent youth acquires a Willie M. classification.

Neither do I consider *In Re Swindell*, 326 N.C. 473, 390 S.E.2d 134 (1990) to have application. Under *Swindell*, the juvenile court has no authority "to order the state . . . to develop and implement specific treatment programs and facilities for juveniles." *Swindell*, 326 N.C. at 475, 390 S.E.2d at 136. However, the court may order an agency to provide specific treatment when such treatment is *currently available*. *Doe*, 329 N.C. at 752, 407 S.E.2d at 803. In summary, the courts simply cannot order the *creation* of treatment programs and facilities which do not exist. Such is not the situation in the case *sub judice*.

There exists a strong presumption favoring correctness of decisions of the trial court, with the burden on the appellant to show error. *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985). Here the State, as appellant, has failed to file a transcript of the proceedings below. Consequently, our consideration of the State's argument is limited to the printed record on appeal. *See Loeb v. Loeb*, 72 N.C. App. 205, 218, 324 S.E.2d 33, 42 (an appellate court's decision must rest on the record on appeal), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 393 (1985).

The limited appellate record prohibits any conclusion that the five placement criteria, as established by Judge Barefoot and directed by Judge Tucker, were non-existent on the date ordered. The

court's unchallenged, and therefore binding, findings, *see Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 365, 291 S.E.2d 308, 309 (1982), on the contrary indicate that plans for Dylan's placement were indeed available, but would require several additional weeks for implementation. Hence the State (as appellant) has failed to show the placement and treatment ordered were unavailable, and therefore the trial court's order is not barred by application of *Swindell*.

For the foregoing reasons, I respectfully dissent.

JONATHAN GARRITY, D/B/A CAMBRIDGE HANOVER AVIATION PARKWAY ASSOCIATES, BROWNING-FERRIS INDUSTRIES, INC., A CORPORATION, AND BOBBY L. MURRAY, PETITIONERS v. MORRISVILLE ZONING BOARD OF ADJUSTMENT, SOUTHPORT BUSINESS PARK, LIMITED PARTNERSHIP, AND MORRISVILLE ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP, RESPONDENTS

No. 9310SC544

(Filed 21 June 1994)

1. Zoning § 109 (NCI4th)— site plan approval by town commissioners—N.C.G.S. § 160A-388(b)—no appellate jurisdiction by board of adjustment

The provision of N.C.G.S. § 160A-388(b) giving a board of adjustment the authority to hear and decide appeals from an order or decision made by "an administrative official" charged with the enforcement of a zoning ordinance did not give a zoning board of adjustment the authority to decide an appeal from a decision by the town board of commissioners approving a site plan since the board of commissioners is not a "person" and is thus not an "official" within the meaning of the statute.

Am Jur 2d, Zoning and Planning §§ 745 et seq.

2. Zoning § 109 (NCI4th)— site plan approval by town commissioners—N.C.G.S. § 160A-388(c)—no appellate jurisdiction by board of adjustment

The provision of N.C.G.S. § 160A-388(c) stating that a board of adjustment "shall hear and decide all matters referred to it or upon which it is required to pass under any zoning ordinance," when considered with town zoning regulations which allow the board of adjustment to hear appeals from an order or decision

made by "other administrative officials" in the carrying out or enforcement of any provisions of the ordinance, did not give a zoning board of adjustment the authority to decide an appeal from the town board of commissioners approving a site plan since the commissioners are not administrative officials.

Am Jur 2d, Zoning and Planning §§ 745 et seq.

3. Zoning § 109 (NCI4th)— site plan approved by town commissioners—N.C.G.S. § 160A-388(c)—no appellate jurisdiction by board of adjustment

Language in N.C.G.S. § 160A-388(c) stating that a zoning ordinance "may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance" did not authorize a zoning board of adjustment to decide an appeal from a decision of the town board of commissioners approving a site plan since this language merely lists specific powers which a town's zoning ordinance may confer on the board of adjustment and does not include hearing appeals.

Am Jur 2d, Zoning and Planning §§ 745 et seq.

4. Zoning § 114 (NCI4th)— board of adjustment decision—judicial review by certiorari—sufficiency of petition

A petition for a writ of certiorari seeking judicial review of the decision of a town zoning board of adjustment was required to comply only with the provisions of N.C.G.S. § 160A-388(e) and was not subject to dismissal because it was not verified, did not contain an undertaking for costs, was not returnable to the superior court, and did not give respondents ten days written notice prior to the date of its return as required by Rule 19 of the General Rules of Practice for Superior and District Courts.

Am Jur 2d, Zoning and Planning § 1020.

Appeal by respondents from order entered 18 December 1992 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 March 1994.

This action arises out of the decision of the Morrisville Board of Commissioners to approve petitioners' proposed building of a regional facility for solid waste and collection on property located in the

Town of Morrisville. Respondents, who own land in the vicinity of the property at issue, petitioned the Town Board of Commissioners to reconsider its approval of the facility. At the same time, respondents also filed a petition for "interpretation and administrative review" of the decision of the Board of Commissioners with the Morrisville Board of Adjustment asking the Board of Adjustment to reverse the decision of the Board of Commissioners and to interpret the Zoning Regulations.

On 23 March 1992, the Town Board of Commissioners reconsidered its approval of the site plan, and on 13 April 1992, the Board of Commissioners approved the site plan again by a vote of three to two. On 20 April 1992, petitioners filed a motion to dismiss respondents' petition for interpretation and administrative review of the decision of the Board of Commissioners with the Board of Adjustment on the basis that the Board of Adjustment did not have the authority to review the Board of Commissioners' decision. The Board of Adjustment denied petitioners' motion, and on 21 April 1992, the Morrisville Board of Adjustment began its hearing based on respondents' petition. Subsequently, on 12 August 1992 the Board of Adjustment entered a decision and order reversing the Board of Commissioners' approval of the site plan.

In September 1992, petitioners filed a petition for writ of certiorari in Wake County Superior Court, which petition the superior court granted. Respondents filed a motion to dismiss and set aside petitioners' writ of certiorari "for failure of the petition to meet the requirements of N.C.G.S. § 160A-388(e) and Rule 19 of the North Carolina General Rules of Practice." On 29 September 1992, petitioners filed a motion pursuant to N.C.R. Civ. P. 15 and Rule 1 of the General Rules of Practice to amend their writ of certiorari to include a verification. Subsequently, the trial court denied respondents' motion to dismiss and set aside the writ of certiorari and granted petitioners' motion to amend the writ.

On 18 December 1992, Judge Henry V. Barnette, Jr. entered an order concluding that the Board of Adjustment did not have jurisdiction to reverse the decision of the Board of Commissioners and vacated the 12 August 1992 decision of the Board of Adjustment. From this decision, respondents appeal.

Poyner & Spruill, by Lacy H. Reaves and John L. Shaw, for petitioner-appellees Browning-Ferris Industries, Inc. and Bobby L. Murray; John E. Bugg for petitioner-appellee Jonathan Garrity.

Maupin Taylor Ellis & Adams, P.A., by John C. Cooke and William J. Brian, Jr., for respondent-appellants Southport Business Park, Limited Partnership and Morrisville Associates.

ORR, Judge.

Petitioner Bobby L. Murray owns a 17.46 acre tract of undeveloped land in Wake County within the town limits of the Town of Morrisville. In this action, petitioners sought a building permit or zoning certificate to build a Regional Facility for solid waste and collection on a portion of this property. Petitioner Jonathan Garrity is the vendee under a contract for sale of the subject property, and he would be the developer and owner of the Proposed Regional Facility. Petitioner Browning-Ferris Industries, Inc. (BFI) is a solid waste collection and disposal firm that wants to lease the facility. Respondent Southport Business Park Limited Partnership owns a business park complex located immediately west and across Aviation Parkway from the subject property. Respondent Morrisville Associates is a general partnership that owns an undeveloped tract of land south of and adjacent to the subject property.

In obtaining approval from the Board of Commissioners to build the regional facility within the town limits of Morrisville, petitioners followed the procedure outlined in the Zoning Regulations for the Town of Morrisville (the "Zoning Regulations"). Article II, § 18.2 of the Morrisville Zoning Regulations states, "No building permit or certificate of zoning compliance shall be issued until the required site plan of the proposed use or development has been approved by the town board with a recommendation from the planning board." Article XVII of the Zoning Regulations defines "town board" as the Town Board of Commissioners.

Under Article II, § 18.7, "[t]he owner or developer shall submit for consideration by the site plan/subdivision review committee a site plan prepared and certified by a registered engineer, architect, landscape architect, or land surveyor." Further, Article II, § 18.8 states:

> The planning board, after receiving a recommendation from the site plan/subdivision review committee, shall review the site plan with respect to the procedures and requirements of this ordinance and any changes or additions which may be necessary to comply with this ordinance and any other applicable local or state law. . . . The planning board shall submit their recommendation on the site plan to the town board [of commissioners] for their review.

Thereafter, Article II, § 18.9 provides, "[t]he town board [of commissioners] will review and approve the site plan as proposed, or subject to modification, or disapprove the plan."

In the present case, the property at issue is zoned as an Industrial Management District under the Zoning Regulations. On 20 December 1991, pursuant to the Zoning Regulations, petitioners submitted a proposed site plan for the regional facility to the Morrisville site plan review committee. The review committee reviewed the plan and returned it to petitioners with comments on 3 January 1992.

On 15 January 1992, petitioners revised the plan and re-submitted it to the review committee for further review, and on 23 January 1992, the review committee presented the revised site plan to the planning board recommending that the site plan be approved as revised with the condition that a legal access to the Wake County sewer line be obtained and adequate capacity be available in the sewer line to serve the site. The planning board reviewed the revised site plan and voted unanimously to recommend the plan for approval to the Morrisville Town Board of Commissioners on the condition that the plan be revised as recommended by the review committee and that branch valves be installed for fire hydrants. On 10 February 1992, the Town Board of Commissioners unanimously approved the site plan subject to certain conditions. Thereafter, respondents asked the Board of Commissioners to reconsider its decision and petitioned the Board of Adjustment for a reversal of the decision of the Board of Commissioners. The Board of Commissioners again approved the site plan, and the Board of Adjustment reversed this decision.

I.

[1] The fundamental substantive issue presented by this appeal is whether the Town Board of Adjustment has jurisdiction to review and reverse the decision of the Town Board of Commissioners. At the outset, we note that the Board of Adjustment is not a part of the pro-

cedure outlined for obtaining approval of a site plan prior to the issuance of a building permit or zoning compliance certificate outlined in Article II of the Zoning Regulations. Respondents contend, however, that the Morrisville Town Board of Adjustment had the power to review and reverse the Morrisville Town Board of Commissioners' decision to approve petitioners' site plan under N.C. Gen. Stat. § 160A-388(b). We disagree.

N.C. Gen. Stat. § 160A-388(b) (1987 & Supp.) states:

> (b) The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination *made by an administrative official charged with the enforcement of any ordinance adopted pursuant to [Part 3 of Article 19 of Chapter 160A]*. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. . . . The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises. To this end the board shall have all the powers of the officer from whom the appeal is taken.

(Emphasis added.)

On the issue of statutory construction, our Supreme Court stated in *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993):

> In construing a statute, the Court must first ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out. . . . To make this determination, we look first to the language of the statute itself. . . . If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

(Citation omitted.)

The statutory language at issue in the case *sub judice* is that the Board of Adjustment has the ability to hear and decide appeals from an order, requirement, decision, or determination "*made by an administrative official charged with the enforcement of any ordinance* adopted pursuant to" Part 3 of Article 19 of Chapter 160A. (Emphasis added.) Thus, the issue presented is whether the Board of Commissioners falls under the definition of an "administrative official."

N.C. Gen. Stat. § 160A-1(3) (1987) defines "board of commissioners" as "the governing *board* of a city." (Emphasis added.) Black's Law Dictionary defines "official" as "a *person* invested with the authority of an office." (Emphasis added.) Under N.C. Gen. Stat. § 160A-388(b), although an appeal to the Board of Adjustment can only be taken from an order, requirement, decision, or determination "made by an administrative official", the appeal may be taken by "any person aggrieved or by an officer, department, *board*, or bureau of the city." By including "board" in the list with "any person aggrieved or . . . an officer," the Legislature in effect recognized the difference between a board and a person or officer. Thus, the Board of Commissioners does not fall under the definition of a "person."

Further, case law in this State refers to individuals, not boards, when referring to "administrative officials" in the context of N.C. Gen. Stat. § 160A-388(b). *See, e.g., In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 738, 15 S.E.2d 1, 3 (1941) (The board of adjustment "is authorized to hear and decide appeals from and review any order, requirement, decision or determination made by the *building inspector* or other administrative official charged with the enforcement of zoning ordinances.") (emphasis added); *Midgette v. Pate*, 94 N.C. App. 498, 502, 380 S.E.2d 572, 575 (1989) ("The board of adjustment is an administrative body with quasi-judicial power whose function is to review and decide appeals which arise from the decisions, orders, requirements or determinations of administrative officials, *such as building inspectors and zoning administrators.*") (emphasis added); *Grandfather Village v. Worsley*, 111 N.C. App. 686, 688, 433 S.E.2d 13, 14, *disc. review denied*, 335 N.C. 237, 439 S.E.2d 146 (1993) ("N.C.G.S. § 160A-388(b) governs an appeal from a decision of a city's *zoning administrator* . . . .") (emphasis added).

Thus, we conclude that the Legislature did not intend to include Board of Commissioners under the term "administrative official," and N.C. Gen. Stat. § 160A-388(b), by its plain and unambiguous language, does not, therefore, confer the right on the Board of Adjustment to hear appeals from the Board of Commissioners. Our conclusion that the Board of Adjustment does not have the power to review the decision of the Board of Commissioners based on the language found in N.C.G.S. § 160A-388(b) is further bolstered by the decision of the United States District Court for the Eastern District of North Carolina in *Mays-Ott Co., Inc. v. Town of Nags Head*, 751 F. Supp. 82 (E.D.N.C. 1990). *Mays-Ott* involved a zoning dispute between plaintiff and the Town of Nags Head. Plaintiff brought an action against

the Town of Nags Head pursuant to 42 U.S.C. § 1983. Subsequently, the Town of Nags Head moved for summary judgment on the basis that plaintiff had failed to exhaust his administrative remedies by following the appeals procedure outlined by the Town's zoning ordinance.

The zoning ordinance for the Town of Nags Head allowed appeals to the Board of Adjustment "from any orders or decisions made by *administrative officials*." *Mays-Ott*, 751 F. Supp. at 86 (emphasis added). On appeal, the United States District Court for the Eastern District of North Carolina noted that plaintiff was not appealing from a decision made by the building inspector, but that plaintiff's complaint was with a decision of the Town's Board of Commissioners to refuse to extend plaintiff's site plan. The Court then stated that "defendant has not pointed out any administrative procedure by which plaintiff could have appealed the Board of Commissioners' refusal to extend the site plan approval . . . ." *Id.* at 87.

Thus, the *Mays-Ott* Court effectively read the language that plaintiff had the right to appeal to the Board of Adjustment "from any orders or decisions made by administrative officials" as arguably including decisions from a building inspector but definitely not including a decision from the Board of Commissioners. This interpretation is consistent with our conclusion that the language in N.C.G.S. § 160A-388(b) does not confer the right on the Board of Adjustment to hear appeals from orders or decisions of the Board of Commissioners.

Respondents contend, however, that the Legislature intended for N.C. Gen. Stat. § 160A-388(b) to confer on the Board of Adjustment the power to hear appeals from any administrative decision, not just decisions made by administrative "officials." In support of this contention, respondents cite authority from other States. Based on our review of the law in this State and the distinction North Carolina Courts have drawn between an official and a board, we find respondents' argument without merit.

II.

[2] Next, respondents argue that N.C. Gen. Stat. § 160A-388(c) and the Morrisville Zoning Regulations broaden the jurisdiction of the Morrisville Board of Adjustment to hear the present action. We disagree.

N.C. Gen. Stat. § 160A-388(c) (1987 & Supp.) states:

> (c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under any zoning ordinance.

First respondents contend that the language in N.C. Gen. Stat. § 160A-388(c) which states that the "board shall hear and decide all matters referred to it *or upon which it is required to pass under any zoning ordinance*" in conjunction with Article XIII, § 2.1 of the Morrisville Zoning Regulations gives the Board of Adjustment jurisdiction over this action. Article XIII, § 2.1 of the Zoning Regulations states:

> The board of adjustment shall have the following powers and duties:
>
> 2.1 *Administrative review.* To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, determination, or refusal made by the building official or other administrative officials in the carrying out or enforcement of any provisions of the ordinance.

In *Tate v. Board of Adjustment of the City of Asheville*, 83 N.C. App. 512, 515, 350 S.E.2d 873, 875 (1986), this Court held that the language of N.C. Gen. Stat. § 160A-388(c) does not confer on the Board of Adjustment "any powers that are not specifically enumerated in either the statute or the ordinance." Our review of the language in both the statute and Article XIII, § 2.1 of the Zoning Regulations shows no provision by which the Board of Adjustment is given the power to hear appeals from an order or decision of the Board of Commissioners. The language of Article XIII, § 2.1 is similar to the language found in N.C.G.S. § 160A-388(b) in that it allows the Board of Adjustment to hear appeals from an order or decision "made by the building official or other administrative officials in the carrying out or enforcement of any provisions of the ordinance." As we have

already concluded, the Board of Commissioners is not an administrative official. Respondents' first argument is without merit.

[3] Next, respondents argue that the language in N.C. Gen. Stat. § 160A-388(c) which states that "[t]he ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance" in conjunction with Article XIII, § 3 of the Zoning Regulations, entitled "Filing and notice for an appeal," confers jurisdiction on the Board of Adjustment over this action. We disagree.

The language of N.C.G.S. § 160A-388(c) which respondents have cited does not address the right of the Board of Adjustment to hear "appeals." Instead, this language lists specific powers which a town's ordinances may confer on the Board of Adjustment, none of which includes hearing appeals. The ordinances may authorize the Board of Adjustment to interpret zoning maps or to pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance. These are specific powers, which do not include the power to hear an appeal from the Board of Commissioners. "[S]tatutes which vest local governments with certain powers are to be strictly construed against the existence of the power." *Tate*, 83 N.C. App. at 515, 350 S.E.2d at 875. Accordingly, respondents' second argument is without merit.

III.

[4] Respondents also contend that the trial court erred in denying their motion to dismiss and set aside petitioners' petition for writ of certiorari. Respondents base their contention on the fact that petitioners' writ of certiorari was not verified, did not contain an undertaking for costs, was not returnable to the Superior Court, and did not give the respondents ten days written notice prior to the date of its return as required by Rule 19 of the North Carolina General Rules of Practice for Superior and District Courts. We disagree.

In *Little v. City of Locust*, 83 N.C. App. 224, 224, 349 S.E.2d 627, 628 (1986), *disc. review denied*, 319 N.C. 105, 353 S.E.2d 111 (1987), petitioners brought proceedings for *certiorari* "in the Stanly County Superior Court to obtain a judicial review of three decisions made by the Zoning Board of Adjustment of the City of Locust." This Court stated that "G.S. 160A-388(e) makes all such decisions reviewable by 'proceedings in the nature of certiorari' and *all that is needed is the*

record of the decision involved and a Superior Court judge to review it." *Id.* at 225, 349 S.E.2d at 628 (emphasis added). Further, this Court stated that "G.S. 160A-388(e) makes zoning board decisions judicially reviewable upon complying with its terms." *Id.* at 225, 349 S.E.2d at 629.

Respondents have not argued, and the record does not show, that petitioners failed to comply with the terms of N.C. Gen. Stat. § 160A-388(e) in filing their petition for writ of certiorari in this action. Respondents' assignment of error is without merit.

IV.

Finally, respondents contend that the trial court erred in allowing petitioners to amend their petition for writ of certiorari to include a verification. Respondents' basis for presenting this argument is to show that petitioners failed to comply with the requirement in Rule 19 that the writ of certiorari be verified and to further their argument that petitioners' writ should have been dismissed. Based on our holding above that petitioners were not required to verify their petition for writ of certiorari, we need not address respondents' final assignment of error.

Affirmed.

Judges WELLS and WYNN concur.

BETTY M. McLEOD, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE CO. AND ALL-STATE INSURANCE CO., DEFENDANTS

No. 9211SC756

(Filed 21 June 1994)

1. Insurance § 496 (NCI4th)— garage policy—employee owned vehicle with dealer tags—coverage not mandated by Financial Responsibility Act

The Financial Responsibility Act did not mandate that a garage policy provide liability coverage where Sanford Toyota permitted an employee to use dealer tags while attempting to sell an automobile which he personally owned and which did not have tags, the employee allowed someone else to drive the vehi-

cle, an accident occurred when that person crossed the center line, a jury absolved Sanford Toyota and the employee of responsibility but returned a verdict against the driver, plaintiff sought recovery under a garage policy issued to Sanford Toyota by defendant Nationwide and under uninsured coverage provided by Allstate, and summary judgment for Nationwide was denied. It is undisputed that Sanford Toyota did not hold legal title to the auto involved in the collision and there is no evidence indicating the dealership promoted the sale of the vehicle or otherwise used the vehicle for its business purposes. Dealer plates constituted the sole relationship between the car and the dealership; standing alone, this connection is too weak to impose mandatory liability coverage on the basis of the owner's policy provisions of the Financial Responsibility Act. N.C.G.S. § 20-279.21(b).

Am Jur 2d, Automobile Insurance §§ 20 et seq.

2. Insurance § 536 (NCI4th)— garage policy—employee owned vehicle with dealer tags—no coverage

There was no coverage under a garage policy for an automobile accident where Sanford Toyota permitted an employee to use dealer tags while attempting to sell an automobile which he personally owned and which did not have tags, the employee allowed someone else to drive the vehicle, an accident occurred when that person crossed the center line, a jury absolved Sanford Toyota and the employee of responsibility but returned a verdict against the driver, plaintiff sought recovery under a garage policy issued to Sanford Toyota by defendant Nationwide, and summary judgment was granted for plaintiff. The term "garage operations" as used in the policy is unambiguous both as to definition and scope of coverage. There is no indication that the automobile was being used in Sanford Toyota's business, it cannot reasonably be asserted that "ownership" and "use" have any application since Sanford Toyota neither owned nor used the automobile, plaintiff has made no contention that Sanford Toyota was maintaining the vehicle, permitting dealer tags to be affixed to an employee's vehicle was in no way necessary to Sanford Toyota's business, and there was no incidental business purpose furthered by the permissive use of the tags. Nationwide is entitled to judgment as a matter of law.

Am Jur 2d, Automobile Insurance §§ 225-228.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like. 93 ALR2d 1047.

Appeal by defendant Nationwide from order entered 5 May 1992 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 3 June 1993.

J. Douglas Moretz, P.A., by Beverly D. Basden, for plaintiff-appellee.

Bryan, Jones, Johnson & Snow, by Robert C. Bryan and Dwight W. Snow, for defendant-appellant Nationwide.

JOHN, Judge.

Defendant Nationwide contends the trial court erred by: (1) granting plaintiff's motion for summary judgment; and (2) denying Nationwide's motion for summary judgment. Defendant's arguments are persuasive, and we therefore reverse the trial court and remand with direction that summary judgment be entered in favor of defendant Nationwide.

The parties have stipulated there are no factual issues and the questions to be decided are purely legal in nature. The facts giving rise to this appeal are as follows: In May 1987, John Green was an employee of P.M. Concepts, Inc. d/b/a Toyota Sanford (Sanford Toyota). Green's employer permitted him to use dealership license tags. He was attempting to sell a 1977 Pontiac (the Pontiac) automobile which he personally owned and which did not have a license plate. Green affixed one of Sanford Toyota's dealership tags to the Pontiac.

Although the exact date and reason for the use are unclear, at some point Green began allowing Tom Skinner to drive his Pontiac while the dealership tags were attached to the vehicle. On 10 May 1987, Skinner crossed the centerline of a highway and struck a van, injuring plaintiff Betty McLeod who was a passenger in the van. Prior to the collision, officers of Sanford Toyota had witnessed Skinner operating the Pontiac on Toyota's premises with dealership tags attached.

Plaintiff sued Skinner's estate, John Green, and Sanford Toyota alleging negligence. On 20 September 1991, a jury found Skinner negligent and awarded plaintiff $95,000; however, the jury absolved Green and Sanford Toyota of liability. Thereafter, plaintiff sought

recovery of the $95,000 pursuant to: (1) a Nationwide garage policy issued to Sanford Toyota (the garage policy); and (2) the uninsured motorist (UM) coverage provided by her Allstate policy. Both insurance companies denied coverage and plaintiff therefore filed the present lawsuit against Nationwide and Allstate.

All parties moved for summary judgment. On 5 May 1992, the trial court entered an order which granted plaintiff's motion for summary judgment against Nationwide—thereby ordering Nationwide to pay $95,000 under the garage policy. By means of this same order, the trial court ruled that Allstate was secondarily liable in the amount of $25,000. On 5 June 1992, *nunc pro tunc* 5 May 1992, the trial court entered an order denying Nationwide's motion for summary judgment.

I.

Before examining the merits of defendant Nationwide's appeal, we deem it appropriate to address several collateral matters.

First, the automobile collision which resulted in plaintiff's injuries has been the subject of a previous appeal. In *Johnson v. Skinner*, 99 N.C. App. 1, 392 S.E.2d 634, *disc. review denied*, 327 N.C. 429, 395 S.E.2d 680 (1990), we reviewed a judgment which awarded plaintiff John Johnson $750,000 based upon the negligent acts of defendants Skinner, Green, and Sanford Toyota. Betsy McLeod, the plaintiff in the case *sub judice*, was a passenger in John Johnson's vehicle.

Second, we note plaintiff originally appealed that portion of the trial court's 5 May 1992 order which limited Allstate's liability to $25,000. Plaintiff's appeal presented questions concerning the "stacking" of UM coverage under her Allstate coverage. After our Supreme Court issued its opinion in *Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992), plaintiff moved to dismiss her appeal against defendant Allstate; on 4 May 1993, this motion was allowed. Consequently, only defendant Nationwide's appeal is at issue.

Third, Nationwide has argued in its appellate brief that the trial court erred by *denying its motion for summary judgment*. Denial of a motion for summary judgment is an *interlocutory* order from which there is ordinarily no right to appeal. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 230 (1985). After reviewing the parties' briefs and the nature of the issues presented, we conclude that our review of the trial court's order will expedite a deci-

sion in the public interest and serve the interests of judicial economy. Accordingly, we treat Nationwide's attempted appeal of the court's denial of its motion for summary judgment as a petition for writ of certiorari, which we grant. *See National Fruit Product Co. v. Justus*, 112 N.C. App. 495, 498, 436 S.E.2d 156, 157 (1993), *disc. review denied*, 335 N.C. 771, 442 S.E.2d 519 (1994).

Only one question is presented herein: *Did the garage policy provide liability coverage for Tom Skinner's negligent use of the Pontiac?* The answer is "no," and therefore the trial court should have allowed defendant Nationwide's motion for summary judgment.

II. *The Financial Responsibility Act*

[1] Our review necessarily begins with an examination of the applicable statutes relating to liability insurance coverage, *i.e.*, the *Motor Vehicle Safety and Financial Responsibility Act* (the FRA), N.C.G.S. § 20-279.1 to -279.39 (1983) (current version at G.S. § 20-279.1 to -279.39 (1993)). This analysis is required since the minimum FRA coverage is written into every automobile liability policy as a matter of law, and the statute controls if policy provisions conflict with provisions of the FRA. *Brown v. Truck Ins. Exchange*, 103 N.C. App. 59, 64, 404 S.E.2d 172, 175, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 515 (1991). Stated otherwise, every automobile liability policy in North Carolina *must* provide the minimum liability coverage required by the FRA, and any policy language which attempts less coverage is ineffective. Although garage policies are not specifically addressed within the FRA, such policies must nevertheless furnish the minimum liability coverage mandated by G.S. § 20-279.21. *See United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 338, 420 S.E.2d 155, 158 (1992).

G.S. § 20-279.21 provides for two types of liability policies: *owner's* and *operator's*. G.S. § 20-279.21(a); *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 622, 298 S.E.2d 56, 57 (1982), *disc. review denied*, 307 N.C. 698, 301 S.E.2d 101 (1983). Garage policies, such as the one *sub judice*, are generally viewed as *owner* policies and consequently must satisfy the minimum requirements of G.S. § 20-279.21(b). *See United Services*, 332 N.C. at 338, 420 S.E.2d at 158; *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444 (1967). In pertinent part, this statutory provision provides:

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages . . . .

G.S. § 20-279.21(b).

The proper interpretation of G.S. § 20-279.21(b), as with any statute, presents a question of law. *See Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988). The cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished. *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 191, 420 S.E.2d 124, 128 (1992). Accordingly, "a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986).

Applying these principles to the case *sub judice*, we conclude the FRA does not mandate that the garage policy provide liability coverage for Skinner's use of the Pontiac. In making this determination, our focus is upon section (b)(2) of the statute which states an owner's policy "[s]hall insure the person named therein . . . using *any [designated] motor vehicle* . . . against loss from the liability imposed by law for damages . . . ." [emphasis added]. Viewed in isolation, this sub-section arguably requires liability coverage for any vehicle *named* in the policy—including even non-owned vehicles over which the named insured exercises only tenuous control. However, individual sections of a statute "must be interpreted in the context of the whole[,]" *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 24, 348 S.E.2d 524, 526 (1986), and "should be construed contextually and harmonized if possible to avoid absurd . . . consequences." *In re King*, 79 N.C. App. 139, 142, 339 S.E.2d 87, 89 (1986). Thus, the phraseology "any [designated] motor vehicle" must be construed with reference to the subject-matter of G.S. § 20-279.21(b), which is: "*an owner's policy.*"

The term "owner," for purposes of the mandatory provisions of the Financial Responsibility Act, is defined by N.C.G.S. § 20-4.01(26) (1983) (current version at G.S. § 20-4.01(26) (1993)). *Jenkins v. Aetna Casualty and Surety Co.*, 324 N.C. 394, 397, 378 S.E.2d 773, 775 (1989). "Unless the context requires otherwise," G.S. § 20-4.01, an "owner" is a "person holding the legal title to a vehicle . . . ." G.S. § 20-4.01(26); *see also Jenkins*, 324 N.C. at 397-401, 378 S.E.2d at 775.

In the case *sub judice*, it is undisputed that Sanford Toyota (the named insured) did not hold legal title to the Pontiac which was involved in the collision; rather the automobile was owned by one of its employees. There is no evidence indicating the dealership actively promoted the sale of this Pontiac, or otherwise used the vehicle for its business purposes. Instead, dealer plates affixed thereto constituted the sole relationship between the Pontiac and the dealership. Standing alone, this attenuated connection is simply too weak to impose mandatory liability coverage on the basis of the "owner's policy" provisions of the FRA.

III. *The Policy*

[2] Our analysis, however, does not terminate with the FRA. Liability coverage which is not statutorily mandated is voluntary in nature, *Aetna Casualty and Surety Co. v. Younts*, 84 N.C. App. 399, 406, 352 S.E.2d 850, 853-54, *disc. review denied*, 319 N.C. 671, 356 S.E.2d 774 (1987), and must therefore accrue under the terms of the insurance policy in question. *Younts v. Insurance Co.*, 281 N.C. 582, 585, 189 S.E.2d 137, 139 (1972). The burden is on the person claiming coverage to show the collision is covered under provisions of the policy. *See Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 188, 314 S.E.2d 552, 554, *disc. review denied*, 311 N.C. 761, 321 S.E.2d 142 (1984).

An insurance policy is a contract, and its provisions, where not contrary to the law, govern the distribution of any insurance proceeds. *Barber v. Woodmen of the World Life Ins. Society*, 88 N.C. App. 666, 672, 364 S.E.2d 715, 719 (1988). "When reviewing an insurance policy, this Court must examine the contract as a whole and effectuate the intent of the parties." *N.C. Farm Bureau Mutual Ins. Co. v. Walton*, 107 N.C. App. 207, 209, 418 S.E.2d 837, 839 (1992). Any question as to the meaning of the language used in a policy is a question of law for the court to resolve. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993).

Because the intention of the parties is paramount, the court must use definitions contained in the policy to determine the meaning of words or phrases detailing the scope of coverage. *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453, *disc. review denied*, 333 N.C. 790, 431 S.E.2d 22 (1993). In the absence of policy definitions, the court must define a term or phrase "consistent with the context in which it is used and the meaning accorded it in ordinary speech." *Maddox v. Insurance Co.*, 303 N.C. 648, 652, 280 S.E.2d 907, 909 (1981). In doing so, courts are encouraged to use "standard, nonlegal dictionaries" as a guide. *See C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng. Co.*, 326 N.C. 133, 152, 388 S.E.2d 557, 569 (1990).

Any ambiguities, however, as to the definition of policy terms or the scope of coverage are to be resolved in favor of coverage. *Maddox*, 303 N.C. at 650, 280 S.E.2d at 908. This is because the insurance company prepared the policy and chose the language contained therein. *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 320, 409 S.E.2d 692, 697 (1991), *disc. review denied*, 332 N.C. 479, 420 S.E.2d 826 (1992). An ambiguity exists when the language used in the policy is susceptible to different, and perhaps conflicting, interpretations. *Id.* at 320, 409 S.E.2d at 697. However, the aforementioned rules of construction cannot be used to rewrite an unambiguous policy, *i.e.*, the court cannot extend coverage to collisions not bargained for in the agreement. *See C.D. Spangler*, 326 N.C. at 142, 388 S.E.2d at 563. (Citations omitted).

In addition, we are examining herein both plaintiff's and defendant Nationwide's motions for summary judgment. Our rules of civil procedure direct that summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The burden of establishing a lack of any triable issue resides with the movant, and all inferences of fact will be drawn in favor of the nonmovant. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985).

Mindful of these principles of civil procedure and insurance policy construction, we turn now to an examination of the garage policy in order to determine whether plaintiff's injuries were covered.

In pertinent part, the Nationwide garage policy provides:

> We will pay all sums the **insured** legally must pay as damages because of **bodily injury** or **property damage** to which this insurance applies caused by an **accident** and resulting from **garage operations**.

According to Nationwide, there are two reasons no coverage exists for plaintiff's injuries. *First*, the collision which caused plaintiff's injuries was not the result of "garage operations." *Second*, the policy provides coverage only if the auto accident is with an "insured"—and Skinner (the driver of the Pontiac at the time of the accident) was not an insured under the policy.

Regarding Nationwide's first argument, the term "garage operations" is defined in the garage policy as:

> [T]he ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. Garage operations includes the ownership, maintenance or use of the autos indicated in Part II as covered autos. Garage operations also include all operations necessary or incidental to a garage business.

As to the *first sentence* of this definition, the American Heritage Dictionary (2d College ed. 1982) defines "business" as: "[c]ommercial, industrial, or professional dealings . . . ." This definition is consistent with both ordinary speech and the context in which the term is used in the garage policy. However, under any view of the evidence, there is simply no indication the Pontiac was being used in Sanford Toyota's "business." The record shows at best only that dealer tags were placed on Green's Pontiac for Green's personal use, and in order to facilitate its sale. Green's status as an employee of Sanford Toyota, standing alone, does not raise a question of fact as to whether the Pontiac was being used in Sanford Toyota's business. *See, e.g., Peirson v. Insurance Co.*, 249 N.C. 580, 583-85, 107 S.E.2d 137, 138-40 (1959) (even though vehicle used occasionally in garage business, no coverage under garage policy for garage owner's use of vehicle to attend unrelated social function).

Under the *second sentence* of the definition, "garage operations" includes Sanford Toyota's "ownership, maintenance or use" of the vehicles designated as "covered autos" in the policy. The policy defines "covered auto" as "any auto"; for purposes of summary judgment, this broad definition encompasses Green's Pontiac. According-

ly, we turn to the phraseology "ownership, maintenance or use" to determine whether plaintiff's collision resulted from garage operations as defined in the second sentence.

It cannot reasonably be asserted that "ownership" and "use" have any application since Sanford Toyota neither *owned* nor *used* the Pontiac. Concerning "maintenance," we note plaintiff has made no contention that Sanford Toyota was "maintaining" the vehicle. Moreover, even construing the evidence in plaintiff's favor, we determine Sanford Toyota did not conduct any "maintenance" on the Pontiac.

The American Heritage Dictionary defines maintenance as "the work of keeping something in proper condition." There is no evidence Sanford Toyota was involved in inspecting or repairing the vehicle at the time of the collision—activities ordinarily associated with maintenance of an automobile by a garage. Plaintiff has produced nothing to indicate the dealership expended any labor to keep the Pontiac operable; rather, the record discloses at most that Sanford Toyota permitted its dealer tags to be affixed to the Pontiac. This isolated act, standing alone, is insufficient to constitute "maintenance."

Because the first two sentences of the definition have no application, we consider the *third and final sentence* which designates "garage operations" as "all operations necessary or incidental to a garage business." Permitting dealer tags to be affixed to an employee's vehicle was in no way "necessary" to Sanford Toyota's business; indeed, at the time of the collision in question, doing so constituted a criminal misdemeanor. N.C.G.S. § 20-79(d) (1983) (amended 1989 and 1993). Further, such use was not "incidental" to dealership business. For example, there is no evidence Green required the dealer tag on the Pontiac in order to travel to and from work. Nor is there any indication Skinner was a prospective dealership customer such that his use of the tag furthered customer goodwill. In the light most favorable to plaintiff, the evidence shows only that dealership officers, for no apparent reason, acquiesced in dealership tags being placed on the Pontiac. From the evidence presented, we can conceive of no incidental business purpose furthered by Sanford Toyota's permissive action. *See, e.g., Lambert v. Northwestern National Insurance Co.*, 769 P.2d 1152, 1155-56 (Idaho Ct. App. 1989) (uses of vehicle covered under garage operations provision include only those "germane to the attending, servicing, repairing, parking or storage of the vehicle").

In summary, we conclude that the term "garage operations" as used in the garage policy is unambiguous both as to definition and scope of coverage, and that, as a matter of law, plaintiff's injuries were not the result of Sanford Toyota's "garage operations." Thus, the garage policy did not provide coverage for plaintiff's injuries, and defendant Nationwide is entitled to judgment as a matter of law.

Since plaintiff's collision was not the result of "garage operations" (and was therefore not covered under the garage policy), we need not examine whether Skinner was an "insured" at the time of the collision.

Based on the foregoing, we reverse the trial court and remand with instruction that summary judgment be entered in favor of defendant Nationwide.

Reversed and remanded.

Judges WELLS and COZORT concur.

FRANCES GRANTHAM, PLAINTIFF-APPELLANT v. R. G. BARRY CORPORATION, EMPLOYER; TRANSPORTATION INSURANCE CO., CARRIER, APPELLEES

No. 9310IC520

(Filed 21 June 1994)

1. Workers' Compensation § 231 (NCI4th)— occupational disease—respiratory irritants—failure to show incapability of earning same wages at other employment

The Industrial Commission did not err by concluding that plaintiff failed to prove disability as a result of her occupational disease after 13 June 1989 and that she was not entitled to temporary total disability benefits after that date where plaintiff developed an allergic reaction to chemicals used in the employer's plant and was awarded temporary total disability benefits for an occupational disease from 4 May 1989 through 5 June 1989; plaintiff thereafter returned to work at the same wage until 13 June 1989; plaintiff showed that she was unable to return to the same employment or any other employment that would expose her to chemical or other respiratory irritants; the only limitation

on plaintiff's ability to work is that she must avoid respiratory irritants; and plaintiff failed to show that she was incapable of earning the same wages she had earned before her injury in any other employment after 13 June 1989.

Am Jur 2d, Workers' Compensation §§ 395-399.

2. Workers' Compensation § 472 (NCI4th)— amount of expert witness fee—no abuse of discretion

The Industrial Commission did not abuse its discretion by awarding plaintiff's medical expert a witness fee of $350 and by denying plaintiff's motion to increase this fee to $3,197.60 where the witness spent only three hours testifying at a deposition and reviewing the file in preparation for the deposition; the witness charges $120 per hour; and other charges billed to plaintiff by the witness were for expert toxicological support for her claim. N.C.G.S. § 97-80(a).

Am Jur 2d, Workers' Compensation § 723.

Appeal by plaintiff from order entered 19 April 1993 in the North Carolina Industrial Commission by Chairman James J. Booker. Heard in the Court of Appeals 28 February 1994.

Prior to this action, Plaintiff Frances Grantham was employed by Defendant R. G. Barry Corporation ("Defendant Corporation") for approximately twenty years in various positions involved in manufacturing bedroom slippers. In 1990, plaintiff filed a "Notice of Accident" and claim against R. G. Barry Corporation in the North Carolina Industrial Commission alleging that on 12 June 1989 she "contracted an occupational disease . . . caused by exposure to chemicals in the work place and aggravation of an asthmatic condition . . ." Thereafter, plaintiff filed a request for a hearing on her claim.

Following a hearing, on 29 July 1991, Deputy Commissioner Tamara R. Nance entered an opinion and award concluding that "[a]s a result of her occupational disease, plaintiff was temporarily and totally disabled from 4 May 1989 to 5 June 1989" but that "[p]laintiff does not retain any permanent disability as a result of her occupational disease." Based on these findings and on findings as to plaintiff's average weekly wage, the deputy commissioner ordered Defendant Corporation to pay plaintiff "temporary total disability benefits at the rate of $166.67 per week for the period from 4 May 1989 through 5 June 1989." Further, the deputy commissioner

ordered Defendant Corporation to pay medical expenses incurred by plaintiff for treatment of her occupational disease and an expert witness fee of $250 to Dr. Lewis, $350 to Dr. Schiller, and $500 to Dr. Yount.

On 2 August 1991, plaintiff filed a motion to modify the deputy commissioner's award regarding Dr. Schiller's expert witness fee by increasing the award from $350 to $3,197.60, which motion Deputy Commissioner Nance denied on 15 August 1991. Thereafter, plaintiff appealed the order of 29 July 1991 to the Full Commission, and on 1 March 1993, the Full Commission entered an opinion and award adopting and affirming the deputy commissioner's opinion and award. From this opinion and award, plaintiff appeals.

Mast, Morris, Schulz & Mast, P.A., by Bradley N. Schulz and T. Michael Lassiter, Jr., for plaintiff-appellant.

Young Moore Henderson & Alvis, P.A., by J. D. Prather, for defendant-appellees.

ORR, Judge.

Plaintiff was employed by R. G. Barry Corporation in August, 1969 in its bedroom slipper manufacturing plant and has worked there continuously up until 1989. During the last ten years she worked for Defendant Corporation, plaintiff experienced headaches, dizziness, chronic sneezing and a rash that itched at work. In 1980 plaintiff underwent nasal surgery.

Subsequently, on 27 April 1989, plaintiff went to see Dr. Yount, a faculty member of the University of North Carolina Medical Center in the division of rheumatology and immunology, complaining of sneezing, watery eyes and nose, itching, and headaches, sometimes associated with dizziness. The symptoms appeared approximately three hours into her shift and would persist throughout the work day, although they did not occur at night or on the weekends. Plaintiff denied shortness of breath or asthma.

Dr. Yount performed allergy tests and diagnosed plaintiff as suffering from a possible work-related reaction to an unidentified substance. Thereafter, Dr. Yount corresponded with the nurse of Defendant Corporation in order to help him identify the element that was triggering plaintiff's "allergic like episodes at work." The nurse told Dr. Yount that "there was toluene in the laminating adhesive" in the plant.

On 9 May 1989, plaintiff returned to Dr. Yount with continued complaints, including mild chest tightness and shortness of breath. As found by the deputy commissioner, "[t]he possibility of allergy shots was discussed with plaintiff and she was given an excuse from work from 4 May 1989 to 5 June 1989, since she had been slow to respond to her medication." Thereafter, plaintiff returned to work until 13 June 1989 and has not worked since that date.

By letter dated 31 May 1989, Dr. Yount advised the nurse for the Defendant Corporation that "he suspected toluene as the agent that might be contributing to plaintiff's problems and that it would be advantageous to the plaintiff if she could be relocated to another job in the plant that would not expose her to toluene." The nurse informed Dr. Yount that the Defendant Corporation "did not have a job available in the plant which would not expose plaintiff to toluene." Subsequently, as found by the deputy commissioner, on 22 June 1989, "Dr. Yount recommended . . . that plaintiff find a new job that did not involve exposure to dust or chemicals." Subsequently, "[o]n 7 September 1989 Dr. Yount referred plaintiff to vocational rehabilitation because he felt plaintiff certainly appeared to have the ability to do other jobs which do not expose her to the environment which triggers her asthmatic attacks."

The deputy commissioner also found that many of the chemicals used in the Defendant Corporation's plant were irritants known to affect the respiratory tract. Further, the deputy commissioner found:

> 20. While plaintiff did not work directly with any of these chemicals, she was exposed to them by virtue of her employment to the extent that they were in the air at the plant which did not have barriers between the departments. . . . [P]laintiff's exposure to these chemicals at the plant was sufficient to generate a reaction in the plaintiff when she was at work.

Plaintiff's symptoms were diagnosed as allergic rhinitis, asthma, and chronic obstructive pulmonary disease, but the deputy commissioner found that "[n]one of these illnesses [were] caused by plaintiff's employment." The deputy commissioner also found, however:

> 22. Plaintiff's allergic upper and lower respiratory disease is related to a number of things to which she was exposed. Dust and mold contributed most to her allergic pulmonary problem. Smoking contributed to her COPD and asthma. She was allergic to some things that would probably not be in the work environ-

ment. However, any person who has this type of allergic problem is at a particular risk for a chemical irritation, and in plaintiff's case her problems were clearly aggravated by the chemical exposures which she experienced in her employment.

23. Plaintiff's employment with defendant-employer placed her at an increased risk of suffering from the illnesses for which Dr. Yount treated her, and aggravated her condition such that it was a significant contributing factor in her disease.

24. As a result of her disease, plaintiff was unable to earn any wages in any employment from 4 May 1989 to 5 June 1989.

Subsequently, plaintiff returned to work after 5 June 1989 and worked until 13 June 1989. On the issue of whether plaintiff was capable of working after 13 June 1989, the deputy commissioner found:

25. As a result of her disease, plaintiff is and has been since 13 June 1989 unable to earn the same or any wages in the same employment or any other employment that would expose her to chemical or other respiratory irritants.

26. The only restriction or limitation in plaintiff's ability to work or do work activity since the date she last worked, is that she must avoid respiratory irritants. From the outset her respiratory symptoms have been mild. In 1989 and 1990 she suffered from mild shortness of breath at times, mild dyspnea and wheezing at times, watery eyes and chronic sneezing. There is no evidence that her pulmonary problems or allergic rhinitis in any way limited her ability to sit, walk or stand for eight hours in a work environment which would not expose her to respiratory irritants. To the extent plaintiff or her husband testified that her symptoms were such that she was and is unable to earn wages in any employment, her testimony is not accepted as credible. Moreover, while there is evidence in the record that plaintiff's referral to vocational rehabilitation did not result in a job referral, there is absolutely no evidence on the record as to why a job referral was not made. Plaintiff has not sought any employment on her own at all, even though the medical records indicate that she had no wheezing at all in October 1990 and March 1991 and even though she testified that she has no shortness of breath when she walks, no difficulty sitting, and now has only intermittent headaches, sneezing and dizziness. There is no evidence that

> plaintiff cannot read, write, make change, sit, stand, bend, walk, lift, or engage in any other activities that might be required in a job. Plaintiff has failed to show that she is unable because of her disease to earn the same or any wages in any other employment which would not involve exposure to respiratory irritants. She is only 47 years old. The fact that she worked only at defendant-employer during her entire adult life does not mean that she has no transferrable skills.

Based on these findings, the deputy commissioner concluded that "[p]laintiff suffers from an occupational disease within the meaning of G.S. § 97-53(13), inasmuch as her employment with defendant-employer placed her at an increased risk of developing her illnesses and significantly aggravated her illnesses" and that "[a]s a result of her occupational disease, plaintiff was temporarily and totally disabled from 4 May 1989 to 5 June 1989." The deputy commissioner also found, however, that plaintiff "failed to prove disability as a result of her occupational disease because she failed to prove that she was incapable after 13 June 1989 of earning the same wages she was earning in any other employment which would not expose her to respiratory irritants" and that plaintiff did not "retain any permanent disability as a result of her occupational disease." Based on these conclusions, the deputy commissioner only awarded plaintiff temporary total disability benefits for the period from 4 May 1989 through 5 June 1989, and the Full Commission affirmed the award.

I.

[1] On appeal, plaintiff first contends that the North Carolina Industrial Commission (the "Commission") erred in refusing to award plaintiff temporary total disability benefits from 13 June 1989 until such time plaintiff is capable of gainful employment. We disagree.

"The Industrial Commission is the fact-finding body." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986).

> In passing upon issues of fact, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). Subsequently, "[t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported

by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix*, 317 N.C. at 186, 345 S.E.2d at 379. "The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684.

Initially, in a claim under the Workers' Compensation Act, the claimant has the burden of proving the extent and degree of her disability; "once the disability is proven, [however,] there is a presumption that it continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.' " *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475-76, 374 S.E.2d 483, 485 (1988) (citations omitted).

In the present case, plaintiff carried her initial burden of showing that she was disabled, and the Commission found that plaintiff was disabled from 4 May 1989 to 5 June 1989. Plaintiff then returned to work performing the exact same job she had performed prior to 4 May 1989 until 13 June 1989. Further, the parties stipulated that plaintiff's average weekly wage was $250, and there is no indication in the record that this wage did not apply to the period of time plaintiff worked from 6 June 1989 until 13 June 1989. Thus, when plaintiff returned to work at the same wage that she received before the disability, the presumption that plaintiff's disability continued was ended, and the burden fell upon plaintiff to prove she was disabled after 13 June 1989. *See Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 ("In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of [her] disability and its degree."). Thus, the first issue raised is whether plaintiff successfully carried her burden of showing that she suffered from a "Disability" after 13 June 1989 as defined under the Workers' Compensation Act.

N.C. Gen. Stat. § 97-2(9) (1991 & Supp.) defines "Disability" as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." In *Hilliard*, our Supreme Court stated:

> We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that

this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard, 305 N.C. at 595, 290 S.E.2d at 683.

Further, as interpreted by our Supreme Court in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443-44, 342 S.E.2d 798, 809 (1986):

> *Hilliard* simply states that, in order to prove disability, an injured employee must prove he is unable to work and not merely that he unsuccessfully sought work. The converse is not true. In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. An unsuccessful attempt to obtain employment is, certainly, evidence of disability. Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

In the present case, the Commission found that "[a]s a result of her disease, plaintiff is and has been since 13 June 1989 unable to earn the same or any wages in the same employment or any other employment that would expose her to chemical or other respiratory irritants." No party excepts to this finding. Further, this finding is supported by competent evidence in the record. Thus, plaintiff met the first prong of the *Hilliard* test "that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment . . . ." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

The second prong of the *Hilliard* test is that plaintiff was incapable after her injury of earning the same wages she had earned before her injury in any other employment. The plaintiff may meet her burden of proving this second prong in one of four ways:

> (1) the production of medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, . . .; (2) the production of evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment . . . ; (3) the production of evidence that [she] is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education,

> to seek other employment . . . ; or (4) the production of evidence that [she] has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citations omitted). Our review of the record shows that plaintiff has presented no such evidence; in fact, the only evidence plaintiff presented to show that she was incapable of earning the same wages she had earned before her injury in any other employment after 13 June 1989 was her and her husband's testimony that plaintiff was unable to do so. The Commission found, however, that "[t]o the extent plaintiff or her husband testified that her symptoms were such that she was and is unable to earn wages in any employment, her testimony is not accepted as credible." This finding is binding on appeal. *See Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683-84.

Further, at the time of the hearing, plaintiff was a forty-seven year-old woman who had obtained her graduate equivalency degree in 1984. The Commission found that "[t]he only restriction or limitation in plaintiff's ability to work or do work activity since the date she last worked, is that she must avoid respiratory irritants." The Commission also found that "[t]here is no evidence that [plaintiff's] pulmonary problems or allergic rhinitis in any way limited her ability to sit, walk or stand for eight hours in a work environment which would not expose her to respiratory irritants" and that "[t]here is no evidence that plaintiff cannot read, write, make change, sit, stand, bend, walk, lift, or engage in any other activities that might be required in a job." Our review of the record shows that these findings are supported by competent evidence. These findings are, therefore, conclusive on appeal. *See Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980).

Based on the Commission's findings and on the lack of evidence produced by plaintiff, we conclude that the Commission's finding that plaintiff "failed to show that she is unable because of her disease to earn the same or any wages in any other employment which would not involve exposure to respiratory irritants" was supported by competent evidence in the record. Accordingly, we affirm the Commission's conclusion that plaintiff failed to prove disability as a result of her occupational disease after 13 June 1989. *See Hilliard*, 305 N.C. 593, 290 S.E.2d 682.

II.

[2] Next, plaintiff contends that the Commission erred in the amount of fees it awarded to plaintiff for her expert witness, Dr. Carol Schiller. We disagree.

N.C. Gen. Stat. § 97-80(a) (1991 & Supp.) gives the "Commission or any member thereof, or any person deputized by it, . . . the power, for the purpose of [the Workers' Compensation Act], to tax costs against the parties . . . ." There is no restriction in either the Workers' Compensation Act or the Rules of the Industrial Commission on the Commission's discretion to tax costs of the expert fee. *See Harvey v. Raleigh Police Dep't*, 85 N.C. App. 540, 548, 355 S.E.2d 147, 152, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 86 (1987) (no restriction on discretion of the Industrial Commission to tax costs of a medical expert's deposition when plaintiff requests the deposition of its own medical expert).

In the present case, the deputy commissioner awarded plaintiff's expert witness, Dr. Schiller, $350.00. Thereafter, plaintiff filed a motion to increase the award of this fee to $3,197.60. On 15 August 1991, Deputy Commissioner Nance entered an order denying plaintiff's motion. In this order, Deputy Commissioner Nance stated:

> According to Dr. Schiller's statement of professional services, the time she spent testifying at the deposition and reviewing the file in preparation for the deposition, was three hours. She charges $120.00 per hour. The $350.00 fee previously approved adequately compensates Dr. Schiller for her expert testimony by way of deposition. The other charges billed by Dr. Schiller are charges incurred by plaintiff to prosecute her claim. Defendants are not responsible for paying bills incurred by plaintiff to obtain expert toxicological support for her claim.

Subsequently, the Commission affirmed the $350.00 award. Based on our review of the record, we find no abuse of discretion. Accordingly, we affirm the award of expert witness fees.

Affirmed.

Judges WELLS and WYNN concur.

DOCKSIDE DISCOTHEQUE, INC. v. BOARD OF ADJUSTMENT OF THE TOWN OF SOUTHERN PINES

No. 9320SC1032

(Filed 21 June 1994)

1. State § 10 (NCI4th)— board of adjustment—violation of open meetings law—decision not declared void

Assuming that an "executive session" was held by a board of adjustment in violation of N.C.G.S. § 143-318.11, the trial court did not abuse its discretion in refusing to declare the decision of the board null and void where the court concluded that the alleged executive session had little effect upon the substance of the challenged action, and the record fails to show that this determination is manifestly unsupported by reason.

Am Jur 2d, Administrative Law § 101.

2. Zoning § 110 (NCI4th)— board of adjustment decision—absence of findings and conclusions—remand not required

Although a board of adjustment failed to make findings and conclusions as required by the town's unified development ordinance in its decision that the use of petitioner's premises for topless entertainment violated the ordinance, remand for findings was not necessary where the record presented no genuine issues of material fact, and a complete understanding of the issues presented could be had from the record on appeal.

Am Jur 2d, Zoning and Planning §§ 799 et seq.

3. Zoning § 47 (NCI4th)— amendment of ordinance—prohibition of topless entertainment in central business district—property not nonconforming use

Petitioner was not entitled to use its property in a town's central business district for topless entertainment as a "nonconforming situation" allowed by the town's unified development ordinance where the ordinance was amended on 13 November 1990 to prohibit "special use entertainment" such as topless entertainment in the central business district; topless entertainment had been provided on petitioner's property at intervals of once a week to once every two to three months between 1983 and December 1989; there was no topless entertainment on the property from December 1989 until 22 March 1991; on 13 Novem-

ber 1990, the date the ordinance was amended, the property had not been used for topless entertainment in eleven months; and, therefore, petitioner's property did not meet the requirement for a nonconforming use that there be an "existing lot or structure or use of an existing lot or structure" at petitioner's locale on the date of the amendment which did not conform "to one or more of the regulations applicable to the district in which the lot or structure is located."

Am Jur 2d, Zoning and Planning §§ 624 et seq.

Appeal by petitioner from judgment entered 14 June 1993 in Moore County Superior Court by Judge Thomas W. Seay. Heard in the Court of Appeals 24 May 1994.

Hatch, Little, & Bunn, by Clyde Holt, III, for petitioner-appellant.

Gill & Dow, by Douglas R. Gill, for respondent-appellee.

GREENE, Judge.

Dockside Discotheque, Inc. (Dockside) appeals from a judgment signed 14 June 1993 in Moore County Superior Court, affirming the Board of Adjustment of the Town of Southern Pines' (the Board) decision to affirm the Land Use Administrator's (the Administrator) decision, that "the use of [Dockside]'s premises for special entertainment is in violation of Section 179 of the Town of Southern Pines Unified Development Ordinance."

The uncontradicted evidence presented in the record is that Dockside, which is located in the Town of Southern Pines' (the Town) central business district, began providing topless entertainment in 1983 on a semi-regular basis until early December 1989. On 13 November 1990, the Town amended its Unified Development Ordinance (the Ordinance), which was enacted in December 1989, to forbid under Section 179 "special use entertainment" such as topless entertainment in the Town's central business district and to allow such use only in the Town's general business district.

Jerry Reid (Reid) bought Dockside in March 1991 from David Talbert (Talbert) with the intention of operating a topless entertainment club. Talbert, whose privileged license expired in July 1990, last provided topless entertainment in December of 1989. On 22 March 1991, Dockside held its first adult entertainment show since Decem-

ber 1989. By letter dated 22 March 1991, the Administrator informed Reid that the use of Dockside for topless entertainment is violative of Section 179 of the Town's Ordinance, and if the violation were not corrected, he would subject Reid "to the maximum civil penalty allowed by law."

Dockside appealed the Administrator's decision to the Board on the grounds that Dockside is a nonconforming use as defined by Section 121(8) of the Ordinance and that topless entertainment at Dockside is permitted pursuant to Section 127(d) of the Ordinance "because the use was reinstated within 180 days of the effective date of the adoption of Section 179, which was November 13, 1990." After the Board heard from Dockside, the Town, and various witnesses, the following exchange took place:

> CHAIRMAN: Are there other questions? Is the Board ready to make a motion?
>
> MR. BOLES: Is there any such thing as executive session?
>
> CHAIRMAN: Okay; we will go into executive session for five or ten minutes. (Whereupon, the Board of Adjustment went into Executive Session at 7:10 p.m. and reconvened the regular session at 7:46 p.m.)[.]
>
> CHAIRMAN: The Board of Adjustment is now back in session. Are we ready to make a motion?
>
> MR. CAMPBELL: Mr. Chairman, I would like to make a motion that the appeal of Dockside, Incorporated be denied, and that the determination by the Administrative Officer be upheld.

This motion was then unanimously carried and the hearing was concluded. Subsequently, Dockside received a letter dated 14 June 1991 regarding its appeal from the Administrator's decision that Dockside was operating a special entertainment use in violation of the Ordinance and its request that Dockside be considered a nonconforming use. The letter stated that "[b]ased upon the evaluation of your request and staff's recommendations, the Board voted to deny the above mentioned requests."

In accordance with N.C. Gen. Stat. § 160A-388(e) (1993), Dockside petitioned the Moore County Superior Court on 12 July 1991 for judicial review of the Board's decision. In the petition, Dockside contended that topless entertainment at its business was a "nonconforming situation" within the meaning of the ordinance and therefore

did not violate the ordinance. Dockside argued in the alternative that the decision of the Board was affected by several procedural errors: (1) the Board "went into an executive session" in violation of Article 33C of Chapter 143 of the North Carolina General Statutes; (2) the motion to deny its appeal from the Administrator did not comply with Section 97(a) of the Ordinance in that it failed to state any reasons to support the motion to deny Dockside's appeal; and (3) the decision of the Board did not state any findings or conclusions as required by Section 106(b) of the Ordinance. The trial court, in affirming the decision of the Board, concluded that (1) because the facts were uncontroverted, the failure of the Board to make findings and conclusions did not require reversal; (2) there was no evidence that an executive session was used to deliberate the matter at issue; (3) if the open meetings law was violated because it affected "the substance of the challenged action," it did not require that the decision be declared null and void; (4) on the merits, the Board correctly determined that Dockside's use of the property was "not a nonconforming situation" within the meaning of the Ordinance.

The issues presented are whether (I) the Board's actions violated Article 33C of Chapter 143 of the North Carolina General Statutes relating to open meetings of public bodies so that its actions are null and void; (II) the Board had to set out specific findings of fact and conclusions where the facts are uncontroverted; and (III) Dockside was a nonconforming situation, entitling Dockside to be exempted from the provisions of Section 179.

I

[1] N.C. Gen. Stat. § 143-318.11(a) provides that a "public body," like the Board in this case, N.C.G.S. § 143-318.10(b) (1993), "may hold an executive session and exclude the public" for only twenty permitted purposes which are listed in Section 143-318.11. N.C.G.S. § 143-318.11(a) (1993). An executive session may be held "only upon a motion made and adopted at an open meeting. The motion shall state the general purpose of the executive session and must be approved by the vote of a majority of those present and voting." N.C.G.S. § 143-318.11(c) (1993). If a public body violates Section 143-318.11, the court, after considering evidence offered on any of six factors listed in Section 143-318.16A(c), "may declare any such action null and void." N.C.G.S. § 143-318.16A(a) (1993). The party seeking to rescind the actions taken in executive session has the bur-

den of producing evidence concerning one or more of the six factors. *Cf. White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) (in equitable distribution action, party desiring unequal division bears burden of producing evidence concerning one or more of the twelve factors listed in Section 50-20). Whether to declare a board's action null and void is within the discretion of the trial court, *see In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (where "may" is used, it will ordinarily be construed as permissive and not mandatory), and can be reversed on appeal only if the decision is "manifestly unsupported by reason" and "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

Dockside, in support of its motion to have the decision declared null and void, contends that the "secret meeting" of the Board prevented it from having "knowledge of the basis of the Board's denial of the current appeal; therefore, the 'substance of the challenged action' is affected in that a meaningful appellate review is now not possible." This allegation is apparently based on the first of the six factors listed in Section 143-318.16A(c), which provides that the court is to consider "[t]he extent to which the violation affected the substance of the challenged action." N.C.G.S. § 143-318.16A(c)(1) (1993). The trial court concluded that the alleged executive session "had little effect upon the substance of the challenged action," and we are unable to hold on this record that this determination is manifestly unsupported by reason. Therefore, assuming the "executive session" of the Board was held in violation of Section 143-318.11, Judge Seay did not abuse his discretion in refusing to declare the decision of the Board null and void.

II

[2] Section 106(b) of the Ordinance provides that the Board's "written decision shall state the board's findings and conclusions, as well as supporting reasons or facts." *Southern Pines, N.C., Unified Development Ordinance* § 106(b) (Dec. 1989) [*Ordinance*]. Dockside argues that the Board's failure to follow this procedure requires remand. We disagree.

As a general rule, when findings and conclusions are required and not entered, the appellate court "may vacate the judgment and remand the case for findings." 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2577, at 697 (1971) (discussing civil procedure Rule 52(a)) [*Wright*]. Because, however,

"findings are not jurisdictional, . . . the appellate court may decide the appeal without further findings if it feels that it is in a position to do so." *Wright* at 699-700. For example, "the appellate court will determine the appeal without more if the record sufficiently informs it of the basis of decision of the material issues . . . or if the facts are undisputed [and different inferences are not permissible]." *Id.* at 700-02; *see Withrow v. Larkin*, 421 U.S. 35, 45, 43 L. Ed. 2d 712, 722 (1975) (remand for findings and conclusions not ordered where it was unlikely to "add anything essential to the determination of the merits").

In this case, although the Board did not make any findings or conclusions, the record presents no genuine issues of material fact, and a complete understanding of the issues presented can be had from the record on appeal. Accordingly, remand is not necessary. Dockside also argues in its brief that Mr. Campbell's motion to deny its appeal was defective because it failed to include any "specific reasons" in support of the motion as required by Section 97(a) of the Ordinance. We do not address this argument because it was not the subject of an assignment of error. N.C. R. App. P. 10(a) (1994).

III

[3] Dockside contends that because it meets the definition of a "nonconforming situation" and because "the activity was conducted on the premises within 180 days of the effective date of the adoption of Section 179" and has never discontinued adult entertainment "without a present intention of resuming that activity," it can continue to provide adult entertainment under Section 122 of the Ordinance. We disagree.

Section 122 of the Ordinance provides that "subject to the restrictions and qualifications set forth in Sections 123 through 128, nonconforming situations that were otherwise lawful on the effective date of this chapter may be continued." *Ordinance* § 122(a). Section 127(b) of the Ordinance provides in pertinent part:

> (b) If the principal activity on property where a nonconforming situation . . . exists is (i) discontinued for a consecutive period of 180 days, or (ii) discontinued for any period of time without a present intention of resuming that activity, then that property may thereafter be used only in conformity with all of the regulations applicable to the preexisting use unless the board

> of adjustment issues a special use permit to allow the property to be used for this purpose without correcting the nonconforming situations.
>
> . . . .
>
> (d) When a structure or operation made nonconforming by this chapter is vacant or discontinued at the effective date of this chapter, the 180-day period for purposes of this section begins to run on the effective date of this chapter.

Ordinance § 127(b), (d). First, there must be a determination that a nonconforming situation exists so that these provisions apply. A nonconforming situation is "[a] situation that occurs when, on the effective date of this chapter, an existing lot or structure or use of an existing lot or structures does not conform to one or more of the regulations applicable to the district in which the lot or structure is located. . . ." *Ordinance* § 121(8).

Even accepting Dockside's argument that the "effective date of this chapter" is 13 November 1990, the date the Ordinance was amended to add Section 179 forbidding "special use entertainment" in Dockside's district rather than December 1989 when the Ordinance itself was enacted, Dockside does not meet the definition of a nonconforming situation. There was no topless entertainment provided at Dockside on 13 November 1990 and no evidence that the property on that date was regularly used for that purpose. The record does reveal that between 1983 and December 1989, topless entertainment was provided on this property at intervals of anywhere from once a week to every two or three months. There was no topless entertainment on the property from December 1989 until 22 March 1991. Thus, on 13 November 1990, the property had not been used for topless entertainment in eleven months, and there is no evidence that its nonuse was beyond the control of Dockside. *See Flowerree v. City of Concord*, 93 N.C. App. 483, 378 S.E.2d 188 (1989) (no cessation of nonconforming use where owner made effort to continue nonconforming use of property). Therefore, on 13 November 1990, there was not at Dockside's locale "an existing lot or structure or use of an existing lot or structures" which did not conform "to one or more of the regulations applicable to the district in which the lot or structure is located." Because Dockside cannot meet the definition of a nonconforming situation, neither Section 122 nor Section 127 applies, and the Board was correct in determining that Dockside

was not entitled to be exempted from the provisions of Section 179 prohibiting adult entertainment in Dockside's district. For these reasons, the decision of the trial court is

Affirmed.

Judges JOHN and McCRODDEN concur.

THOMAS L. THRASH AND WIFE, LORA R. THRASH, KEITH HERMAN AND WIFE, TERRY HERMAN, AND WILLARD HINTZ AND WIFE, ELIZABETH HINTZ, PETITIONERS v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, RESPONDENT, BASF CORPORATION, PETITIONER v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, RESPONDENT

No. 9328SC637

(Filed 21 June 1994)

1. Municipal Corporations § 121 (NCI4th)— annexation—challenge—burden of proof

Where the record of annexation proceedings shows substantial compliance with the requirements of Chapter 160A, the burden is on petitioners to prove failure to meet those requirements or an irregularity in the proceedings which materially prejudiced their substantive rights.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 70 et seq.

2. Municipal Corporations § 49 (NCI4th)— annexation—notice—hearing continued without notice

The trial court did not err in an annexation challenge by finding that the City had substantially complied with N.C.G.S. § 160A-49 where the City gave proper notice of a public hearing; the City Council met at 4:00 p.m. and conducted its regular meeting; the meeting was recessed and continued until 7:00 p.m., the time scheduled for the public hearing; the public hearing was held and the Council heard from several citizens; several members of the Council did not return to the public hearing portion of the meeting; and the Council voted to continue the public hearing without further advertisement to the next regular Council meeting. By the plain language of N.C.G.S. § 160A-81, which pro-

vides for a continuance if a quorum is not present, the Council was within its authority to continue the public hearing without further advertisement.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 65 et seq.

3. Municipal Corporations § 49 (NCI4th)— annexation—notice—certificate that notice mailed to all property owners—substantial compliance

There was no procedural violation warranting remand of an annexation ordinance where the materials delivered to the superior court did not include a certificate that notice of the public hearing was mailed to all property owners in the affected area as required by N.C.G.S. § 160A-49(b) but there was ample evidence that the notices were mailed and no contention that the property owners did not receive the notices. The irregularity of including the certificate was so slight that it could not have prejudiced petitioner and did not preclude a finding of substantial compliance.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 65 et seq.

4. Municipal Corporations § 58 (NCI4th)— annexation—urban use of annexed property—time of calculation

The superior court did not err in an annexation challenge by concluding that the City appropriately found that the area to be annexed was developed for urban purposes where the finding was not made on the date of annexation. There is no requirement in Chapter 160A that the City review its tax maps or other sources on the day the annexation ordinance is adopted in order to make up-to-the-minute amendments of the annexation plan and, in this case, the calculations related to urbanization were made shortly before the ordinance was passed and were amended once to reflect corrections which the City made after the initial adoption of the annexation plan. Furthermore, the petitioner did not contend that a last minute review of the lots in the annexed area would have made any difference in the results.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 66 et seq.

5. Municipal Corporations § 77 (NCI4th)— annexation—contiguous boundary—natural topographic features—no error

The petitioners challenging an annexation ordinance did not establish error on the issues of contiguous boundaries and whether the City followed natural topographic features and streets where petitioners argued that the ordinance did not contain the appropriate finding concerning contiguous boundaries, but such a finding was present, and did not guide the Court of Appeals to any portion of the record containing evidence in support of the contention regarding topographic features or the statistical calculations to prove that the proposed boundaries comply with the urbanization requirements of N.C.G.S. § 160A-48.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 55 et seq.

6. Municipal Corporations § 96 (NCI4th)— annexation—water and sewer services—FmHA funds

An annexation was not prohibited by the fact that the annexed area consumes the majority of a water and sewer district which recently constructed water and sewer facilities using funds borrowed from the Farmers Home Administration. The statute involved, 7 U.S.C. § 1926(b), does not prohibit annexation of an area served by an association such as this district; it merely prohibits the annexing municipality from curtailing, limiting, or otherwise interfering with the services provided by such an association.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 56 et seq.

Appeal by petitioners from judgment entered 15 December 1992 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 10 March 1994.

This appeal arises from petitioners' challenge to an annexation ordinance adopted by the City of Asheville (the City) on 18 December 1990. Petitioners initiated review proceedings in the superior court pursuant to N.C. Gen. Stat. § 160A-50(a) (1987) and argued that the City did not comply with all the requirements for annexation found in Chapter 160A of the General Statutes. The superior court determined that the City substantially complied with the requirements of Chapter 160A and entered judgment for the City. From this judgment petitioners appeal.

Adams, Hendon, Carson, Crow & Saenger P.A., by S.J. Crow and Martin Reidinger, for petitioner appellants Thrash, et al.

Moore & Van Allen, by Douglas R. Ghidina, for petitioner appellant BASF Corp.

Nesbitt & Slawter, by William F. Slawter and Sarah Patterson Brison, for respondent appellee.

ARNOLD, Chief Judge.

[1] Where the record of the annexation proceedings shows substantial compliance with the requirements of Chapter 160A, the burden is on petitioners to prove failure to meet those requirements or an irregularity in the proceedings which materially prejudiced their substantive rights. *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 17-18, 293 S.E.2d 240, 243, *disc. review denied*, 306 N.C. 559, 294 S.E.2d 371 (1982). Despite petitioner BASF's commendable effort to convince us that the burden never shifted to petitioners, our review of the record reveals substantial compliance with Chapter 160A, and therefore the burden was on petitioners to prove noncompliance or a procedural irregularity and resulting prejudice.

[2] Petitioners contend that the superior court erred in finding that the City substantially complied with several of the procedural requirements of Chapter 160A. First, petitioners contend that the City did not comply with N.C. Gen. Stat. § 160A-49 (1987) which sets out specific requirements for the time and manner in which the City must give notice of the public hearing on the proposed annexation. The City gave proper notice of a public hearing held on 13 November 1990. On that date, the City Council (the Council) met at 4:00 p.m. and conducted its regular meeting. It then recessed the meeting and continued it until 7:00 p.m., the time scheduled for the public hearing. At the reconvened meeting the public hearing was conducted and the Council heard from several citizens. Although they had not been excused, several members of the Council did not return to the public hearing portion of the meeting. Therefore, at the conclusion of the public hearing the Council voted to continue the public hearing without further advertisement to the next regular Council meeting on 27 November 1990. Petitioners argue that the Council could not continue the public hearing without repeating the notice requirements in G.S. § 160A-49. We disagree.

G.S. § 160A-81 governs the conduct of public hearings before city councils. Aside from establishing the city council's power to control

the conduct of hearings generally, this section provides that "[t]he council may continue any public hearing without further advertisement. If a public hearing is set for a given date and a quorum of the council is not then present, the hearing shall be continued until the next regular council meeting without further advertisement." By this section's plain language the Council was within its authority to continue the public hearing without further advertisement, and accordingly, the Council's action does not foreclose a finding of substantial compliance with Chapter 160A. We are not persuaded by petitioners' arguments that G.S. § 160A-81 is applicable only to public hearings not concerning annexation. Nothing in G.S. § 160A-81 indicates that its application should be so limited, and we decline to read such a limitation into it. Petitioner's remaining arguments on this issue are also not persuasive, and we therefore reject them.

[3] Petitioner BASF argues that the City failed to comply with G.S. § 160A-50(c), which provides that within 15 days of receiving a copy of the petition for review of the annexation ordinance the City must deliver to the superior court "(1) [a] transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and (2) [a] copy of the report setting forth the plans for extending services to the annexed area as required in G.S. § 160A-47." Petitioner argues that the materials delivered to the court are incomplete because they do not include a certificate that notice of the public hearing was mailed to all the property owners in the affected area as required by G.S. § 160A-49(b). G.S. § 160A-49(b) provides that the "person or persons mailing such notices shall certify to the governing board that fact, and such certificate shall become a part of the record of the annexation proceeding and shall be deemed conclusive in the absence of fraud." Because the certificate becomes part of the record, petitioner argues, its absence from the materials delivered to the superior court constitutes a procedural violation warranting remand of the ordinance.

Petitioner does not contend that the City failed to mail the notices, and there was ample evidence before the court in the form of an affidavit and testimony showing that the notices were actually mailed to all affected property owners. Because the notices were mailed and there is no contention that the property owners did not receive the mailed notices, this irregularity was so slight that it could not have prejudiced petitioner, and it does not require remand of the ordinance. *See In re Annexation Ordinance*, 278 N.C. 641, 180 S.E.2d 851 (1971) (Slight irregularities will not invalidate annexation.).

We note that petitioner uses the certificate's absence from the record as support for its argument that the burden of proof did not shift to petitioners. Petitioner argues that there cannot be substantial compliance with the statute when a document required by the statute is omitted from the record. Petitioner then argues that because there was not substantial compliance, petitioner does not have to show it was prejudiced by the omission. This minor omission, however, does not preclude a finding of substantial compliance. *See In re Annexation Ordinance*, 278 N.C. 641, 180 S.E.2d 851 (finding prima facie substantial compliance when the city, at the public hearing, failed to comply with the statutory requirement of explaining the plan to extend services to the annexed area).

[4] Petitioners in 91 CVS 174 (Thrash) next argue that the superior court erred in concluding that the City made the appropriate findings required by G.S. § 160A-49(e) showing that the annexed area was qualified under G.S. § 160A-48 for annexation. G.S. § 160A-48 sets the standards that must be met before an area may be annexed:

(1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.

(2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

(3) No part of the area shall be included within the boundary of another incorporated municipality.

In addition, the area to be annexed must be developed for urban purposes. G.S. § 160A-48(c)(3) provides that an area is developed for urban purposes if it meets the following standard:

> [It is] so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

When all the requirements for annexation are met, the governing body may adopt an annexation ordinance. The annexation ordinance must contain "specific findings showing that the area to be annexed meets the requirements of G.S. 160A-48." G.S. § 160A-49(e)(1). Peti-

tioner Thrash contends that the City's ordinance does not contain sufficient findings in several categories.

Petitioner first takes issue with the urbanization findings. Petitioner acknowledges that the City made findings with respect to urbanization, but he claims that because the findings were not made on the date of annexation they do not comply with Chapter 160A. We disagree. We do not find a requirement in Chapter 160A that the City review its tax maps or other sources on the day the annexation ordinance is adopted in order to make up-to-the-minute amendments of the annexation plan. In this case, the calculations related to urbanization were made shortly before the ordinance was passed, and they were amended once to reflect corrections which the City made after the initial adoption of the annexation plan. The City even made findings with respect to property exchanges which some individuals made in an effort to thwart the annexation after the annexation plan was adopted. Even with these amendments the findings in the ordinance showed that the annexed area met the statutory standard for urbanization. Furthermore, petitioner does not contend that a last minute review of the lots in the annexed area would have made any difference in the results.

[5] Next petitioner argues that the ordinance does not contain a finding that one eighth of the annexed area's boundary is contiguous to the existing municipal boundary as required by G.S. § 160A-48(e). On the same page with the findings petitioner refers to above, however, we discovered the following finding in paragraph (1) of the "Statement of Statutory Standards":

> The area is contiguous as defined in N.C. Gen. Stat. Sec. 160A-53 in that at least one-eighth of the aggregate boundary coincides with the present City of Asheville boundary. . . . [O]n October 9, 1990, the aggregate external boundary line of the area to be annexed was approximately 49,020 feet, of which approximately 7,000 feet or 14.3 percent coincided with the present City of Asheville boundary. Taking into consideration boundary changes to the annexation area made by the City of Asheville after the initial adoption of the Plan, the aggregate external boundary of the area to be annexed is approximately 51,830 feet, of which approximately 7,000 feet or 13.5 percent coincides with the present City of Asheville boundary.

Simple division reveals that 7000 feet is greater than one eighth of the annexed area's total boundary. Petitioner does not acknowledge

these figures and therefore does not dispute their accuracy. The finding of contiguousness could not be plainer.

Petitioner Thrash further argues that the trial court erred in finding that the City followed natural topographic features and streets wherever practical in defining the boundaries of the annexed area. Petitioner describes six areas which he contends do not comply with the statute and argues that alternative boundaries should have been used. He does not, however, guide us to any portion of the record containing evidence in support of his contention, nor does he provide the statistical calculations to prove that his proposed boundaries comply with the urbanization requirements of G.S. § 160A-48. We conclude that petitioner did not meet his burden of establishing error on this issue.

[6] Finally, petitioner Thrash argues that this annexation was prohibited by 7 U.S.C. § 1926(b) (1988). The annexed area consumes the majority of the Enka Candler Water and Sewer District (ECWSD), which recently constructed water and sewer facilities using funds borrowed from the Farmers Home Administration (FmHA). 7 U.S.C. § 1926(b) provides that the service provided by an association such as ECWSD

> shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body . . . nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

This issue does not appear to be within the scope of review of an annexation ordinance under G.S. § 160A-50, but we will consider it nonetheless.

Petitioner argues that annexation is absolutely prohibited by 7 U.S.C. § 1926(b); he does not offer proof that the annexation will actually curtail or limit ECWSD's service. We believe that 7 U.S.C. § 1926(b) does not prohibit annexation of an area served by an "association" such as ECWSD; it merely prohibits the annexing municipality from curtailing, limiting, or otherwise interfering with the services provided by such an association.

A reading of the plain language in the statute reveals that the statute actually contemplates the annexation of an area served by an

"association." The statute first provides that service may not be curtailed by inclusion of the area within municipal limits, but it continues to state that "nor shall the *happening of any such event* [referring to the inclusion of that area within municipal boundaries] be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event." 7 U.S.C. § 1926(b) (emphasis added). Obviously the statute does not intend to prohibit annexation in one sentence and provide for its occurrence in the next. Reading the statute as a whole reveals its true intent—to prevent curtailment or limitation of service by events which might follow annexation.

Further support is found in the legislative history of § 1926(b) which provides in part: "A new provision has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." 1961 U.S.C.C.A.N. 2243, 2309. The history further provides that this statute "[p]rohibits curtailment of a water association borrower's service as a result of inclusion of its service area within the boundaries of any public body or as the result of the granting of any private franchise for similar service in such area." *Id.* at 2305. From this language it is clear that Congress was aware that cities, due to growth needs, may annex certain areas served by FmHA borrowers. The statute was designed to protect "associations" from competitive facilities which might follow annexation, not from annexation itself. *See Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444 (M.D.N.C. 1988), *aff'd*, 887 F.2d 1080 (4th Cir. 1989). Obviously then the statute permits annexation of the area served by ECWSD.

The superior court's order is affirmed.

Affirmed.

Judges COZORT and LEWIS concur.

VULCAN MATERIALS COMPANY v. GUILFORD COUNTY BOARD OF COUNTY COMMISSIONERS

No. 9318SC750

(Filed 21 June 1994)

1. **Zoning § 71 (NCI4th)— proposed stone quarry—denial of special use permit—use not in harmony with area**

Material, competent, and substantial evidence supported a decision by a board of county commissioners to deny petitioner's applications for special use permits to operate a stone quarry in an agricultural district on the ground that the evidence failed to show that the proposed use "will be in harmony with the area in which it is to be located and in general conformity with the plan of development of this jurisdiction and its environs" where the record discloses that the area surrounding the proposed quarry is entirely residential and agricultural; the closest non-residential use is over two miles away; the county's comprehensive plan reserves the area of the proposed quarry for residential uses; and the record does not disclose the existence of any industrial use of nearby land.

Am Jur 2d, Zoning and Planning §§ 803-806.

2. **Zoning § 66 (NCI4th)— denial of special use permits—no showing of predisposition by board members**

The decision of a board of county commissioners to deny petitioner's applications for special use permits to operate a stone quarry was not shown to be arbitrary on the ground that the board members were biased and predisposed to vote against the applications where comments in the record indicating that certain board members were going to vote to deny the permits were made after the evidence was presented, and there was no evidence in the record that any board member had made a fixed decision, prior to the hearing, to vote against granting the permits.

Am Jur 2d, Zoning and Planning §§ 974-978.

Appeal by respondent from judgment entered 17 May 1993 in Guilford County Superior Court by Judge J. B. Allen, Jr. Heard in the Court of Appeals 12 April 1994.

Patton, Boggs & Blow, by C. Allen Foster, Thomas J. Pooley, and Gary L. Beaver, for petitioner-appellee.

Guilford County Attorney's Office, by Jonathan V. Maxwell and J. Edwin Pons, for respondent-appellant.

GREENE, Judge.

Appeal by Guilford County Board of County Commissioners (the Board) from judgment entered 17 May 1993 reversing the Board's decision not to issue special use permits to Vulcan Materials Company (Vulcan) and ordering that such special use permits be issued.

On 23 December 1991, Vulcan and other owners of approximately 235 acres of property in eastern Guilford County filed applications for special use permits with the Guilford County Planning Department to use the property for a stone quarry. Vulcan owned one of the five contiguous parcels of land, consisting of approximately 46 acres, and held valid options to purchase the remaining four parcels of land. Each of the other property owners identified Vulcan as their agent on the permit applications.

After a public hearing on 15 January 1992, the Guilford County Planning Board voted to deny the permit applications. Vulcan appealed this decision by requesting a *de novo* hearing before the Board of County Commissioners. The Board held a public hearing on 20 February 1992.

At this hearing, Vulcan presented competent and material evidence which in summary form reveals: the tract of land in question contains approximately 235 acres located between Birch Creek Road and Knox Road, which feed into Mount Hope Church Road; the land is located in an area zoned agricultural; a stone quarry is a permitted use in an area zoned agricultural upon receipt of a special use permit; the quarry pit will be approximately 300 feet deep, will initially occupy ten acres, and will eventually grow to occupy seventeen to twenty acres of the entire site; the quarry site will be surrounded by twenty to thirty-foot high landscaped berms, and the quarry pit will be surrounded by a six-foot high chain link fence topped with three strands of barbed wire; upon cessation of the operation of the quarry, which is estimated will last twenty years, the property will be reclaimed in accordance with the regulations of the State of North Carolina; the quarry will have no adverse effect on water resources and will not result in pollution of the ground water; the quarry will not cause or contribute to a reduction in air quality; ground vibra-

tions from blasting at the site will not be capable of causing damage to surrounding structures and blasting will not effect local wells; air concussion from blasting will be well within the limits allowable by the State of North Carolina and by the United States Bureau of Mines; noise levels, including noise from trucks, loaders and crushers, will be completely inaudible at most homes in the vicinity; traffic from the quarry would result in an additional 228 vehicle trips per day, 185 of which would be trucks, in the quarry's first year of operation; eventually, as production increases, the number of vehicle trips per day will rise to 400, with 345 of those being trucks; all trucks from the quarry would use Knox Road to access Mt. Hope Church Road, where 75% of the trucks would turn south and get on I-85, while the remaining 25% of the trucks would turn north onto Mt. Hope Church Road; the North Carolina Department of Transportation has plans to improve the interchange at I-85 and Mt. Hope Church Road, and Vulcan has agreed to work with the Department of Transportation on widening that portion of Knox Road from the site entrance west to Mt. Hope Church Road; and quarries do not adversely affect property values in neighboring areas.

Those opposed to the issuance of the special use permit offered competent and material evidence as follows in summary form: there are 119 homes within 3,000 feet, and 450 homes within one mile, of the quarry site; Mt. Hope Church Road, a two lane paved road, is traveled twice a day by ten school buses; the area immediately surrounding the quarry site is residential and agricultural, although a commercial business, Replacements Ltd., has a 100,000 square foot facility some 11,000 feet from the proposed quarry site; area residents obtain their water from wells which are generally 80 to 140 feet deep; the proposed quarry site is located in part of a watershed for a planned drinking water source; one area resident testified that when she put her home, which is located directly across from the site, up for sale and disclosed that a quarry was proposed for the site, no one even looked at the house; the Guilford County Comprehensive Plan adopted in 1986 reserves the area of the site for residential use; neighbors of a Vulcan quarry in Elkin, North Carolina, stated through affidavits that they have suffered broken windows, cracked walls, dried up wells, dust, noise and falling rocks as a result of the operation of that quarry; Vulcan was fined $10,000 by the United States Department of Labor for an incident in which a man was killed by flying debris from a quarry blast while mowing his lawn some 900 feet from a Vulcan quarry in Weston, Illinois; there are several quarries

already operating in Guilford County; and, according to the *National Environmental Journal*, Vulcan is the seventh worst emitter of toxic chemicals in the United States, based on air, water, land, underground, public sewage, and off-site releases.

After hearing the evidence, the Board denied the permit by a vote of 6-1. In denying the permit, the Board found that there was not credible evidence that the proposed use (1) was "consistent with the purposes of the District and compatible with surrounding uses," (2) would "not materially endanger the public health or safety," (3) would "not substantially injure the value of adjoining or abutting property," and (4) "will be in harmony with the area in which it is to be located and in general conformity with the plan of development of this jurisdiction and its environs."

After the Board denied the special use permits, Vulcan petitioned for a writ of certiorari to the Superior Court of Guilford County, pursuant to N.C. Gen. Stat. § 153A-340. The writ was granted, and after oral arguments and a review of the record of the hearing before the Board, the Superior Court held that the denial of the special use permits was not based upon material, competent, and substantial evidence in the record as a whole and, alternatively, was arbitrary and capricious. The court then reversed the denial of the special use permits and ordered the Board to issue permits for the entire 235 acre tract of land. From this judgment, the Board appeals.

Although the North Carolina Administrative Procedure Act (the Act) provides review only for agency decisions, N.C.G.S. § 150B-50 (1991), and local units of government are not within the definition of agencies, N.C.G.S. § 150B-2(1), the principles embodied in the Act "are highly pertinent" to appellate review of local government actions. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs of the Town of Nags Head*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980). Thus any court reviewing a special use permit issued by a county necessarily must determine if the decision is affected by any error of law; made upon unlawful procedure; comports with due process; is supported by competent, material, and substantial evidence in the whole record; or is arbitrary and capricious. *Id.* at 626, 265 S.E.2d at 383. In this case, we need review only the sufficiency of the evidence and whether the decision was arbitrary and capricious, because these are the only issues raised. *Utilities Comm'n v. Bird Oil Co.*,

302 N.C. 14, 21, 273 S.E.2d 232,236 (1981) ("The nature of the contended error dictates the applicable scope of review.").

The issues presented are therefore whether the Board's decision to deny the special use permits was (I) supported by material, competent, and substantial evidence; or (II) arbitrary and capricious.

I

[1] Pursuant to N.C. Gen. Stat. § 153A-340 (1991), Guilford County enacted a Development Ordinance which divided the county into numerous zoning districts. For each district the ordinance included a list of permitted uses, some of which were permitted "by right" and some permitted only upon receipt of a "special use permit." Applications for special use permits must first be processed by the Planning Board and, upon appeal, by the Board of County Commissioners. The application must be approved upon a finding by the Board that seven conditions are satisfied. Included among those conditions are: (1) "the use as proposed, or the use as proposed subject to such additional conditions as the owner may propose or the Planning Board may impose, is consistent with the purposes of the District and compatible with surrounding uses"; (2) "the use will not materially endanger the public health or safety if located where proposed and developed according to the plan submitted"; (3) "the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity"; and (4) "the location and character of the use, if developed according to the plan submitted, will be in harmony with the area in which [it] is to be located and in general conformity with the plan of development of the Jurisdiction and its environs." Guilford County Development Ordinance § 3-13.4 (1992). Because all four of these findings are required for the issuance of the special use permit, if there is not competent, material, and substantial evidence to support any one of these findings, we must affirm the Board's denial of the special use permit. *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 441, 342 S.E.2d 545, 547, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

In this case, the Board's rejection of the finding that the "character of the use . . . will be in harmony with the area in which [it] is to be located and in general conformity with the plan of development of the Jurisdiction and its environs" is supported by competent, material, and substantial evidence. The record discloses that the area surrounding the proposed quarry is entirely residential and agricultural,

that the closest non-residential use to the proposed quarry site is the Replacements Ltd. facility which is located over two miles away, and that the Guilford County Comprehensive Plan of 1986 reserves the area of the proposed quarry site for residential uses. The record does not disclose the existence of any industrial uses of nearby land.

Vulcan contends that because "quarrying" is a permitted use within the context of the zoning ordinance, it necessarily is in "harmony with the area." We disagree. The inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan. 3 Arden H. Rathkopf and Daren A. Rathkopf, *The Law of Zoning and Planning* § 41.13, at 41-77 (1992) [hereinafter *Rathkopf*]; *Woodhouse v. Board of Comm'rs of the Town of Nags Head*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980); *Humble Oil & Refining Co. v. Board of Alderman of the Town of Chapel Hill*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). If, however, competent, material, and substantial evidence reveals that the use contemplated is not in fact in "harmony with the area in which it is to be located" the Board may so find. *See* 3 Robert M. Anderson, *American Law of Zoning* § 21.13, at 682 (3d ed. 1986); 3 *Rathkopf* § 41.13, at 41-83; *see Triple E Assocs. v. Town of Matthews*, 105 N.C. App. 354, 358, 413 S.E.2d 305, 307-08, *disc. rev. denied*, 332 N.C. 150, 419 S.E.2d 578 (1992); *Piney Mountain Neighborhood Assoc., Inc. v. Town of Chapel Hill*, 63 N.C. App. 244, 251, 304 S.E.2d 251, 255 (1983); *People's Counsel for Baltimore County v. Mangione*, 584 A.2d 1318, 1322-23 (Md. App. 1991).

II

[2] A decision denying a special use permit is arbitrary and capricious "if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decisionmaking." *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988).

Vulcan first argues that the decision is arbitrary because "the undisputed competent, material and substantial evidence appearing in the record contradicts the Board's findings." We reject this argument because we have held above that the evidence does support at least one of the findings of the Board.

Vulcan next contends that the decision is arbitrary because the Board members were "predisposed and biased" against them. Without question if any of the Board members "had made a fixed decision,

prior to the Board's hearing," to vote against the granting of the special use permit, the decision would have to be classified as arbitrary. *See Crump v. Board of Educ.*, 326 N.C. 603, 616, 392 S.E.2d 579, 586 (1990). In this case, although the record contains some comments which indicate that certain members of the Board were going to vote to deny the special use permits, these comments were made after evidence was presented, and there is no evidence in the record which discloses that any Board member had made a fixed decision, prior to the hearing, to vote against granting the special use permits.

Accordingly, the judgment of the Superior Court must be reversed.

Reversed.

Chief Judge ARNOLD and Judge MARTIN concur.

EZEKIEL HUGHES AND ALMA JEAN HUGHES, PLAINTIFFS v. SAMUEL K. YOUNG AND KIMBERLY M. YOUNG, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. GENERAL ELECTRIC CAPITAL CORPORATION, THIRD PARTY DEFENDANT

No. 9324SC777

(Filed 21 June 1994)

1. **Husband and Wife § 23 (NCI4th)— conveyance of husband's property—wife's joinder in deed—wife not liable for covenants**

A wife could not be held liable for breach of any covenants in a deed conveying property owned solely by the husband where she joined in the execution of the deed only to release her inchoate rights.

Am Jur 2d, Husband and Wife §§ 132-229.

2. **Deeds § 33 (NCI4th); Fixtures § 1 (NCI4th)— deed describing land—conveyance of affixed mobile home**

A general warranty deed describing only land was sufficient, as between the grantor and the grantees, to transfer title to a mobile home affixed to the land where the sale was intended by the parties to include both the land and the mobile home.

Am Jur 2d, Deeds §§ 221 et seq.; Fixtures §§ 1, 78-90.

3. Deeds § 97 (NCI4th)— conveyance of land and mobile home—lien on mobile home—breach of covenant against encumbrances

Where a general warranty deed containing a covenant against encumbrances was intended by the parties to convey both the described land and a mobile home affixed thereto, the mobile home became realty as between the parties to the deed, and a lien noted on the certificate of title for the mobile home constituted an "encumbrance" which breached the covenant against encumbrances. Accordingly, the cause must be remanded for a determination of damages.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 81, 82.

Appeal by plaintiffs from order entered 10 May 1993 by Judge Charles C. Lamm in Yancey County Superior Court. Heard in the Court of Appeals 14 April 1994.

Kyle D. Austin, P.A., by Kyle D. Austin, for plaintiffs.

Bailey and Bailey, by G.D. Bailey and J. Todd Bailey, for defendants and third party plaintiffs.

LEWIS, Judge.

Plaintiffs commenced this action for breach of warranties arising out of the sale of property by general warranty deed. The trial court entered an order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment. From this order, plaintiffs appeal.

[1] On 4 September 1990, defendant Samuel K. Young (hereinafter "Young") conveyed a tract of real estate, identified as Lot 9 of the Earl Young Trailer Park in Yancey County, to plaintiffs by general warranty deed. We note that Samuel Young was the sole owner of the property, and that defendant Kimberly M. Young, Samuel's wife, joined in the execution of the deed in order to release her marital interest and prospective rights of inheritance in the property. "[A] married woman who joins her husband in the execution of a deed to his property, merely to release her inchoate right of dower, conveys nothing and is not bound by the covenants in such deed." *Maples v. Horton*, 239 N.C. 394, 399-400, 80 S.E.2d 38, 42 (1954). Further, even if there is only a rebuttable presumption that a wife who joins in the

execution of a deed to property owned solely by her husband does so merely to release her inchoate rights, the presumption can only be rebutted by evidence of the wife's true purpose, such as an agreement with her husband to share the proceeds of the sale. *Wellons v. Hawkins*, 46 N.C. App. 290, 293, 264 S.E.2d 788, 790 (1980). In the present case, plaintiffs have shown no evidence whatsoever of Kimberly Young's purpose in joining in the execution of the deed. Accordingly, we must conclude that her purpose was merely to release her inchoate rights. Therefore, Kimberly Young cannot be held liable for breach of any covenants made in the deed.

Located on the property was a 1985 Scott Rockford Mobile Home. The deed to plaintiffs did not mention the mobile home, but both Young and plaintiffs agree that the sale was to include the real property and the mobile home. Plaintiffs allege that the consideration paid was $25,500, with $10,500 of that total representing the value of the mobile home.

The mobile home had been purchased and placed on the lot by Young's grantors, Randy A. Hughes and his wife Kimberly W. Hughes. Randy is Ezekiel Hughes' son. Randy and Kimberly Hughes purchased the mobile home from Imperial Homes, Inc. (hereinafter "Imperial") under an installment sales contract. As part of that transaction, Randy and Kimberly Hughes gave Imperial a purchase money security interest in the mobile home. Imperial then assigned its rights to General Electric Credit Corporation. The certificate of title to the mobile home issued by the Department of Motor Vehicles listed General Electric Credit Corporation as lienholder. No Uniform Commercial Code fixture filing noting the lien was filed.

During the period in which Young and plaintiffs owned the mobile home, no payments on the installment sales contract were made. Furthermore, it is unclear from the record whether Young and plaintiffs knew of the existence of the debt and lien on the mobile home. After plaintiffs purchased the improved property from Young, General Electric Capital Corporation (hereinafter "G.E."), either on behalf of or as assignee of General Electric Credit Corporation, filed suit against plaintiffs to recover possession of the mobile home. G.E. prevailed and removed the mobile home from the lot. Plaintiffs then commenced this action against the Youngs for breach of their general warranty deed, which contained a covenant against encumbrances.

At the heart of this appeal is the question of whether a deed describing only real property suffices to transfer title to a mobile home located on that real property. If it does, the next question is whether the covenant against encumbrances in the general warranty deed is breached by the existence of a lien on the mobile home which existed on the date of the transfer of the property.

I.

[2] In addressing the first issue, we note that prior decisions of this Court and our Supreme Court have classified a mobile home as a "motor vehicle" for purposes of interpreting the application of our motor vehicle laws to mobile homes, *see Peoples Sav. & Loan Ass'n v. Citicorp Acceptance Co.*, 103 N.C. App. 762, 407 S.E.2d 251, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991); *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E.2d 329 (1968), and that N.C.G.S. § 20-72(b) (1993) provides that no title to a motor vehicle shall pass until the transferor executes an assignment and warranty of title on the reverse of the certificate of title, and delivers the motor vehicle to the transferee. However, a mobile home that is affixed to land presents a unique dilemma, having the qualities of both personalty and realty, and we believe it is appropriate to look to the law of fixtures for guidance.

"A fixture has been defined as that which, though originally a movable chattel, is, by reason of its annexation to land, or association in the use of the land, regarded as part of the land, partaking of its character . . . ." 1 Thompson on Real Property, 1980 Replacement, § 55, at 179 (1980). The test for determining whether a chattel which has been annexed to land has become real property or remains personal property is the intention with which the annexation was made. *Little v. National Serv. Indus., Inc.*, 79 N.C. App. 688, 692, 340 S.E.2d 510, 513 (1986). Further, the status of an item as realty or personalty may depend on the relation of the parties claiming an interest in the item to each other and to the land, as this relation is often indicative of the reasonably presumable intention of the annexor at the time he made the annexation. Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 16 (3d ed. 1988) [hereinafter *Webster's*]. That is, the same item that may be considered personal property in one situation may be considered real property where a different relationship exists. *Id.*

For example, where the parties involved are the seller of a chattel and the purchaser of that chattel who gives the seller a security

interest in the chattel and then affixes the chattel to real property, the item remains personalty as between the parties. Id. § 20. This situation is analogous to that found in *Peoples Savings & Loan Ass'n v. Citicorp Acceptance Co.*, 103 N.C. App. 762, 407 S.E.2d 251, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). In that case, the purchaser of a mobile home gave Citicorp a purchase-money security interest in the mobile home, which was noted on the certificate of title. Citicorp did not make a fixture filing on the mobile home. The purchaser then affixed the mobile home to real estate. Thereafter, the purchaser borrowed money from a lender and gave a deed of trust on the real property to the lender as security. The Court held that, pursuant to motor vehicle law, Citicorp's lien on the mobile home was properly perfected and had priority over the deed of trust, notwithstanding the fact that the mobile home had become affixed to the real property before the deed of trust was given. *Id.* at 767, 407 S.E.2d at 254. Thus, as between those parties, the mobile home remained personalty.

Where the relation between the parties, however, is that of grantor and grantee of land upon which a chattel has been affixed by the grantor, the presumption is different. In that situation, it is generally presumed that the purpose of the annexation is to enhance the value of the land and that the attached item becomes part of the realty. *Little*, 79 N.C. App. at 692, 340 S.E.2d at 513. Thus, when Randy and Kimberly Hughes sold the improved land to Young, the attached mobile home was part of the realty. And, when Young sold the improved land to plaintiffs, the mobile home continued to be a part of the realty. This conclusion is supported by the parties' stated intentions, as set forth in the pleadings. Both Young and plaintiffs agree that the sale was to include both the land and the mobile home. Accordingly, we hold that in the case of a mobile home which has been affixed to realty and which is intended to pass with the realty, as between the grantor and grantee of the improved property the result must be that the mobile home passes as real property. Thus, in the case at hand, the mobile home having become a part of the realty, the general warranty deed given to plaintiffs by Young was sufficient to transfer title to the land and the mobile home.

However, we note that the prudent purchaser will examine both the real property records in the county where the land is located and the records of the Department of Motor Vehicles, and will require that the seller deliver to him a deed to the real property and the title certificate to the mobile home. As this Court held in *Peoples*, a per-

fected lien noted on the certificate of title remains superior despite the annexation of the mobile home to realty.

II.

[3] Having resolved the issue regarding title to the mobile home, we now address the alleged breach of the general warranty deed. Plaintiffs' deed from Young contained a covenant that the property was free and clear of all encumbrances, subject to the listed exceptions. The lien on the mobile home in favor of General Electric Credit Corporation, which was noted on the title certificate, was not listed as an exception.

"The covenant against encumbrances is a covenant that there are no encumbrances outstanding against the premises at the time of the conveyance." *Webster's*, *supra* p.5, § 217. An encumbrance is a "claim, lien, charge, or liability attached to and binding real property." *Commonwealth Land Title Ins. Co. v. Stephenson*, 101 N.C. App. 379, 381, 399 S.E.2d 380, 381 (1991) (quoting Black's Law Dictionary 473 (5th ed. 1979)). Because the mobile home in the case at hand became real property as between these parties, the lien on the certificate of title was a lien attached to and binding real property, and therefore became an "encumbrance." Furthermore, even a grantee's actual knowledge and record notice of the existence of an encumbrance are not a defense to the grantee's action to recover damages for breach of the covenant against encumbrances. *Philbin Invs., Inc. v. Orb Enters., Ltd.*, 35 N.C. App. 622, 626, 242 S.E.2d 176, 179, *disc. review denied*, 295 N.C. 90, 244 S.E.2d 260 (1978).

Inasmuch as the pleadings and supporting documents, including Young's deed to plaintiffs, conclusively establish that 1) Young covenanted to plaintiffs that the property was free from encumbrances, and 2) the lien on the mobile home existed at the time Young transferred the property to plaintiffs, the validity of plaintiffs' claim for breach of the covenant against encumbrances has been established as a matter of law. *Id.* at 625, 242 S.E.2d at 178 (1978). However, genuine issues of material fact do exist regarding the issue of damages. Accordingly, as to defendant Samuel Young, the trial court's granting of defendants' motion for summary judgment is reversed. As to defendant Kimberly Young, summary judgment was properly granted, for she is not bound by the covenants made in the deed to plaintiffs. Further, the trial court's denial of plaintiffs' motion for summary judgment is reversed and remanded for entry of partial

summary judgment for plaintiffs against defendant Samuel Young on the issue of liability, with the issue of damages to be resolved at trial.

For the reasons stated, the order of the trial court is affirmed in part, reversed in part and remanded.

Affirmed in part; reversed in part and remanded.

Judges EAGLES and WYNN concur.

CHARLES BRIAN GUNTER AND MARTINA ANDERSON, PLAINTIFFS/APPELLANTS v. ANTHONY D. ANDERS, ALLEN EDWARDS, DAVID A. MARTIN, TERRI MOSLEY, AND SURRY COUNTY BOARD OF EDUCATION, DEFENDANTS/APPELLEES

No. 9317SC236

(Filed 21 June 1994)

1. Pleadings § 367 (NCI4th)— governmental immunity—purchase of insurance—motion to amend complaint—denied—no abuse of discretion

There was no abuse of discretion in a negligence action which included a school principal and a board of education as defendants where defendants filed a motion to dismiss because plaintiffs failed to allege that the board had purchased liability insurance and waived governmental immunity. Plaintiffs knew of the board's purchase of insurance for nearly two and a half years and failed to amend their complaint to allege this until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead.

Am Jur 2d, Pleading §§ 306 et seq.

2. Schools § 172 (NCI4th)— negligence action against school board—failure to allege purchase of insurance—12(b)(6) dismissal

The trial court properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) a complaint which included a school principal and school board as defendants but failed to allege that the board had purchased liability insurance and waived governmental immunity where plaintiff contended that an affirmative allegation of the waiver of governmental immunity to the extent of liability cover-

age should no longer be required under the Rules of Civil Procedure.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 59, 60.

Appeal by plaintiffs from judgment entered 17 December 1992 by Judge James C. Davis in Surry County Superior Court. Heard in the Court of Appeals 9 December 1993.

Lewis & Daggett, P. A., by Michael Lewis; Edwards & Kirby, by John R. Edwards; and Young Moore Henderson & Alvis, P.A., by Walter E. Brock, Jr., for plaintiffs-appellants.

Petree Stockton, by Richard J. Keshian and Edwin W. Bowden, for defendants-appellees.

JOHNSON, Judge.

After our decision was filed in *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994), plaintiffs timely petitioned for rehearing. We have granted this petition and will address the arguments presented by plaintiffs.

The pertinent facts underlying this appeal, as stated in our earlier decision, are as follows:

> Plaintiff Charles Brian Gunter (Gunter) was a student at North Surry High School when he was hit by an automobile driven by defendant Anthony Anders. Gunter was hit while he was crossing a driveway on the school campus. Gunter's injuries as a result of this accident included the amputation of his left arm.
>
> Following is a synopsis of the events leading up to this accident: During the morning of 8 December 1988, Gunter was in a physical education class instructed by Terri Mosley (a defendant herein). As was their custom, Gunter and his classmates ran from the locker room, where they dressed, and headed toward the physical education field. This path took them across a driveway which divides the school campus. This driveway ran by a wall which prevented drivers and pedestrians from seeing each other. As Gunter and his classmates ran across this driveway, Gunter was struck by defendant Anders' car.
>
> The school principal, Allen Edwards (a defendant herein), had ordered students to move their cars from a parking lot on the

campus so that the parking lot could be paved. Neither Gunter nor Mosley were aware of this.

Two months before this accident occurred, another student had been struck by a car at the same location on the high school campus. No steps had been taken to prevent another accident from occurring after this first accident.

Gunter v. Anders, 114 N.C. App. at 63, 441 S.E.2d at 168-69.

On 9 March 1992 plaintiffs filed a complaint against defendant Anthony Anders and defendants Edwards, Martin, Mosley and the Surry County Board of Education (hereafter, collectively referred to as school defendants), asserting negligence, negligence per se, negligent infliction of emotional distress and gross negligence; plaintiff mother alleged loss of services of her son. School defendants filed answers and cross-claims. Defendant Anders filed a motion for summary judgment; school defendants filed in their answer a motion to dismiss, pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6) (1990).

These motions came on for hearing on 14 December 1992 at which time school defendants moved that plaintiffs' complaint against the Surry County Board of Education (hereafter Board) be dismissed because plaintiffs failed to allege in their complaint that the Board had purchased liability insurance and waived its governmental immunity. Plaintiffs' attorney responded as follows:

. . . IT IS CORRECT THAT IN ITS CURRENT STATUS, THE COMPLAINT DOES NOT CONTAIN AN ALLEGATION THAT THEY HAVE WAIVED THEIR IMMUNITY; AND TO THAT END, WE WOULD, AT THIS TIME, YOUR HONOR, MAKE A MOTION PURSUANT TO RULE 15 AS TO THE DEFENDANTS EDWARDS, MARTIN, MOSLEY AND THE SURRY COUNTY BOARD OF EDUCATION—THAT MOTION BEING PURSUANT TO RULE 15—TO AMEND THE COMPLAINT TO ALLEGE THAT EACH OF THOSE DEFENDANTS HAS PROCURED LIABILITY INSURANCE TO COVER NEGLIGENT OR OTHER COURSES OF CONDUCT AND THAT SAID DEFENDANTS HAVE THEREBY WAIVED THEIR IMMUNITY FOR TORT LIABILITY TO THE EXTENT OF SUCH INSURANCE COVERAGE. WE, IN MAKING THAT MOTION, YOUR HONOR, WOULD POINT OUT SEVERAL THINGS. FIRST OF ALL, WHEN THIS CASE WAS FILED IN 1990, WE DID NOT ALLEGE THAT THEY HAD INSURANCE BECAUSE WE WERE NOT AWARE OF IT; BUT IN THE DISCOVERY IN THE 1990 CASE, WHICH IS PART OF THE RECORD HERE, THE DEFENDANTS DID FILE ANSWERS TO INTERROGATORIES IN WHICH THEY, UNDER OATH, REPRESENTED THAT THEY DID HAVE LIABILITY INSUR-

ANCE POLICIES AS TO THE SCHOOL BOARD. AND IN THIS 1992 CASE, AGAIN, IN INTERROGATORIES WHICH WERE ANSWERED ON OCTOBER 30TH OF THIS YEAR, THE INDIVIDUAL DEFENDANTS REPRESENTED TO US THAT THEY HAD LIABILITY INSURANCE COVERAGE.

The trial court denied the motion to amend, denied defendant Anders' motion for summary judgment, and granted school defendants' motion to dismiss. The trial court certified the order for appeal pursuant to North Carolina General Statutes § 1A-1, Rule 54(b) (1990). Plaintiffs filed timely notice of appeal to this Court.

[1] Plaintiffs argue on rehearing that the trial court erred in denying plaintiffs' motion to amend their complaint at the 14 December 1992 hearing on defendants' motions to dismiss, because delay alone is not sufficient to justify denial of a motion to amend; the burden is on the party opposing a proposed amendment to show prejudice; and because a misapprehension of the law by the trial judge in exercising his discretion is reversible error. Plaintiffs also assert that plaintiffs' motion to amend was made to cure a "technical defect," and that no prejudice would have resulted to defendant by allowing the "technical" amendment.

We do not agree. Plaintiffs knew of the Board's purchase of insurance for nearly two and a half years, and failed to amend their complaint to allege this until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead. "Where the granting or denial of a motion to amend is within the discretion of the trial court, it will not be overturned absent an abuse of discretion. 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." Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 178, 419 S.E.2d 195, 197 (1992), disc. review denied, 333 N.C. 254, 424 S.E.2d 918 (1993). We find no abuse of discretion by the trial court in denying plaintiffs' motion to amend their complaint at the 14 December 1992 hearing on defendants' motions to dismiss.

[2] Plaintiff further contends on rehearing that the trial court erred in dismissing the complaint as the complaint stated claims upon which relief could be granted as to the Board. North Carolina General Statutes § 1A-1, Rule 12(b)(6).

"A county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar as it has duly waived its immunity from tort liability pursuant to statutory

authority." *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 22-23, 348 S.E.2d 524, 526 (1986). North Carolina General Statutes § 115C-42 (1991) states in pertinent part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

Plaintiffs assert that

> [a]n affirmative allegation in a complaint of the waiver of governmental immunity to the extent of liability insurance coverage should no longer be required under the North Carolina Rules of Civil Procedure. Rule 9 contains requirements for pleading special matters, but does not list the waiver of immunity as a required pleading. G.S. 1A-1, Rule 9. The applicable waiver statute does not require the affirmative pleading of waiver of immunity. G.S. 115C-42. The authority for requiring such a pleading, and relied upon by the defendants and this Court, was a decision made before the enactment of the North Carolina Rules of Civil Procedure (Fields v. Board of Education, 251 N.C. 699, 111 S.E.2d 910 (1960)), and not long after the statute was enacted authorizing the waiver of governmental immunity. In Fields, the issue appears to have been whether the Board of Education had insurance, not whether plaintiff had properly pled the existence of insurance and the resulting waiver. Here, the Record is uncontradicted that the insurance coverage was present, thereby automatically invoking the following statutory waiver: "[I]t shall be no defense to any such action that the negligence or tort complained of was in pursuance of governmental, municipal, or discretionary function of a local board of education if, and to the extent, such local board of education has insurance coverage. . . . " (Emphasis retained.)

Plaintiffs further argue that "[a]nother principle of our modern North Carolina Rules of Civil Procedure is that pleadings are deemed

amended by unpleaded, uncontested matters of Record known by the parties." Finally, plaintiffs state that "[i]t has long been recognized in North Carolina that the defense of governmental immunity is an affirmative defense that must be specially pleaded. (Citation omitted.) This requirement has been carried forward under the North Carolina Rules of Civil Procedure where they require the pleadings of 'any . . . matter constituting an avoidance or affirmative defense.' "

We disagree with plaintiffs' contention that the issue in *Fields v. Board of Education*, 251 N.C. 699, 111 S.E.2d 910 was whether the Board of Education had insurance, not whether plaintiff had properly pled the existence of insurance and the resulting waiver. *Fields* clearly held "[i]n the absence of an allegation in the complaint in a tort action against a city board of education, to the effect that such board has waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such board has waived its immunity as authorized in G.S. 115-53, such complaint does not state a cause of action." *Id.* at 701, 111 S.E.2d at 912. The effect in *Fields* was that the defendant's demurrer to the complaint was sustained because there was no such allegation in the plaintiff's complaint.

Plaintiffs argue that requirements for pleading special matters are now addressed in the N.C.R. Civ. P., enacted after Fields (the N.C.R. Civ. P. took effect on 1 January 1970. North Carolina General Statutes § 1A-1 (1990)). However, as cited in our earlier opinion, in *Clary v. Board of Education*, 286 N.C. 525, 529, 212 S.E.2d 160, 163 (1975), our Supreme Court noted that the plaintiff amended its complaint to allege that the defendant school board had procured liability insurance, thereby waiving its immunity for tort liability; the Court cited *Fields* and said "[t]his allegation alleged facts prerequisite to recovery by plaintiff. In the absence thereof, demurrers to the complaint would have been sustained." This case was decided *after* the N.C.R. Civ. P. were adopted. (*See also Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979), where our Supreme Court held the defendant school board could not be joined as a party defendant on a defamation claim. The Court said:

> Unless and until a school administrative unit has waived its immunity by procuring an applicable policy of liability insurance, it may not be held responsible under respondeat superior for the intentional torts of its employees. [Citations omitted.] *There being no allegations in the complaint of such a waiver via*

insurance procurement, the complaint fails to state a claim for defamation against the school board.

Id. at 721, 260 S.E.2d at 614-15 (emphasis added).

Finally, we address plaintiffs' argument that "[t]he Record is uncontradicted that the insurance coverage was present, thereby invoking the following statutory waiver: '[I]t shall be no defense to any such action that the negligence or tort complained of was in pursuance of governmental, municipal, or discretionary function of a local board of education if, and to the extent, such local board of education has insurance coverage.' " (Emphasis retained.) North Carolina General Statutes § 115C-42. This language is simply not applicable in the instant case. We note that this language was also in the statute when *Fields* was decided in 1960; indeed, this entire section is substantially the same as it was in 1960.

Based on *Fields v. Board of Education*, *Clary v. Board of Education*, and *Presnell v. Pell*, we find the trial court properly dismissed the complaint herein as to the Board pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6).

The decision of the trial court is affirmed.

Judges MARTIN and McCRODDEN concur.

LEON C. BAKER, PLAINTIFF-APPELLANT v. CONNIE A. BAKER, DEFENDANT-APPELLEE

No. 9312DC717

(Filed 21 June 1994)

Judgments § 547 (NCI4th)— absolute divorce—motion for relief from judgment—equitable distribution claim as meritorious defense

A claim for equitable distribution constitutes a meritorious defense to an action for absolute divorce for the purpose of obtaining relief from the judgment of absolute divorce under Rule 60(b)(1). Therefore, where the trial court found that defendant's failure to file a claim for equitable distribution was the result of excusable neglect not attributable to defendant, the court properly set aside the judgment of absolute divorce and

permitted defendant to file her answer and counterclaim for equitable distribution. N.C.G.S. § 1A-1, Rule 60(b)(1).

Am Jur 2d, Judgments §§ 739 et seq., 869 et seq.

Appeal by plaintiff from order entered 28 January 1993 by Judge Andrew R. Dempster in Cumberland County District Court. Heard in the Court of Appeals 23 March 1994.

Plaintiff and defendant were married in 1969 and separated in June 1991 with the intent to permanently terminate the marriage. On 6 July 1992, plaintiff filed this action for absolute divorce based on one year's separation. The civil summons and a copy of plaintiff's complaint were personally served upon defendant on 8 July 1992. Through her counsel in a pending action between the parties for divorce from bed and board and child custody and support, defendant obtained two extensions of time, until 7 September 1992, for filing responsive pleadings in the divorce action. However, no responsive pleading was filed, apparently due to a misunderstanding between defendant and her counsel. A hearing for absolute divorce was held on 18 September 1992; neither defendant nor her counsel attended, and plaintiff was granted a judgment for absolute divorce.

Thereafter, defendant filed a motion seeking relief from the divorce judgment pursuant to G.S. § 1A-1, Rule 59(a)(1) and (9) and Rule 60(b)(1) and (6), in order that she could assert a counterclaim for equitable distribution of the parties' marital property. After a hearing, the trial court found that defendant's Rule 59 motion should be denied, but, with respect to her Rule 60(b) motion the trial court found that defendant and her counsel had "acted in good faith, but on mutually erroneous assumptions; and that defendant did act diligently in attempting to preserve her rights to an equitable distribution." The court found further "that the presentation of defendant's equitable distribution claim does constitute a 'meritorious defense' within the meaning of Rule 60(b); and that defendant's failure to file a claim for equitable distribution in this action was the result of excusable neglect not attributable to defendant." Thus, the trial court granted defendant's Rule 60(b) motion and set aside the divorce judgment, whereupon defendant immediately filed an answer admitting the allegations of plaintiff's complaint for absolute divorce and asserting a counterclaim for equitable distribution. Plaintiff appealed.

Blackwell, Luedeke, Hicks & Burns, P.A., by Kenneth D. Burns and John Blackwell, Jr., for plaintiff-appellant.

Reid, Lewis, Deese & Nance, by Renny W. Deese, for defendant-appellee.

MARTIN, Judge.

Plaintiff appeals from the trial court's order setting aside the judgment of absolute divorce and permitting defendant to file her answer and counterclaim for equitable distribution. Although neither party has addressed the point, we note that the appeal is interlocutory and subject to dismissal. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980). Nevertheless, in the exercise of the discretion granted us by N.C.R. App. P. 21, we treat the appeal as a petition for writ of certiorari, issue the writ, and proceed to consider the appeal.

Plaintiff sets forth six assignments of error in the record on appeal. His first and third assignments of error relate to the trial court's findings of fact, however, plaintiff failed to include the evidence in the record as provided by App. Rule 9(c)(1) or to designate and file the verbatim transcript as provided by App. Rule 9(c)(2) and (3). Therefore, we must assume that the trial court's findings of fact are supported by competent evidence and we will not consider plaintiff's assignments of error related thereto. *In re Botsford*, 75 N.C. App. 72, 330 S.E.2d 23 (1985). Appellant's fifth assignment of error is not brought forward in his brief; it is deemed abandoned. N.C.R. App. P. 28(b)(5). The sole question presented by plaintiff's remaining assignments of error is whether a counterclaim for equitable distribution can constitute a "meritorious defense" to a complaint for absolute divorce, necessary to the granting of relief from a judgment pursuant to G.S. § 1A-1, Rule 60(b). We answer the question affirmatively and affirm the trial court's order.

Rule 60(b) permits a party to obtain relief from a final judgment when certain requirements are met. In this case, the trial court granted defendant relief pursuant to Rule 60(b)(1) which provides:

> Rule 60. Relief from judgment or order.
>
> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect; . . . .

Under this section, a party may be relieved from a final judgment on the grounds of mistake, inadvertence, surprise or excusable neglect. A party moving to set aside a judgment under Rule 60(b)(1) must show not only one of the grounds listed above but also the existence of a meritorious defense, *Grant v. Cox*, 106 N.C. App. 122, 415 S.E.2d 378 (1992); *see generally 7 Moore's Federal Practice* 60.27(1) (2d ed. 1983); W. Shuford, *N.C. Civ. Prac. & Proc. § 60-11* (2d ed. 1981 & Supp. 1984), because it would be a waste of judicial resources to vacate a judgment or order when the movant could not prevail on the merits of the civil action. *In the matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 328 S.E.2d 7 (1985); *Doxol Gas v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971). A motion for relief under this rule is addressed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975); *Grant v. Cox*, *supra*; *Perkins v. Perkins*, 88 N.C. App. 568, 364 S.E.2d 166 (1988).

Plaintiff seems to argue that a counterclaim cannot constitute a **defense** for Rule 60(b) purposes and that it is only when a **plaintiff** is seeking relief from a judgment that a **meritorious claim** will suffice. *See Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971). (Relief may be granted from judgment of dismissal upon showing by plaintiff of meritorious cause of action and proper diligence.) This argument is clearly without merit. North Carolina's Rule 60(b) is nearly identical to the Federal Rule 60(b), enabling us to look to Federal decisions for interpretations and enlightenment. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971), *reh'g denied*, 281 N.C. 317 (1972). In *Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808 (4th Cir. 1988), the court held that a counterclaim is sufficient to constitute a meritorious defense for the purposes of Federal Rule 60(b), saying that a meritorious defense requires "a proffer of evidence which would permit a finding for the defaulting party or **which would establish a valid counterclaim**." *Id.* at 812. (Emphasis added.) Explaining that the purpose behind requiring a meritorious defense is met by allowing a counterclaim to suffice, the court stated that "[t]he underlying concern is . . . whether there is some possibility that the outcome . . . after a full trial will be contrary to the result achieved by default." *Id. citing* 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2697, p. 531 (2d ed. 1983). *See also Williams v. Blitz*, 226 F.2d 463 (4th Cir. 1955). (Meritorious counterclaims, even though not answering the substance of the complaint, may justify relief from a default

judgment upon a showing of excusable neglect as the cause of the default.)

Even so, plaintiff contends, citing *Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987) and *Carter v. Carter*, 102 N.C. App. 440, 402 S.E.2d 469 (1991), that a claim for equitable distribution is insufficient to constitute a meritorious defense to an action for absolute divorce. Neither of these cases supports his position.

In *Howell*, Mr. Howell filed for and obtained a divorce from Mrs. Howell. Thereafter, Mrs. Howell sought to set aside the "effects" of the valid divorce judgment so that she could file her claim for equitable distribution. Our Supreme Court held that:

> [b]ecause the trial court did not set aside the divorce judgment itself, its terms and validity still abide. Likewise, the legal effects of the divorce judgment still obtain. Neither Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or avoid one or more of the legal effects of a valid judgment while leaving the judgment itself intact.

Id. at 91, 361 S.E.2d at 588 (footnote omitted). The *Howell* court's holding is limited to the pronouncement that the effects of a judgment may not be set aside without setting aside the entire judgment. Furthermore, the *Howell* court recognized that a divorce judgment itself could properly be set aside. The court stated:

> . . . The divorce judgment in this case had only one operative provision—it granted Mr. Howell an absolute divorce. The only question before the trial court when this judgment was entered was whether to grant or not to grant the divorce. The judgment is thus not subject to modification. It is subject only to being set aside or left intact. So long as it is left intact all of the legal effects that flow from it obtain.

Id. at n.3. The court never reached the question of whether a counterclaim for equitable distribution could be a meritorious defense to the divorce complaint.

In *Carter v. Carter*, *supra*, this Court was faced with a similar issue. Rather than setting aside the divorce judgment, the trial court had simply reaffirmed the divorce and reserved for future resolution the issue of equitable distribution. We held, pursuant to *Howell*, that because "the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert

her claim for equitable distribution prior to the entry of judgment for divorce," the order for relief was error. *Carter* at 446, 402 S.E.2d at 472. (Citation omitted.)

> [W]e reject defendant's argument that the [trial] court effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim. Assuming the defendant was correct in her argument, the reservation of the equitable distribution claim would be a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim or separate action requesting distribution.

Id. (Citation omitted.) In the present case, however, the trial court avoided the errors of *Howell* and *Carter* by setting aside the divorce judgment and subsequently allowing defendant to file an answer, including her counterclaim for equitable distribution.

Plaintiff correctly argues that North Carolina law requires that a claim for equitable distribution be brought prior to the granting of the divorce. G.S. § 50-11 (1984), entitled "Effects of absolute divorce," provides in pertinent part as follows:

> (e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. § 50-20 unless the right is asserted prior to judgment of absolute divorce . . . .

However, when the trial court granted defendant relief from the judgment of absolute divorce and permitted defendant to file her answer, the effect was the same as if the judgment had never been entered, and defendant's right to equitable distribution was revived.

Affirmed.

Judges EAGLES and McCRODDEN concur.

BARBARA J. SEALEY, PLAINTIFF v. WILLIAM B. GRINE, M.D.; ADEL MOHAMED, M.D.; ADEL MOHAMED, M.D., P.A.; AND MOHAMED & LIPPITT UROLOGY CENTER, P.A., DEFENDANTS

No. 9311SC855

(Filed 21 June 1994)

1. Costs § 9.1 (NCI4th)— voluntary dismissal—costs taxed in subsequent actions

The trial court did not err by taxing costs in a previous action where plaintiff filed a complaint alleging medical malpractice, breach of contract, intentional infliction of emotional distress, unfair and deceptive practices, and fraud; plaintiff took a voluntary dismissal as to three of those causes of action; partial summary judgment was granted against plaintiff as to certain issues and certain defendants; plaintiff filed a voluntary notice of dismissal as to its remaining causes of action; defendants' motion for costs was never calendared for hearing; plaintiff subsequently filed another complaint arising from the same treatment; defendants refiled the motion for costs; and the court granted that motion. Language in N.C.G.S. § 1A-1, Rule 41(d) constitutes a mandatory directive to the trial court, and payment of costs taxed in the first action is a mandatory condition precedent to the bringing of a second action on the same claim. The filing of a notice of dismissal does not terminate the court's authority to enter orders apportioning and taxing costs.

Am Jur 2d, Costs §§ 4 et seq.

2. Costs § 47 (NCI4th)— medical malpractice—costs—deposition expenses included—copies of x-rays and records not included

The trial court did not err in an action arising from an allegedly negligent lithotripsy by taxing as costs deposition expenses where there was no assignment of error to the finding that the costs were reasonable and necessary. However, the record does not show that expenses for copies of x-rays and records related to depositions, these costs are not enumerated in N.C.G.S. § 7A-305(d), and the court erred in taxing these expenses as costs.

Am Jur 2d, Costs § 57.

Judge McCRODDEN concurring.

SEALEY v. GRINE

[115 N.C. App. 343 (1994)]

Appeal by plaintiff from order entered 28 June 1993 in Johnston County Superior Court by Judge William C. Gore, Jr. Heard in the Court of Appeals 21 April 1994.

Barrow, Redwine and Davis, by Paul D. Davis and Kenneth C. Haywood, for plaintiff-appellant.

Walker, Young & Barwick, by Robert D. Walker, Jr. and Sarah E. Edwards, for defendant-appellees.

GREENE, Judge.

Barbara J. Sealey (plaintiff) appeals from an order entered in open court on 28 June 1993 and signed 30 June 1993, granting William B. Grine, M.D., Adel Mohamed, M.D., Adel Mohamed, M.D., P.A., and Mohamed & Lippitt Urology Center, P.A.'s (defendants) motion to tax plaintiff with the costs incurred by defendants in the defense of the action bearing file number 90 CvS 0635.

In an action with the file number 90 CvS 0635, plaintiff filed a complaint signed 10 April 1990 against William B. Grine, M.D. (Dr. Grine), Adel Mohamed, M.D. (Dr. Mohamed), and Carolina Lithotripsy, a limited partnership (Carolina), containing seven causes of action alleging that in treating plaintiff's kidney stone with lithotripsy, (1) Dr. Grine was grossly negligent; (2) Dr. Grine's negligence is imputed to Carolina; (3) Dr. Mohamed was grossly negligent; (4) Dr. Grine and Carolina breached a contract with her; (5) Dr. Grine, Carolina, and Dr. Mohamed's actions caused plaintiff intentional infliction of emotional distress; (6) Carolina's actions constituted unfair and deceptive practices; and (7) Dr. Grine, Carolina, and Dr. Mohamed committed actual and constructive fraud on plaintiff.

The trial court allowed plaintiff to amend her complaint on 12 April 1990 to join Adel Mohamed, M.D., P.A. (Mohamed, P.A.) as an additional named party defendant. Dr. Grine, Dr. Mohamed, and Mohamed, P.A. responded to plaintiff's amended complaint by moving to dismiss pursuant to Rule 12(b)(6), by moving to strike plaintiff's fifth, sixth, and seventh causes of action pursuant to Rule 12(f), by denying any negligence on their part, and by requesting the action be dismissed and costs be taxed against plaintiff. Carolina filed a separate answer and motion to dismiss.

On 5 February 1992, plaintiff took a voluntary dismissal of her fourth, fifth, sixth, and seventh causes of action. On 10 February 1992, upon motion by Carolina, the trial court granted summary judgment in Carolina's favor. Also on 10 February 1992, the trial court granted Dr. Grine, Dr. Mohamed, and Mohamed, P.A.'s motion "for partial summary judgment on the issue of 'Informed Consent' " and dismissed plaintiff's action "with respect to any claim based upon a lack of informed consent."

On 14 February 1992, plaintiff filed a notice of dismissal pursuant to Rule 41 of the North Carolina Rules of Civil Procedure for the remaining causes of action against defendants. On 25 February 1992, Dr. Grine, Dr. Mohamed, and Mohamed, P.A. moved the court "for an order taxing the costs of this action" (No. 90 CvS 0635). This motion, however, was never calendared for hearing.

On 10 February 1993, plaintiff filed a complaint, in an action with the file number 93 CVS 283, against defendants for negligence in the lithotripsy treatment of plaintiff for a kidney stone. On 23 February 1993, defendants refiled a motion to tax costs pursuant to Rule 41 because in action 90 CvS 0635, plaintiff "sought money damages from all defendants based upon allegations arising from the same series of transactions and occurrences set forth and described in the claim for relief" in this action, 93 CVS 283, plaintiff filed a voluntary dismissal as to four of her seven causes of action in 90 CvS 0635, she took a dismissal as to the remaining causes of action in 90 CvS 0635, defendants filed a motion to tax costs on 25 February 1992, and plaintiff has not made any attempt to pay such costs. The trial court, in an order signed 30 June 1993, made the following findings of fact:

> 3. . . . defendants undertook the de bene esse deposition of Dr. James L. Lingeman, a nationally known expert in the field of lithotripsy, whose testimony was vital to the defense of this action by the defendants.
>
> . . . .
>
> 6. The Court finds as a further fact that the action initially filed by the plaintiff . . . bearing File Number 90 CvS 0635, was not filed in forma pauperis.
>
> . . . .
>
> 9. The Court, in its discretion, finds as a fact that the costs enumerated and set forth in Exhibit A of this order, which is

> incorporated herein by reference, are reasonable and necessary costs, and should be taxed against the plaintiff in the amounts indicated thereon.

Exhibit A, which consisted of expenses totaling $11,526.98, specifically listed $615.00 in expenses "for copies of x-ray films" and $164.25 "for copies made of records" and also included expenses for taking depositions, court reporting services for depositions, traveling for Dr. Lingeman's deposition, videotaping depositions, obtaining copies of depositions from a reporting service, and subpoena service fees. The court then concluded it had the authority and jurisdiction to tax costs and ordered plaintiff to pay costs of $11,526.98 incurred by defendants "in the defense of the case bearing File Number 90 CvS 0635."

The issues presented are whether (I) a trial court, in one action, can, under N.C. Gen. Stat. § 1A-1, Rule 41(d), tax costs incurred in an earlier action that was voluntarily dismissed; and (II) a trial court can tax costs for deposition expenses.

I

[1] N.C. Gen. Stat. § 1A-1, Rule 41, which governs dismissal of actions, provides in pertinent part:

> (d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

N.C.G.S. § 1A-1, Rule 41(d) (1990). This language "constitutes a mandatory directive to the trial court," and "payment of costs taxed in the first action is a mandatory condition precedent to the bringing of a second action on the same claim." *Sims v. Trailer Sales Corp.*, 18 N.C. App. 726, 728, 730, 198 S.E.2d 73, 75-76, *cert. denied*, 283 N.C. 754, 198 S.E.2d 723 (1973); *Sanford v. Starlite Disco*, 66 N.C. App.

470, 471-72, 311 S.E.2d 67, 68 (1984) (1979 amendment only added 30-day grace period within which to pay costs assessed).

Plaintiff contends that "there is no provision upon the refiling of a once voluntary dismissed claim to go back into the previous action and revive jurisdiction in order to make a determination as to whether an item in the old action was a reasonable and necessary cost." We reject this argument because "the filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs" pursuant to Rule 41, and "where the parties chose to reinstitute the suit and the reinstituted suit was still pending . . . the courts . . . [are] able to order payment of costs." *Ward v. Taylor*, 68 N.C. App. 74, 79, 314 S.E.2d 814, 819, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984). Therefore, the trial court in 93 CVS 283 had authority under Section 1A-1, Rule 41(d) to tax against plaintiff costs incurred by defendants in 90 CvS 0635.

II

[2] The "costs" to be taxed under N.C. Gen. Stat. § 1A-1, Rule 41(d) against a plaintiff who dismisses an action under Section 1A-1, Rule 41(a), means the costs recoverable in civil actions as delineated in N.C. Gen. Stat. § 7A-305(d) (1989). *See City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (costs may be taxed only on basis of statutory authority). This Court has nonetheless held that "costs" also includes "deposition expenses," unless the depositions were unnecessary, even though an award of deposition expenses is not expressly allowed by statute. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982); *Alsup v. Pitman*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990). In this case, because plaintiff did not assign error to the trial court's finding of fact that "the costs enumerated and set forth on Exhibit A . . . are reasonable and necessary," those costs are deemed to be necessary. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982) (if party fails to except to findings of fact, findings are presumed to be supported by competent evidence and are binding on appeal). We therefore need only determine whether the costs awarded in this case are either "deposition expenses" or specifically authorized by statute. The expenses for subpoena service fees are statutorily permitted, see N.C.G.S. § 7A-305(d)(6), and the expenses for taking depositions, traveling for Dr. Lingeman's deposition, videotaping depositions, obtaining copies of depositions from a reporting

service, and court reporting services for taking depositions are included within the scope of "deposition expenses." Therefore, the trial court did not err in taxing plaintiff with those expenses. Because, however, the record does not show that the $615.00 in expenses "for copies of x-ray films" and $164.25 "for copies made of records" relates to depositions and because these costs are not enumerated in Section 7A-305(d), the trial court erred in taxing such costs against plaintiff. For these reasons, we modify the amount of costs taxed against plaintiff to exclude the $615.00 expended for copies of x-ray films and the $164.25 expended for copies of records. Otherwise, the order of the trial court is affirmed.

Modified in part and affirmed.

Chief Judge ARNOLD concurs.

Judge McCRODDEN concurs with separate opinion.

Judge McCRODDEN concurring.

Realizing that our Court is bound by the decisions of other panels, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), I am constrained to concur in the result. I am concerned, however, that the definition of "costs," which this Court has interpreted to include deposition expenses, *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982), and which we use today, could make refiling cases prohibitive for plaintiffs who have taken voluntary dismissals. I cannot believe that the General Assembly, in enacting N.C. Gen. Stat. § 1A-1, Rule 41(d) (1990), intended to place such a barrier to litigation. Indeed, the language of the statute (plaintiff "shall be taxed with the costs") connotes an automatic *ex mero motu* action by the trial court in assessing costs normally associated with civil litigation, *i.e.*, as defined by N.C. Gen. Stat. § 7A-305(d) (1989). By my reading, that statute does not include deposition costs or other costs of discovery.

FLOWERS v. BLACKBEARD SAILING CLUB

[115 N.C. App. 349 (1994)]

WILLIAM L. FLOWERS AND WIFE, ELIZABETH R. FLOWERS; WALTER L. FLOWERS AND WIFE, SUSAN L. FLOWERS, PLAINTIFFS v. BLACKBEARD SAILING CLUB, LTD., A NORTH CAROLINA CORPORATION, DEFENDANT

No. 933SC749

(Filed 21 June 1994)

Waters and Watercourses § 57 (NCI4th)— riparian rights—CAMA permit—trespass—failure to pursue administrative remedies

The trial court did not err in a trespass action by granting defendant's motion to dismiss for lack of subject matter jurisdiction, but did err by allowing a motion to dismiss for failure to state a claim upon which relief may be granted, where defendant filed for a CAMA permit for construction of a pier, plaintiff William Flowers submitted written objections, the Division of Coastal Management issued the permit, plaintiff did not request a contested case hearing, and plaintiffs began this action 22 months later, alleging that defendant's pier encroaches the riparian boundary between plaintiffs' and defendant's property. The location of the boundary was settled as a part of the DCM permitting process; an administrative body with expertise in the subject matter of the action should be given the first opportunity to correct any errors and this policy has the status of a jurisdictional prerequisite when a party has effective administrative remedies. The superior court lacked subject matter jurisdiction to review the location of the boundary, which was the only material issue in the action, and therefore could not dismiss the complaint with prejudice under N.C.G.S. § 1A-1, Rule 12(b)(6).

Am Jur 2d, Waters §§ 86-95.

Appeal by plaintiffs from order entered 10 May 1993 by Judge Napoleon B. Barefoot in Craven County Superior Court. Heard in the Court of Appeals 14 April 1994.

Plaintiffs and defendant are property owners on the Upper Broad Creek which branches off the Neuse River in Craven County. Defendant operates a sailing club where members are permitted to moor their sailboats along the piers in front of defendant's property. Defendant originally had two piers, but the need arose for a third pier that would allow larger sailboats to moor in larger deep water slips. In November 1990 defendant filed an application for a Coastal Area

Management Act (CAMA) major development permit for construction of the third pier.

The Department of Environment Health and Natural Resources implements CAMA through the Coastal Resources Commission (CRC). Permitting decisions are delegated to the Division of Coastal Management (DCM). Plaintiff William Flowers submitted written objections to the DCM. After reviewing plaintiffs' objections, and comments from concerned agencies, DCM issued the permit to defendant. At that time plaintiffs did not request a contested case hearing concerning issuance of the permit. Twenty-two months after the permit was issued plaintiffs commenced an action for trespass in the superior court, alleging that defendant's pier encroaches over the riparian boundary between plaintiffs' and defendant's property. Defendant moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. The trial judge allowed the motion on both grounds and entered an order dismissing plaintiffs' claim with prejudice. From this order plaintiffs appeal.

Ward, Ward, Willey & Ward, by A.D. Ward, for plaintiff appellants.

Ward and Smith, P.A., by I. Clark Wright, Jr., for defendant appellee.

ARNOLD, Chief Judge.

The location of the riparian boundary line between plaintiffs' property and defendant's property is crucial in plaintiffs' trespass action. The location of that boundary was settled by the DCM as part of the permitting process. By asserting the present trespass action plaintiffs collaterally attack the DCM's decision and seek to have the superior court realign the riparian boundary in accordance with their alleged boundary line. Without that realignment no part of defendant's pier intrudes into plaintiffs' riparian access area, and consequently there is no trespass. We agree with the superior court that it lacked jurisdiction to define a new boundary line when plaintiffs did not exhaust their remedies before the Coastal Resources Commission.

Regulations governing permit application are designed to protect the public's right to use navigable waters, and this protection specifically extends to property owners adjacent to proposed development sites. Pursuant to those regulations applicants are required to attach

maps and workplat drawings of the proposed development along with proof that adjacent property owners received copies of the application for the proposed development. 15A N.C. Admin. Code § 07J.0203 and 15A N.C. Admin. Code § 07J.0204(b)(5). The record, which contains the DCM file, reflects defendant's compliance with these regulations. The record also reflects that plaintiffs received notice of the proposed development and were aware of the proposed riparian boundary line between the two riparian access areas.

15A N.C. Admin. Code § 07H.0208(b)(6)(E) provides detailed guidance on the manner in which the riparian boundary between two properties is established.

> The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge.

This method of determining riparian boundaries was expressly approved in *In re Mason*, 78 N.C. App. 16, 28, 337 S.E.2d 99, 106 (1985), *disc. review denied*, 315 N.C. 588, 341 S.E.2d 27 (1986). This regulation also provides that any development must be set back fifteen feet from the riparian boundary. *Id.* Following this method, defendant drew a perpendicular line from the center of Upper Broad Creek to the parties' common property line and drew in the proposed pier fifteen feet back from that line. A DCM field investigation report shows that defendant's plan complied with the set-back requirement to the DCM's satisfaction. The report provides:

> The proposed pier will be offset from [plaintiffs'] property line by at least 15' as the structure intersects the highground property. The applicant has, in the planning of the project, observed the CAMA 15' sideline setback requirement. This was determined by surveying a 90 [degree] angle from the center line of Upper Broad Creek . . . .

Based upon this report and the other application materials, the DCM approved defendant's plans, including the riparian boundary, and issued the permit. Plaintiffs were provided a copy of the permit which, on its face, informed them they had twenty days to appeal the decision. The permit also informed plaintiffs that work on the project would not begin until any appeal was resolved.

Appeal from the permitting decision by a third party is pursuant to N.C. Gen. Stat. § 113A-121.1(b) (1989) which provides that

> A person other than a permit applicant or the Secretary who is dissatisfied with a decision to deny or grant a minor or major development permit may file a petition for a contested case hearing only if the [Coastal Resources Commission] determines that a hearing is appropriate. A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made. A determination of the appropriateness of a contested case shall be made within 15 days after a request for a determination is received and shall be based on whether the person seeking to commence a contested case:
>
> (1) Has alleged that the decision is contrary to a statute or rule;
>
> (2) Is directly affected by the decision; and
>
> (3) Has a substantial likelihood of prevailing in a contested case.
>
> If the Commission determines a contested case is appropriate, the petition for a contested case shall be filed within 20 days after the Commission makes its determination. A determination that a person may not commence a contested case is a final agency decision and is subject to review under Article 4 of Chapter 150B of the General Statutes.

G.S. § 113A-123(a) then provides that any person directly affected by a decision or order of the Commission under this part may appeal to the superior court pursuant to the provisions of Chapter 150B. These statutes provided a direct and immediate route for plaintiffs to contest the location of the riparian boundary.

If a statute provides a means for superior court review, this is the exclusive means. *Snow v. North Carolina Bd. of Architecture*, 273 N.C. 559, 570-71, 160 S.E.2d 719, 727 (1968). So long as the statutory procedures provide effective judicial review of an agency action, courts will require a party to exhaust those remedies. *See Porter v. North Carolina Dept. of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44, *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). "This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions

or agencies particularly qualified for the purpose." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). The administrative body with expertise in the subject matter of the action should be given the first opportunity to correct any errors. *Id.* This policy of judicial restraint has the status of a jurisdictional prerequisite when a party has effective administrative remedies. *Id.* at 722, 260 S.E.2d at 615.

Plaintiffs had effective administrative remedies at their disposal but did not resort to them. A myriad of CAMA regulations apply to the construction of piers. If defendant did not comply with these regulations or if the DCM improperly issued the permit, G.S. §§ 113A-121.1 and 123(a) provide the appropriate recourse to the CRC and superior court. If defendant did not correctly define the riparian boundary pursuant to regulation, it was within the CRC's power to correct that error. The CRC possesses the necessary expertise to discover and correct any errors on this issue and should have been given the first opportunity to review the boundary pursuant to G.S. § 113A-121.1. Because plaintiffs failed to pursue their administrative remedies the superior court lacked subject matter jurisdiction to review the location of the boundary. Because the location of the boundary is the only material issue in plaintiffs' action, the action was properly dismissed for lack of subject matter jurisdiction.

Plaintiffs make an argument on the propriety of the DCM's decision to issue a permit to defendant. This argument is irrelevant to plaintiffs' trespass action, and it is also one which should have first been addressed to the CRC pursuant to G.S. 113A-121.1. We therefore do not consider this argument.

Plaintiffs finally argue that the superior court erred by dismissing their complaint with prejudice. Defendant agrees with plaintiffs that the superior court could not dismiss the complaint with prejudice under N.C.R. Civ. P. 12(b)(6) if the court lacked subject matter jurisdiction over plaintiffs' claim. Because we affirm the dismissal based on lack of subject matter jurisdiction we vacate that part of the judgment dismissing the complaint with prejudice.

Affirmed in part.

Vacated in part.

Judges GREENE and McCRODDEN concur.

WARREN DAUGHTRY EMPLOYEE, PLAINTIFF-APPELLANT v. METRIC CONSTRUCTION COMPANY, EMPLOYER AND AETNA INSURANCE DIVISION, CARRIER, DEFENDANTS-APPELLEES

No. 9310IC689

(Filed 21 June 1994)

Workers' Compensation § 235 (NCI4th)— ability to earn same or greater wage—no showing by temporary earnings and college degree

The Industrial Commission erred by finding that plaintiff laborer/welder was capable of earning $12.00 per hour, the same or greater wage than plaintiff was earning prior to his compensable knee injury, based upon evidence that plaintiff obtained a temporary job paying $12.00 per hour and that he had obtained a college degree in 1970 which he had never utilized where there was no evidence that other permanent jobs for which plaintiff is qualified are available, that such jobs would pay $12.00 per hour, or that plaintiff would be able to secure such a job.

Am Jur 2d, Workers' Compensation §§ 395-399.

Appeal by plaintiff from Opinion and Award entered 16 April 1993 by the Full Commission of the Industrial Commission. Heard in the Court of Appeals 11 March 1994.

Lore & McClearen, by R. Edwin McClearen, for plaintiff-appellant.

Ward and Smith, P. A., by William Joseph Austin, Jr., for defendants-appellees.

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: On 21 December 1986, plaintiff, Warren Daughtry, was employed by defendant-employer, Metric Construction Company (Metric), as a laborer/welder. On this date, while performing his duties of employment, and as plaintiff and several fellow employees were carrying a large, heavy pipe, plaintiff struck his left knee on a stanchion, twisting his knee. Plaintiff was then taken to a hospital in Plymouth and treated in the emergency room. Plaintiff was referred to an orthopaedic surgeon who performed surgery on his left knee on 10 February 1987. Plaintiff then filed a workers' compensation claim with the North

Carolina Industrial Commission. Metric admitted liability for the injury and agreed to compensate plaintiff for "necessary weeks." This agreement was approved by the Industrial Commission on 19 March 1987.

After a period of rehabilitation, plaintiff returned to work for Metric on 12 March 1987. After returning to work, plaintiff continued to experience frequent episodes of his knee slipping out of joint. Plaintiff's employment with Metric ended sometime in March of 1987.

After plaintiff's work with Metric ceased, he went to work for Temporary Employee Services/Hartford in May of 1988. Temporary Employee Services/Hartford is in the business of assigning workers to different sites for different employers on a temporary basis. On 20 May 1988, plaintiff was assigned to work at the Texas Gulf plant in Aurora, N.C., constructing a multi-bucket well-digger for a mine that goes down into the earth. As plaintiff was completing his duties on a catwalk, approximately sixty feet in the air, plaintiff stepped down on the grading and caught his foot on one of the extra brackets lying on the catwalk, which caused him to twist his left leg and once again pop his knee out of joint. Plaintiff then filed a claim for workers' compensation against Temporary Employee Services/Hartford. Additionally, plaintiff filed a motion for change of conditions pursuant to North Carolina General Statutes § 97-47 (1991) against Metric.

A disagreement arose between Metric and Temporary Employee Services/Hartford as to who was responsible for the medical coverage and disability benefits subsequent to the second alleged injury of 20 May 1988. In order to resolve this dispute, both claims against Metric and Temporary Employee Services/Hartford were joined for hearing on 19 October 1988 before Deputy Commissioner Richard B. Ford of the North Carolina Industrial Commission. On 25 October 1989, Deputy Commissioner Ford entered an Opinion and Award finding that plaintiff had suffered an injury by accident on 21 December 1986 and a second accidental injury on 20 May 1988. Liability and the cost of the action were split between Metric and Temporary Employee Services/Hartford.

Plaintiff appealed the order of Deputy Commissioner Ford to the Full Industrial Commission based upon a technical mistake in the provisions made for medical services on 14 November 1989. The Full Commission modified the medical entitlement of plaintiff and the case was affirmed.

On 9 October 1990, plaintiff requested a second hearing asking that rehabilitation services be provided by Metric since those services had been denied to plaintiff. Metric responded by saying that "based on the educational level of the employee and medical reports and records, defendants claim that employee could return to gainful employment on May 24, 1989." On 31 October 1990, plaintiff made a motion for reinstatement of rehabilitation services pursuant to North Carolina General Statutes § 97-25 (1991).

On 25 February 1991, a second hearing was held before Deputy Commissioner Jan N. Pittman. Temporary Employee Services/ Hartford did not participate since they had fully complied with the terms of the first Opinion and Award. On 10 July 1991, Deputy Commissioner Pittman filed an Opinion and Award finding, among other things, that plaintiff had periods of temporary total disability pursuant to North Carolina General Statutes § 97-29 (1991), a period of temporary partial disability pursuant to North Carolina General Statutes § 97-30 (1991) and assigned a 20% permanent partial disability rating pursuant to North Carolina General Statutes § 97-31(15) (1991).

Plaintiff gave notice of appeal to the Full Commission on 30 July 1991 from Deputy Commissioner Pittman's Opinion and Award, based primarily upon finding of fact four, which states in part that "[a]s of December 18, 1990, plaintiff was employable and capable of earning the same or greater wages than he was earning prior to the injury giving rise to this claim." On 16 April 1993, the Full Commission summarily affirmed and adopted Deputy Commissioner Pittman's Opinion and Award. From the Opinion and Award of the Full Commission, plaintiff gave notice of appeal to this Court.

Plaintiff first contends that the Industrial Commission erred by finding, as a matter of law and fact, that plaintiff was capable of earning $12.00 per hour, the same or greater wage than plaintiff was earning prior to the injury, after 18 December 1990, as this finding was improperly based on the speculation of future events and not supported by existing competent evidence of record.

At the outset, we note the standard of review of workers' compensation cases on appeal to this Court is whether there is any competent evidence in the record to support the Commission's findings of fact, and whether these findings support the conclusions of the Commission. *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 374 S.E.2d 483 (1988).

In order to obtain compensation under the Workers' Compensation Act, the claimant must prove the existence of a disability as well as its extent. *Hillard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). "Disability" is defined by North Carolina General Statutes § 97-2(9) (1991) as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." "To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986).

In *Kennedy v. Duke Medical Center*, 101 N.C. App. 24, 398 S.E.2d 677 (1990), this Court held that the claimant has the initial burden of proving that his wage-earning capacity has been impaired by injury. If the claimant presents substantial evidence that he is incapable of earning wages, the employer has the burden of producing evidence to rebut the claimant's evidence. *Id.* This requires the employer to establish that suitable jobs are available and that plaintiff is capable of getting one, taking into account his specific limitations. *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 368 S.E.2d 388, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). If the employer produces evidence that there are suitable jobs available which the claimant is capable of getting, the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establish that he has unsuccessfully sought the employment opportunities located by his employer. *Tyndall v. Walter Kiddie Co.*, 102 N.C. App. 726, 403 S.E.2d 548, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

In the case *sub judice*, there is no dispute as to whether plaintiff presented sufficient evidence that he was unable, as a result of injuries sustained in the course of his employment, to earn the same wages earned before the injury. Plaintiff, however, argues that defendant did not meet its burden of showing that suitable jobs were available for plaintiff and that plaintiff was capable of getting those jobs. Plaintiff contends that Metric's ability to find one job for plaintiff, which was temporary in nature, is not sufficient to support the conclusion that despite plaintiff's injury, plaintiff was capable of earning the same or greater wages as prior to plaintiff's injury.

In our review of the evidence, we do not find that there was ample competent evidence to support the Commission's finding that plaintiff was capable of earning $12.00 per hour. The only evidence which appears to support this finding of fact is plaintiff obtaining a temporary position paying $12.00 per hour. However, we do not find that defendant presented any evidence that other suitable jobs for which plaintiff was qualified were available. We find no evidence that any other positions for which plaintiff is qualified would pay $12.00 per hour or that plaintiff would be able to secure such a position. Nor do we find any evidence that plaintiff's ability to obtain a temporary position paying $12.00 per hour necessarily means that plaintiff when permanently employed would receive $12.00 per hour. Additionally, we note that we do not find the fact that plaintiff has a college education dispositive; a college degree from 1970, which plaintiff never utilized, we believe is not evidence of plaintiff's ability to earn the same or greater wages as before the injury. Thus, we vacate the Opinion and Award appealed from and remand this matter to the Industrial Commission for further findings and conclusions in accord with this opinion.

In light of this decision, we do not address plaintiff's other assignments of error.

Vacated and Remanded.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. FREDDIE ROBINSON, DEFENDANT

No. 9310SC902

(Filed 21 June 1994)

1. Evidence and Witnesses § 368 (NCI4th)— breaking or entering—previous incident—no conviction—course of conduct—admission erroneous but not prejudicial

There was no prejudicial error in a prosecution for feloniously breaking or entering a health club and possession of housebreaking tools where the trial court allowed the State to introduce the testimony of a salesperson at a store that defendant had entered the stockroom and office area and had stolen a

cash box, but had been acquitted because the arresting officer was not present when the case was tried. Since the probative value of the testimony to prove intent, common scheme, plan, *modus operandi* or absence of mistake directly depended on defendant in fact having committed the crime which the testimony related, the acquittal divests the evidence of probative value and its admission was error. However, given the other evidence, there was no reasonable possibility that a different result would have been reached had the testimony been excluded.

Am Jur 2d, Burglary § 63.

2. Burglary and Unlawful Breakings § 121 (NCI4th)— possession of housebreaking implements—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss the charge of felonious possession of implements of housebreaking where defendant was found inside a private office in a private establishment without permission, standing behind the owner's desk, in possession of a screwdriver and ice pick; the owner heard defendant shake the desk drawer; defendant tried to leave upon being discovered; and defendant gave conflicting statements as to his purpose in being there. Although the tools possessed by defendant were capable of legitimate use, a legitimate inference can be drawn that defendant possessed the screwdriver and ice pick for the purpose of breaking into the building. N.C.G.S. § 14-55.

Am Jur 2d, Burglary § 77.

3. Burglary and Unlawful Breakings § 167 (NCI4th)— felonious breaking or entering—non-felonious breaking or entering not submitted—no error

The trial court did not err in a felonious breaking or entering prosecution by not submitting non-felonious breaking or entering where defendant specially requested the trial court not to submit non-felonious breaking or entering as a lesser-included offense and where there was no evidence tending to show non-felonious breaking or entering.

Am Jur 2d, Burglary §§ 66 et seq.

Appeal by defendant from judgment entered 6 May 1993 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 13 April 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Deborah L. McSwain, for the State.

John T. Hall for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a jury verdict finding him guilty of felonious breaking or entering and possession of implements of housebreaking and from a judgment and commitment entered on the verdicts imposing an active term of imprisonment.

The evidence presented at defendant's trial tended to show that on Sunday, 8 March 1992, the owner of a health and fitness club in Raleigh found the door to his second floor office open and heard the sound of a desk drawer being shaken. Upon investigating, the owner found defendant standing behind the desk. Defendant was not a member of the club and did not have permission to be in the building or in the owner's office. Defendant told the owner he was looking for a job and tried to leave. The owner subdued him and found a screwdriver in defendant's pocket and an icepick in his waist band. The police were notified and when an officer arrived, defendant told the officer that he had had car trouble and had come into the building looking for tools. He later told the officer that his car was operational but that he had been working on the mirrors.

After a *voir dire* hearing, the State also offered the testimony of two witnesses who testified as to similar incidents involving defendant. Crystal Clayton, a store manager at a Greensboro shopping mall, testified that on 3 October 1991, defendant had entered the store's stockroom and tampered with the handle of the store's safe. When Ms. Clayton started towards the stockroom, defendant quickly left. The trial court admitted Ms. Clayton's testimony for the limited purpose of showing defendant's intent, a common plan or scheme, or the absence of mistake. Michelle Austin, a salesperson at a store in a Burlington shopping mall, testified that on 30 March 1989, defendant had entered the stockroom and office area of the store and had stolen a cash box. However, Ms. Austin testified that defendant was acquitted of the charge because the arresting police officer was not present in court when defendant's case was tried.

[1] Defendant first contends that he is entitled to a new trial because the admission of Ms. Austin's testimony unfairly prejudiced him by allowing the jury to consider evidence concerning a crime for which

defendant was acquitted. We agree that the admission of Ms. Austin's testimony was error, but not of such magnitude as to entitle defendant to a new trial.

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides:

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

The trial court admitted the testimony of Ms. Austin to show intent, plan or absence of mistake on the part of defendant. However, even if the evidence was relevant for one of the purposes enumerated in Rule 404(b), it must still be excluded, under Rule 403, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

The State argues that according to *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990), the decision "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court," and that the trial judge properly exercised his discretion. In admitting the testimony, the trial court stated that it had applied the balancing test of Rule 403 to the evidence and concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant. Ordinarily, such a determination is committed to the sound discretion of the trial judge, but the exercise of that discretion is reviewable and "[w]hen the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under the rule as a matter of law." *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992).

In *Scott*, the Supreme Court observed:

> The North Carolina Rules of Evidence must be interpreted and applied in light of this proposition: an acquittal and the undefeated presumption of innocence it signifies mean that, in law, defendant did not commit the crime charged. When the probative value of evidence of this other conduct depends upon the proposition that defendant committed the prior crime, his earlier

> acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403.

Id. at 44, 413 S.E.2d at 790. Thus, the court held:

> [E]vidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime. To admit such evidence violates, **as a matter of law**, Evidence Rule 403. (Emphasis added.)

Id. at 42, 413 S.E.2d at 788.

Since the probative value of Ms. Austin's testimony to prove intent, common scheme, plan, *modus operandi*, or absence of mistake directly depended on defendant in fact having committed the crime about which Ms. Austin testified, pursuant to *Scott*, we are compelled to find that defendant's "acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant." *Id.* at 41, 413 S.E.2d 788. Thus, we hold that the admission of Ms. Austin's testimony was error.

In spite, however, of our conclusion that the admission of Ms. Austin's testimony was error, the error was not so prejudicial as to warrant a new trial. Given the circumstances under which defendant was found in the private office, his self-contradictory and highly improbable explanations for his presence there, and the strikingly similar testimony of Ms. Clayton, to which defendant did not object, we do not believe that there was any reasonable possibility that, had Ms. Austin's testimony been excluded, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a).

[2] Defendant next assigns error to the denial of his motion to dismiss the charge of felonious possession of implements of housebreaking. We hold that the evidence was sufficient to submit the question of defendant's guilt of felonious possession of implements of housebreaking to the jury. In ruling upon a motion to dismiss in a criminal case, the trial court must determine whether there is substantial evidence to support a finding of the existence of each element of the offense charged and that the defendant committed it. *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986). "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). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975).

N.C. Gen. Stat. § 14-55 provides, in pertinent part:

> If any person . . . shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; . . . such person shall be punished as a Class H felon.

The necessary elements for conviction of the offense described in the above quoted provision are (1) the possession of an implement of housebreaking (2) without lawful excuse. *State v. Morgan*, 268 N.C. 214, 220, 150 S.E.2d 377, 382 (1966).

In the present case, defendant was found inside a private office in a private establishment without permission, standing behind the owner's desk, in possession of a screwdriver and an icepick. The owner heard defendant shake the desk drawer. Upon being discovered, defendant tried to leave. He gave conflicting statements as to his purpose in being there. Although the tools possessed by defendant were capable of legitimate use, under the circumstances shown by the State, a legitimate inference can be drawn that defendant possessed the screwdriver and icepick for the purpose of breaking into the building, so as to come within the proscription of N.C. Gen. Stat. § 14-55 as "other implements of housebreaking." *See State v. Lovelace*, 272 N.C. 496, 158 S.E.2d 624 (1968). Defendant's motion to dismiss was properly denied.

[3] Finally defendant contends that the trial court committed error by failing to instruct as to the lesser included offense of non-felonious breaking or entering. We disagree. The record reflects that at the conference on instructions, defendant specifically requested the trial court not to submit the offense of non-felonious breaking or entering as a lesser included offense. Thus, he is barred by N.C.R. App. P. 10(b)(2) from assigning as error the failure of the trial court to instruct the jury on the lesser included offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Defendant argues, however, that the failure to give the instruction was "plain error," reviewable under *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). We disagree.

"Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a charge of less degree . . . the court correctly refuses to charge on the unsupported lesser degree." *State v. Duboise*, 279 N.C. 73, 80, 181 S.E.2d 393, 397 (1971). In this case, there was no evidence tending to show the commission of non-felonious breaking or entering; rather the evidence showed clearly defendant's intent to commit larceny in the owner's office and that he was interrupted in the commission of his objective. The failure of the trial judge to submit the lesser included misdemeanor was not "plain error."

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges COZORT and ORR concur.

DONALD R. HOLLOWELL v. ROBERT EDWARD CARLISLE AND CHARLES EDWARD CARLISLE

No. 938SC618

(Filed 21 June 1994)

Process and Service § 54 (NCI4th)— dormant summons—extension of time to serve—excusable neglect—discretion of court

The trial court had the discretion, upon a showing of excusable neglect, to grant an extension of time under Rule 6(b) to serve a dormant summons where neither an endorsement nor an alias or pluries summons was issued within the 90-day period specified by Rule 4(e) but the original summons and complaint were served on defendant within the 90-day period. Therefore, where the trial court erroneously concluded that it had no authority to extend the time for service of the summons, the cause must be remanded to the trial court for a ruling on plaintiff's motion to extend the time for service of the original summons. N.C.G.S. § 1A-1, Rules 4(e) and 6(b).

Am Jur 2d, Process § 119.

HOLLOWELL v. CARLISLE

[115 N.C. App. 364 (1994)]

Appeal by plaintiff from order entered 31 March 1993 by Judge William C. Griffin, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 7 March 1994.

This case arises out of a civil action filed by plaintiff on 31 July 1992, alleging that the plaintiff was injured through the negligence of the defendant on 2 August 1989. The parties have stipulated that summons was duly issued on 31 July 1992, and that the complaint and original summons were served on the defendants by certified mail on some date between 7 October 1992 and 29 October 1992.

On 10 December 1992, the defendants filed a motion to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, pleading failure to state a claim for which relief can be granted and insufficiency of service of process in bar of plaintiff's action, in that summons expired on 30 August 1992 and that the defendants were not served until sometime in October 1992. Plaintiff filed a motion for extension of time for service of process on 8 March 1993 pursuant to Rule 6(b), alleging excusable neglect by the plaintiff's attorney.

On 15 March 1993, hearings were held on both plaintiff's and defendants' motions. The trial court found that the failure to complete proper service within thirty days of the issuance of the original summonses resulted from excusable neglect. The court further found that the summonses became dormant and unserveable when they were not served within the thirty-day period following their issuance, and that neither an endorsement nor an alias and pluries summons was issued within ninety days after the 31 July filing date of the original complaint and summonses.

By order filed 1 April 1993, the court denied the plaintiff's motion for extension of time, and granted the defendants' motion to dismiss. From this order, the plaintiff appeals.

Bailey & Dixon, by Gary S. Parsons, Patricia P. Kerner and Kenyann G. Brown; and George Lee Jenkins, for plaintiff-appellant.

Wallace, Morris, Barwick & Rochelle, P.A., by Thomas H. Morris and Elizabeth H. McCullough, for defendant-appellees.

ORR, Judge.

The central question is whether the trial court may, upon a showing of excusable neglect, grant an extension of time under these facts

to serve a dormant summons where no alias and pluries summons has been obtained. In the court below, the trial court concluded when neither an endorsement nor an alias and pluries summons was issued within ninety days of the original filing that the action was discontinued pursuant to Rule 4(e), and that the court had no authority to grant the plaintiff's motion for extension of time pursuant to Rule 6(b).

The plaintiff argues to the Court that *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 367 S.E.2d 655, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988), controls the outcome here. Conversely, the defendants contend that the plaintiff's failure to obtain an alias and pluries summons effectively discontinued the action as was the case in *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635 (1992).

Rule 4 of the North Carolina Rules of Civil Procedure sets forth the requirements for service of process. Under that rule, a summons must be served within thirty days of its issuance. N.C. Gen. Stat. § 1A-1, Rule 4(c) (1990). "A summons not served within 30 days loses its vitality and becomes *functus officio*, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. . . . However, although a summons not served within 30 days becomes dormant and unserveable, under Rule 4(c) it is not *invalidated nor is the action discontinued.*" *Dozier* at 75-6, 411 S.E.2d at 636 (emphasis added) (citation omitted). Rule 4(d) permits the action to be continued through an endorsement from the clerk or through the issuance of an alias or pluries summons. As is the case with the original summons, the alias or pluries summons "must be served within thirty days of issuance. Rule 4(e) provides that when there is neither an endorsement nor an alias or pluries summons issued, the action is discontinued as to any defendant who was *not served within the time allowed.*" *Lemons* at 275, 367 S.E.2d at 657 (emphasis added).

In *Lemons*, our Supreme Court examined the interplay between Rules 4(c) and 6(b) of the Rules of Civil Procedure. There, the plaintiff commenced an action against the defendant on 6 February 1986. A summons was also issued that day, but was not served. An alias summons was issued on 2 May of that year and was served on 5 June, more than thirty days after its issuance. On 13 October 1986, the plaintiff filed a motion for retroactive extension of time, *nunc pro tunc*, from 2 June until 6 June to serve the alias summons. The Court,

noting initially that the Rules of Civil Procedure were adopted "to eliminate the sporting element from litigation," *Lemons* at 274, 367 S.E.2d at 657 (citation omitted), held that Rule 4 must be construed in *para materia* with Rule 6(b), "which addresses the computation of any time period prescribed by the Rules of Civil Procedure." *Id.* at 275, 367 S.E.2d at 657. Rule 6(b) provides that:

> When by these rules . . . *an act* is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before expiration of the period originally prescribed or as extended by a previous order. Upon motion made *after the expiration of the specified period*, the judge *may permit the act to be done where the failure to act was the result of excusable neglect.*

N.C.G.S. § 1A-1, Rule 6(b); *Lemons* at 275-76, 367 S.E.2d at 657 (emphasis in original).

As a result of this language, the Court found that the General Assembly intended that a trial judge have within his discretionary powers the ability to "breathe new life and effectiveness into such a summons retroactively after it has become *functus officio*," excepting the time periods allowed for motions pursuant to Rule 50(b), Rule 52, Rule 59(b), (d), or (e), and Rule 60(b). *Lemons* at 274, 367 S.E.2d at 656. The *Lemons* Court then found that the Rule permitted an extension of time to serve a dormant summons and thus revive it where the alias summons was served on the defendant after the time for service of process under Rule 4(c) had expired.

By contrast, in *Dozier*, the plaintiff filed an action on 15 March 1990, alleging personal injuries on 19 March 1987. On 15 June 1990, an alias and pluries summons was *issued*, ninety-two days after the original summons. The defendant accepted service on 20 August 1990, over sixty days later, and filed a motion for judgment on the pleadings asserting the three-year statute of limitations. The plaintiff moved pursuant to Rule 6 to extend the period for issuance of the alias and pluries summons. This Court held that *Lemons* was distinguishable from the case before it in that Rule 6(b) does not allow a party to continue an action beyond the ninety-day period specified in Rule 4(e). The court agreed that *Lemons* held that a court may permit an extension of time to *serve* a dormant summons and thus revive it, but that the discretion allowed by *Lemons* did not apply where the defendant was not served within the time allowed by Rule 4(e).

Here, the parties have stipulated that the defendant was indeed served with the original summons and complaint sometime between sixty-eight and ninety days after the issuance of the summons on 31 July 1992, unlike the defendant in *Dozier*, who was served some five months after the original complaint was filed in March with an alias summons that was issued outside the ninety-day time period required by Rule 4(e). Under *Lemons*, the trial court may allow an extension of time to serve a *dormant* summons and complaint upon a showing of excusable neglect, but may not circumvent the express language of Rule 4(e), which *discontinues* an action after ninety days as to any defendant not served. We have determined that *Lemons* controls the facts of this case. Since the defendant in the case *sub judice* was served with a *dormant* summons within the 90-day limit, rather than notice of a *discontinued action*, the trial court had the authority pursuant to the language of Rule 6(b) to extend the time for service of process under Rule 4(c), "to permit the act to be done where the failure to do the act was the result of excusable neglect."

We therefore conclude that the trial court, while not required to exercise its discretion, has mistakenly concluded that it had no authority to extend the time for service of the complaint. Pursuant to *Lemons*, we accordingly reverse and remand to the trial court for a ruling on plaintiff's motion to extend time for service of the original summons.

Reversed and remanded.

Judges WELLS and WYNN concur.

ERIC L. WIGGINS, PLAINTIFF v. TRIESLER COMPANY, INC. D/B/A COVERALL OF CHARLOTTE, INC., DEFENDANT

No. 9326DC867

(Filed 21 June 1994)

1. Appeal and Error § 418 (NCI4th)— no assignments of error or arguments—appeal abandoned

Plaintiff's appeal was deemed abandoned where he failed to provide any assignments of error for review and present those in his brief. N.C.R. App. P. 10(a).

Am Jur 2d, Appeal and Error §§ 693-696.

2. Unfair Competition or Trade Practices § 65 (NCI4th)—business opportunity sales—prohibited acts—findings

A district court ruling that defendant had violated the provisions of N.C.G.S. § 66-98 in the sale of a janitorial franchise by failing to provide required information was remanded for entry of findings on the evidence offered at trial because the court did not make any mention of representations made by defendant to plaintiff of the franchise's income or earning potential or defendant's failure to disclose to plaintiff data substantiating those claims. A recitation of all evidentiary facts is not required by N.C.G.S. § 1A-1, Rule 52(a), but specific findings on the ultimate facts established by the evidence which are determinative of the issues and essential to the conclusions are required.

Am Jur 2d, Private Franchise Contracts §§ 304 et seq.

Appeal by defendant from order entered 15 March 1993 by Judge Phillip F. Howerton in Mecklenburg County District Court. Heard in the Court of Appeals 21 April 1994.

In January 1990, plaintiff read the following advertisement in The Charlotte Observer:

> JANITORIAL BUSINESS BE YOUR OWN BOSS: Choose from a $500-4167/mo. income packages. We provide you with completely guaranteed accounts in your area. You can start your business part time or full time with as low as $1700 down. This is a turn-key program with no guesswork that starts generating an income immediately. We have put over 1000 people in their own business. Call . . . COVERALL

On 19 January 1990, plaintiff met with defendant's representative to discuss the purchase of a franchise offered by defendant. At that time, plaintiff received a copy of defendant's Disclosure Statement.

On 9 February 1990, plaintiff entered into a Janitorial Franchise Agreement (hereinafter the Agreement) with defendant. The Agreement required defendant to provide plaintiff with training in commercial cleaning, equipment, and customer cleaning accounts that would generate gross billings of $4167 per month. Plaintiff paid defendant a franchise fee of $10,500 and executed a promissory note in the principal amount of $4500.

Beginning 9 February 1990, defendant provided various cleaning accounts to plaintiff. Plaintiff was responsible for supplying janitorial cleaning services to those accounts. During the period of time which plaintiff was a franchisee of defendant, several of the representatives of the cleaning accounts provided to him complained to defendant about the quality of his janitorial cleaning services. Three account representatives wrote letters to defendant requesting that it remove plaintiff from those particular accounts and replace him with another franchisee. Defendant complied with the representatives' requests and removed plaintiff from those accounts.

On 1 November 1990, plaintiff notified defendant that he wanted to rescind the Agreement and receive a refund of all amounts he had paid to defendant. Plaintiff, however, continued to accept cleaning accounts which defendant offered him to replace accounts lost by plaintiff. Defendant terminated the plaintiff's franchise on 1 May 1991. At the time of termination, plaintiff owed defendant $39.63 on the outstanding promissory note.

On 10 December 1990, plaintiff filed suit against defendant alleging defendant had violated various provisions of the North Carolina Business Opportunity Sales Act, Chapter 66, Article 19 of the North Carolina General Statutes. Defendant subsequently answered and filed a counterclaim against plaintiff, alleging breach of contract and seeking money damages. At the close of plaintiff's evidence, the trial judge, sitting without a jury, allowed defendant's motion under N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990) and dismissed plaintiff's claim for relief under N.C. Gen. Stat. § 66-100(a) (1992). The trial court subsequently ruled that defendant had violated the provisions of N.C. Gen. Stat. § 66-98(1), but denied recovery to plaintiff on the ground that he failed to prove any damages. The court further ruled that plaintiff had breached his agreement with defendant, but only allowed defendant to recover damages equal to the balance remaining on plaintiff's promissory note. Defendant and plaintiff each filed notice of appeal.

Eric L. Wiggins, plaintiff appellee, pro se.

William T. Sharpe, P.A., by William T. Sharpe, for defendant appellant.

ARNOLD, Chief Judge.

[1] Although plaintiff filed a timely notice of appeal, he failed to provide any assignments of error for review and present those arguments in his brief. Because this Court's scope of review on appeal is

limited to a consideration of those assignments of error set out in the record on appeal, plaintiff's appeal is deemed abandoned. N.C.R. App. P. 10(a) (1994); *see also* N.C.R. App. P. 28 (1994).

[2] Defendant's first assignment of error is that the trial court erred in ruling defendant violated the provisions of G.S. § 66-98 entitled "Prohibited acts." G.S. § 66-98 provides, in part, the following:

> Business opportunity sellers shall not:
>
> (1) Represent that the business opportunity provides income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earning potential and discloses this data to the prospective purchaser at the time such representations are made . . . .

G.S. § 66-98(1). In his complaint, plaintiff alleged violations of this and one other statutory provision, N.C. Gen. Stat. § 66-95(10), which require disclosure of certain information by the franchisor. After the trial court had dismissed plaintiff's claim that defendant violated G.S. § 66-95(10), and defendant had begun to put on evidence regarding its counterclaim, plaintiff made a motion for the court to review its ruling under Rule 41(b). Plaintiff informed the court that it had not ruled on the G.S. § 66-98(1) violation alleged in his complaint. Over defendant's objection, the court allowed plaintiff's motion, concluding in its order that "[t]he Defendant violated the provisions of N.C. Gen. Stat. § 66-98(1) by failing to provide the information required by the statute in the Disclosure Statement." However, the court nevertheless concluded that plaintiff failed to show damages and was not entitled to anything under N.C. Gen. Stat. § 66-100(b). Defendant contends, *inter alia*, that the trial court made no specific finding of fact to support its conclusion of law. We agree.

In order to determine whether defendant violated G.S. § 66-98(1), the court first had to find that defendant represented to plaintiff that the janitorial franchise offered "provides income or earning potential of any kind," and second, that defendant failed to disclose documented data substantiating its claims of income or earning potential. We hold the trial court erred by failing to make such findings.

When an action is tried upon the facts without a jury, the court is required to make findings of fact and conclusions of law. N.C. Gen. Stat. § 1A-1, Rule 52(a) (1990); *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985). Findings of fact made by the trial judge must be "sufficiently specific to enable an appellate court to

review the decision and test the correctness of the judgment." *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 65 N.C. App. 242, 249, 310 S.E.2d 33, 37 (1983), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L. Ed. 2d 69 (1984) (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)). Rule 52(a)(1) does not require a recitation of all evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, which are determinative of the issues involved in the action and essential to support the conclusions of law reached. *Id.*

In the case at bar, not only were the ultimate facts relevant to a violation of G.S. § 66-98(1) not specific, but they were absent. Nowhere in its ten findings of fact did the court make any mention of representations made by defendant to plaintiff of the franchise's income or earning potential, or defendant's failure to disclose to plaintiff data substantiating those claims. Such findings are necessary to a valid judgment in this action. By failing to make findings of fact as to whether defendant made representations of income or earning potential and whether it further failed to disclose information substantiating those representations, meaningful appellate review is not possible. *See Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980).

We have reviewed defendant's remaining assignments of error and find no error. We remand for the entry of findings solely on the evidence offered at the trial.

Vacated and remanded.

Judges GREENE and McCRODDEN concur.

DANA M. CROSSMAN, APPELLANT/PLAINTIFF v. VAN DOLAN MOORE; AND VAN DOLAN MOORE II, INDIVIDUALLY, APPELLEES/DEFENDANTS

No. 9326SC907

(Filed 21 June 1994)

Limitations, Repose, and Laches § 150 (NCI4th)— misidentified party—amendment of complaint—relation back—statute of limitations

The trial court correctly refused to allow an amendment to a complaint adding a party to relate back where plaintiff was

injured in an automobile accident; the driver of defendants' car was Van Dolan Moore II, the seventeen-year-old son of Van Dolan Moore; the accident report identified Moore as the driver, listed Moore II's driver's license number, and clearly showed that the driver was barely seventeen years old; plaintiff filed an action based in negligence against Van Dolan Moore and the Dolan Moore Company, the owner of the van; plaintiff subsequently moved to amend her complaint to add Moore II as a party defendant; and the trial court allowed Moore's motion for summary judgment, allowed plaintiff to amend her complaint to add Moore II as a defendant, and refused to allow relation back of the amendment. The third factor of the *Schiavone* test (adopted in *Ring Drug Co. v. Carolina Medicorp Enterprises*, 96 N.C. App. 277) for interpreting Rule 15(c) was not met in that Moore II could not have had notice prior to the expiration of the statute of limitations. Although the Federal Rule 15(c) was revised to change the result in *Schiavone*, the North Carolina Rule 15(c) has not been amended; furthermore, a subsequent panel of the Court of Appeals is bound by the decision of another panel on the same issue until it has been overturned by the N.C. Supreme Court.

Am Jur 2d, Limitation of Actions §§ 232 et seq.

Appeal by plaintiff from order entered 1 July 1993 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 May 1994.

This appeal questions our current interpretation of Rule 15(c) of the Rules of Civil Procedure. More specifically, it deals with the criterion to be applied when a party has misidentified a party-defendant and then seeks to correct that mistake by adding a new party after the expiration of the statute of limitations.

This case arose from a 25 January 1989 automobile accident in which plaintiff was injured. Three years later, on 24 January 1992, plaintiff filed an action based in negligence against Van Dolan Moore (Moore) and the Dolan Moore Company (DMC). Unbeknownst to plaintiff, the actual driver had been Moore's seventeen year old son, Van Dolan Moore II (Moore II). The accident report, though identifying Moore as the driver, listed Moore II's driver's license number. In her complaint, plaintiff named Moore as the operator of both DMC and the responsible automobile, though the accident report clearly showed that the driver was barely seventeen years old.

Moore answered the complaint and denied most of plaintiff's allegations. On 28 January 1993, Moore moved for summary judgment. In support of his motion, he submitted several affidavits. In his own affidavit, Moore stated that the driver of the automobile had been his son, Moore II, but that, prior to speaking with an attorney in October of 1992, Moore believed he was the proper defendant based on DMC's ownership of the automobile, and the fact that he, or his business, insured it. He added that he sent the complaint to his insurer soon after receiving it without retaining a copy, and that Moore II had not read the complaint. Moore II's affidavit revealed that he did not sign the return receipts for the summons and complaint, nor did he receive or read a copy of either. Like his father, Moore II believed plaintiff had sued Moore because DMC owned the automobile involved in the accident and did not know until October of 1992 that he was the proper defendant.

Plaintiff moved to amend her complaint to add Moore II as a party-defendant. She also sought a ruling that the amendment would relate back to the filing of the original complaint, thereby avoiding a statute of limitations defense. The trial court allowed Moore's motion for summary judgment. It also allowed plaintiff to amend her complaint and add Moore II as a defendant. The court refused, however, to allow relation back of the amendment. In doing so, it found that Moore II "neither knew or should have known within the prescribed limitations period that, but for a mistake concerning identity, the plaintiff's action would have been brought against him." From that portion of the order denying relation back of the amendment, plaintiff appeals.

Wishart, Norris, Henninger & Pittman, P.A., by William H. Elam and Daniel C. Marks, for plaintiff appellant.

Kennedy Covington Lobdell & Hickman, by F. Fincher Jarrell, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff contends the trial court erred in refusing to allow relation back of the amended complaint. Rule 15(c), which provides when an amended pleading will relate back, reads as follows:

> (c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occur-

> rences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990). Admittedly, the language of the Rule provides very little help in deciding its application in misidentification cases. Case law, however, does supply some necessary guidance.

In *Schiavone v. Fortune*, involving a similar problem, the United States Supreme Court was called upon to interpret Federal Rule 15(c). *Schiavone v. Fortune*, 477 U.S. 21, 91 L. Ed. 2d 18 (1986). In its analysis, the Court set forth a four factor test to determine when an amended pleading adding a party-defendant after the expiration of the statute of limitations would relate back. *Id.* Under the test, an amended pleading will relate back when:

> 1. the basic claim arises out of the conduct set forth in the original pleading,
>
> 2. the party to be brought in receives such notice that it will not be prejudiced in maintaining its defense,
>
> 3. the party knows or should have known that, but for a mistake concerning identity, the action would have been brought against it, and
>
> 4. the second and third requirements are fulfilled within the prescribed limitations period.

Id. at 29, 91 L. Ed. 2d at 27. The plaintiff in *Schiavone* argued that the prescribed limitations period, a key factor in the test, meant the time allowed by Rule 4 for service of process. The Supreme Court disagreed, stating that "[w]e are not inclined . . . to temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint." *Id.* at 30, 91 L. Ed. 2d at 28.

In 1989, this Court adopted *Schiavone's* four factor test, as well as the Court's determination that the relevant period was the statute of limitations. *Ring Drug Co. v. Carolina Medicorp Enterprises*, 96 N.C. App. 277, 385 S.E.2d 801 (1989); *see also Stevens v. Nimocks*, 82 N.C. App. 350, 346 S.E.2d 180, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986) (utilizing the test without formal adoption). Many, however, strongly criticized *Schiavone*, viewing it as an unwarranted construction contrary to the liberalized pleading policy of Rule 8. Diane

S. Kaplan and Kimberly L. Craft, *Time Warps and Identity Crises: Muddling Through the Misnomer/Misidentification Mess*, 26 J. Marshall L. Rev. 257, 289-290 n. 164 (1993); *see also* Note, *Schiavone v. Fortune: Notice Becomes a Threshold Requirement for Relation Back under Federal Rule* 15(c), 65 N.C.L. Rev. 598 (1987) (arguing that *Schiavone* creates a double standard for defendants). As a result of these and similar criticisms, Congress revised Federal Rule 15(c) in 1991 to change the result in *Schiavone*. As amended, Federal Rule 15(c) requires that the newly named defendant receive notice or become aware of the misidentification within the prescribed period for service of process under Rule 4(m). Fed. R. Civ. P. 15(c)(3).

Plaintiff argues that, because we adopted the federal interpretation of Rule 15(c) created in 1986, we must now adopt the changes made in 1991 and overrule our decision in *Ring Drug*. While we recognize that *Schiavone*, and thus *Ring Drug*, represent a strict construction of Rule 15(c) that should be reexamined, we are not in a position to change Rule 15(c), nor may we overrule *Ring Drug*. In fact, while Federal Rule 15(c) has been amended, our version of Rule 15(c) remains unchanged and it is not a function of this Court to legislate. Furthermore, a subsequent panel of this Court is bound by the decision of another panel on the same issue until it has been overturned by our Supreme Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). *Ring Drug* remains good law. As a result, any changes must come from either the Legislature or the Supreme Court and, at this time, we are bound by our decision in *Ring Drug*.

Applying the test to the facts of this case, we affirm the trial court's order. The third factor, requiring that the party knew or should have known that, but for a mistake concerning identity, the action would have brought against him, all within the period prescribed by law, is not met. Moore was served in April of 1992, three and a half months after the expiration of the statute of limitations. Clearly, Moore II could not have notice prior to the expiration of the statute of limitations.

Accordingly, the order of the trial court is

Affirmed.

Judges GREENE and McCRODDEN concur.

LOIS UPCHURCH JEFFREYS AND JOSEPH RANDOLPH JEFFREYS, PLAINTIFFS v. RALEIGH OAKS JOINT VENTURE, RALEIGH OAKS SHOPPING CENTER, INC., A TENNESSEE CORPORATION; SEYMOUR VOGEL, SYSON GROUP, INC., W.R. HENDERSON & ASSOCIATES, INC., A NORTH CAROLINA CORPORATION, W.R. HENDERSON, VERNON BROWN, RALEIGH OAKS LIMITED, A NORTH CAROLINA PARTNERSHIP, AND FLEET NATIONAL BANK, DEFENDANTS

No. 9310SC431

(Filed 21 June 1994)

Appeal and Error § 119 (NCI4th)— action on lease payments—partial summary judgment—appeal interlocutory

Defendants' appeal was dismissed as interlocutory where a dispute arose concerning lease payments, defendant ROJV asserted counterclaims, summary judgment was allowed for plaintiffs on those counterclaims, and the sole issue on appeal was whether the court erred in granting plaintiffs' summary judgment motion. The trial court made no certification as required by N.C.G.S. § 1A-1, Rule 54(b), and ROJV presented neither argument nor citation to show that it had the right to appeal the dismissal. It is not the duty of the Court of Appeals to construct arguments for or to find support for appellants' right to appeal.

Am Jur 2d, Appeal and Error § 104.

Appeal by defendants from order entered 14 December 1992 by Judge F. Gordon Battle in Wake County Superior Court. Heard in the Court of Appeals 4 February 1994.

This action arises out of an alleged lease agreement between plaintiffs and Defendants Henderson and W.R. Henderson & Associates, Inc. ("WRH&A") wherein Henderson and WRH&A allegedly agreed to lease seventeen acres of real property from plaintiffs for a period of ninety-nine years. The lease agreement was allegedly entered into on 19 September 1986, and the lease was entitled "Option for Ground Lease." Subsequently the parties amended the "Option for Ground Lease" by letter dated 26 October 1987. Thereafter, on 13 December 1988, plaintiffs and Defendant Vogel signed a document entitled "Option for Ground Lease" which contained the terms of the lease amendment that related to an "option" to lease nine of the seventeen acres of the property.

On 14 December 1988, Henderson and WRH&A purported to assign their interest in the 19 September 1986 lease to Raleigh Oaks

Joint Venture ("ROJV"), a Tennessee joint venture between Raleigh Oaks Shopping Center ("ROSC") and Vogel. ROJV obtained financing from Defendant Fleet National Bank to construct a shopping center on the front eight acres of the property leased by ROJV pursuant to the assignment, which shopping center ROJV constructed.

Plaintiffs filed this action against defendants alleging claims for breach of contract and fraud based on the allegations that defendants had failed to fulfill their obligations under the "Option for Ground Lease" as amended, the original "Option for Ground Lease," and the "Option for Ground Lease" pertaining to the option to lease nine of the seventeen acres by failing to pay rent due on the property. Defendants ROJV, ROSC, Memphis General Shopping Centers, Inc., Seymour Vogel, Syson Group, Inc., Vernon Brown, and Raleigh Oaks Limited filed an answer denying plaintiffs' allegations.

Further, Defendant ROJV asserted counterclaims against plaintiffs for slander of title, malicious interference of contract, fraud, and negligent misrepresentation. In support of its counterclaims, ROJV alleged that plaintiffs incorrectly informed Fleet that ROJV was in default on their payments under the lease causing diminution of ROJV's credit rating and ROJV's loss of possession of the shopping center.

Subsequently, ROJV filed a motion for partial summary judgment as to plaintiffs' claims against ROJV, and plaintiffs also moved for summary judgment as to all of ROJV's counterclaims against plaintiffs. On 14 December 1992, Judge F. Gordon Battle entered an order denying ROJV's motion for summary judgment as to plaintiffs' claim for breach of contract by ROJV, allowing ROJV's summary judgment motion as to plaintiffs' claim of fraud by ROJV, and allowing plaintiffs' motion for summary judgment as to each of ROJV's counterclaims against plaintiffs. The trial court left plaintiffs' claim for breach of contract for trial. From this order, Defendants Seymour Vogel, Memphis General Shopping Centers, and ROJV appeal.

McMillan, Kimzey & Smith, by James M. Kimzey and Katherine E. Jean, for plaintiff-appellees.

Howard, From, Stallings & Hutson, P.A., by John N. Hutson, Jr., for defendant-appellant.

ORR, Judge.

The sole issue before this Court is whether the trial court erred in granting plaintiffs' summary judgment motion as to ROJV's coun-

terclaims against plaintiffs. We need not address this issue, however, as this appeal is interlocutory and ROJV has failed to show this Court that a substantial right of ROJV's will be affected if ROJV is not given the right of immediate appeal from this order.

ROJV is appealing from the grant of partial summary judgment dismissing its counterclaims against plaintiffs. "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985).

"Nonetheless, in two instances a party is permitted to appeal interlocutory orders . . . ." *Liggett Group Inc.*, 113 N.C. App. at 23, 437 S.E.2d at 677 (emphasis by underline added). First, a party is permitted to appeal from an interlocutory order when the trial court enters "a final judgment as to one or more but fewer than all of the claims or parties" and the trial court certifies in the judgment that there is no just reason to delay the appeal. N.C.R. Civ. P. 54(b); *Liggett Group Inc.*, 113 N.C. App. at 23, 437 S.E.2d at 677. Second, a party is permitted to appeal from an interlocutory order when "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988); N.C. Gen. Stat. § 1-277. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Because the trial court in the case *sub judice* made no certification as required by Rule 54(b) of the North Carolina Rules of Civil Procedure, the first avenue of appeal is closed to ROJV. *See Liggett Group, Inc.*, 113 N.C. App. at 24, 437 S.E.2d at 677. ROJV did not, therefore, have a right to appeal the order in this case unless the order affected a substantial right that would work injury to ROJV if not corrected before appeal from final judgment. *Goldston v.*

American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). ROJV has failed, however, to make such a showing to this Court.

ROJV presented neither argument nor citation to show this Court that ROJV had the right to appeal the order dismissing its counterclaims. 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. *See GLYK and Associates v. Winston-Salem Southbound Railway Co.*, 55 N.C. App. 165, 170-71, 285 S.E.2d 277, 280 (1981) (wherein this Court stated that the question of whether it should entertain an appeal from an interlocutory order "depend[ed] upon whether [the appellant] has shown that it was deprived of any substantial right" and dismissed the appeal upon finding that the appellant "failed to show that the [interlocutory order] deprived it of any substantial right"); *See also Godley Auction Co., Inc. v. Myers*, 40 N.C. App. 570, 574, 253 S.E.2d 362, 365 (1979) (dismissing appeal from interlocutory order when appellant "*failed to show*" "that the trial court's interlocutory order '[would] work an injury to him if not corrected before an appeal from the final judgment.' ") (emphasis added); *See generally Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991) ("In civil cases, '[t]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.' "); *Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 791 (1992) (appellant has the burden of showing error). Accordingly, we dismiss ROJV's appeal.

Further, Defendants Seymour Vogel and Memphis General Shopping Centers failed to file a brief with this Court. Appellate review is limited to questions presented to the reviewing court by briefs in accordance with the Rules of Appellate Procedure. *See* N.C.R. App. P. 28(a). Accordingly, we dismiss the appeal of these defendants.

Dismissed.

Judges COZORT and GREENE concur.

CRAIGHEAD v. CARROLS CORP.

[115 N.C. App. 381 (1994)]

ANN WHIPKEY CRAIGHEAD AND HUSBAND, RUSSELL CRAIGHEAD, PLAINTIFFS v. CARROLS CORPORATION, INC., DEFENDANT

No. 9314SC655

(Filed 21 June 1994)

Judgments § 115 (NCI4th)— offer of judgment—costs—ambiguity

Defendant's offer of judgment was remanded for entry of an order for $45,001.00 plus remaining costs as determined by the trial court where the offer was for "$45,001.00 together with costs accrued as of the date hereof." The phrase "together with costs accrued" is ambiguous as to whether the "costs accrued" are included in the $45,001.00 figure or whether the costs are left to be separately determined by the court. Any ambiguity in the offer must be construed against the drafter.

Am Jur 2d, Judgments §§ 1080 et seq.

Appeal by plaintiffs from order entered 30 March 1993 by Judge Robert L. Farmer in Durham County Superior Court. Heard in the Court of Appeals 9 March 1994.

Clayton, Myrick, McClanahan & Coulter, by Robert D. McClanahan, for plaintiffs-appellants.

Newsom, Graham, Hedrick, Kennon & Cheek, P.A., by Joel M. Craig, for defendant-appellee.

WYNN, Judge.

The question in this case is whether defendant's offer of judgment included all costs such as prejudgment interest or whether the offer left the amount of costs to be determined by the trial court. This Court has previously addressed this issue in *Harward v. Smith*, 114 N.C. App. 263, 441 S.E.2d 313 (1994) and *Aikens v. Ludlum*, 113 N.C. App. 823, 440 S.E.2d 319 (1994).

This action arose out of injuries plaintiff sustained when she bit down on a piece of metal in a chicken sandwich she purchased at defendant's restaurant. Defendant's insurance carrier made a settlement offer and plaintiffs' counsel requested the offer be put in the form of an offer of judgment, as provided by N.C. Gen. Stat. § 1A-1, Rule 68, in order to provide an incentive for plaintiffs to accept the offer. Subsequently, on 4 February 1992, defendant served upon

plaintiffs an offer of judgment which stated that defendant "pursuant to Rule 68 of the Rules of Civil Procedure offers to allow Plaintiffs to take judgment against this Defendant in the sum of $45,001.00 together with costs accrued as of the date hereof." Plaintiffs accepted this offer and a judgment to that effect was entered by the clerk of superior court. Plaintiffs then made a motion to tax costs against defendant and asked for the filing fee, deposition expenses, and interest at the legal rate from 1 October 1990, the date the complaint was filed, until the judgment was satisfied. The trial court granted plaintiffs' motion as to the filing fee but denied it with respect to the deposition expenses and interest. From the denial of their motion to tax interest against defendant, plaintiffs appeal.

In *Aikens v. Ludlum* this Court held that lump sum offers of judgment are permissible, but that the defendant making the offer bears the responsibility of making "sure that he has used language which conveys that he is making a lump sum offer." *Aikens*, 113 N.C. App. at 826, 440 S.E.2d at 321. The defendant's offer of judgment in *Aikens* provided:

> Defendants, pursuant to G.S. § 1A-1, Rule 68, more than ten days before trial, offers [sic] to allow judgment to be taken against them in this action in the amount of $10,001.00 for all damages and attorneys' fees taxable as costs, together with the remaining costs accrued at the time this offer is filed.

Id. at 824, 440 S.E.2d at 320 (emphasis in original).

This Court concluded that the phrase "together with the remaining costs accrued at the time this offer is filed" created an ambiguity as to whether the offer of judgment was intended to include costs. The defendant who makes an offer of judgment has three options:

> 1) to specify the amount of the judgment and the amount of costs, 2) to specify the amount of the judgment and leave the amount of costs open to be determined by the court, or 3) to make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs.

Id. at 825, 440 S.E.2d at 321. In *Aikens*, since the language of the offer was ambiguous as to costs, this ambiguity was interpreted against the drafter and this Court concluded the offer of $10,001.00 included the plaintiff's damages and attorney's fees, but did not include the remaining costs accrued such as interest. *Id.* at 826-7, 440 S.E.2d at 322.

In *Harward v. Smith*, this Court held that the defendant's offer of judgment was not ambiguous and provided that the lump sum payment covered the plaintiff's damages, attorney's fees, and costs. The defendant's offer of judgment read:

> Defendant, pursuant to G.S. § 1A-1, Rule 68, more than ten days before trial, offers to allow judgment to be taken against her in this action in the lump sum amount of $7,001.00 for all damages, attorneys' fees taxable as costs, and the remaining costs accrued at the time this offer is filed. This offer is made for the purposes set out in G.S. § 1A-1, Rule 68(a), and for no other purpose.

Harward, 114 N.C. App. at 263-4, 441 S.E.2d at 313.

This Court in *Harward* concluded that "[t]his language evinces an unmistakable intent that the $7,001.00 lump sum be payment not only for plaintiff's damages, but for her attorney's fees and the costs accrued at the time the Offer of Judgment was filed." *Id.* at 265, 441 S.E.2d at 314. The Court held that the plaintiff was not entitled to any additional attorney's fees or costs of the action such as prejudgment interest. *Id.*

In the instant case, defendant's offer of judgment provided:

> NOW COMES Defendant, CARROLS CORPORATION, by and through its attorneys, Newsom, Graham, Hedrick, Kennon & Cheek, P.A., and pursuant to Rule 68 of the Rules of Civil Procedure offers to allow Plaintiffs to take judgment against this Defendant in the sum of $45,001.00 together with costs accrued as of the date hereof.
>
> This offer is made more than ten days before the commencement of trial and shall be deemed withdrawn if not accepted within ten days after service.

We conclude that, as in *Aikens*, the phrase "together with costs accrued" is ambiguous as to whether the "costs accrued" are included in the $45,001.00 figure or whether the costs are left to be separately determined by the court. *See Aikens*, 113 N.C. App. at 826, 440 S.E.2d at 321. Any ambiguity in the offer must be construed against the drafter. *Id.* at 826-7, 440 S.E.2d at 322; *see also Hicks v. Albertson*, 284 N.C. 236, 241, 200 S.E.2d 40, 43 (1973) ("If this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and

the defendant must bear any loss resulting therefrom."). Therefore, we affirm the judgment of the trial court, but based upon our conclusion that a lump sum offer was not intended we remand to the trial court for entry of an order for $45,001.00 plus those remaining costs accrued, such as interest, as determined by the trial court.

Affirmed and remanded.

Judges WELLS and ORR concur.

STEVE WILSON v. CLAUDE J. WELCH BUILDERS CORPORATION, AND/OR VICTOR K. "VIC" SANDERS, T/A VIC SANDERS PAINTING, AETNA CASUALTY AND SURETY COMPANY, AND/OR SELECTIVE INSURANCE COMPANY

No. 9310IC916

(Filed 21 June 1994)

Workers' Compensation § 327 (NCI4th)— insurance—cancellation—notice—evidence of receipt

The Industrial Commission erred in a workers' compensation action by finding that an insured did not have notice of cancellation of the workers' compensation policy where the evidence supports a finding that the notice of intent to cancel was received by the insured at least ten days prior to the date of cancellation, 11 September 1989. The notice was mailed from the insurance company offices in New Jersey on 25 August 1989 to both the insured and the agent, the agent received the notice on 27 or 28 August, the letter to the insured was sent by certified mail, properly addressed, postage prepaid, and, although there was some evidence that the insured did not personally receive the letter, there was no evidence that the insured's secretary, whose duties included handling the mail, did not receive the letter. The inference created by the prima facie case is not rebutted.

Am Jur 2d, Workers' Compensation § 472.

Appeal by defendant Selective Insurance Company from Opinion and Award for the Full Commission entered 4 May 1993. Heard in the Court of Appeals 10 May 1994.

No brief filed for plaintiff Steve Wilson.

Russell & King, P.A., by J. William Russell and Jill S. Stricklin, for defendant-appellees Claude J. Welch Builders Corporation and Aetna Casualty & Surety Company.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton and W. Bradford Searson, for defendant-appellant Selective Insurance Company.

GREENE, Judge.

Selective Insurance Company (Selective) appeals from an Opinion and Award for the Full Commission (Commission) entered 4 May 1993.

This case involves a dispute between Selective and Aetna Casualty and Surety Company (Aetna) over who is responsible for paying workers' compensation benefits to plaintiff Steve Wilson, who was injured on 22 September 1989 while employed by and working for Victor K. "Vic" Sanders (Sanders), a subcontractor of Welch Builders. Selective contends it has no liability because its policy insuring Sanders was cancelled on 11 September 1989 for nonpayment of premium. Aetna contends the policy was not cancelled. The parties agree that if the Selective policy was cancelled, Aetna is responsible for paying the workers' compensation benefits. If not cancelled, Selective is responsible. The Commission determined that the Selective policy was not cancelled because "Sanders never received" the notice of cancellation.

The evidence before the Commission reveals that on 25 August 1989 Selective sent, via Certified U.S. Mail, to Sanders at his address in Highlands, and to Ronald Winecoff, the insurance agent through whom Sanders had obtained his workers' compensation insurance, at his address in Franklin, a notice of intention to cancel Sanders' workers' compensation insurance policy by reason of nonpayment of premium. The notice informed Sanders that the policy would be cancelled if payment was not received by 11 September 1989. Sanders testified that he did not "recall" receiving the notice of cancellation but acknowledged that he had a "secretary hired to take care of this stuff." Mr. Winecoff testified that he received the notice of Selective's intent to cancel Sanders' workers' compensation insurance policy on 27 or 28 August.

The Commission found as fact that:

> 4. . . . [N]either Sanders nor anyone on his behalf received the written notice of intention to cancel which Selective Insurance Company mailed to him on August 25, 1989. The written . . . notice [was] ineffective and did not cancel Selective's workers' compensation insurance policy which had been issued to Sanders.

The dispositive issue presented is whether the evidence before the Commission supports the finding that Sanders did not receive the notice of cancellation.

A workers' compensation policy can be cancelled by the insurance company "for nonpayment of premium on 10 days' written notice to the insured." N.C.G.S. § 97-99(a) (1991). There is no requirement that the notice of intent to cancel due to nonpayment of premium be sent by registered or certified mail. *Id.*

Evidence of the deposit in the mails of a letter, properly stamped and addressed, establishes prima facie that it was received in the regular course of the mail by the addressee. 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 65, at 215-16 (4th ed. 1993) (hereinafter *Brandis*); *Parnell-Martin Supply Co. v. High Point Motor Lodge, Inc.*, 277 N.C. 312, 321, 177 S.E.2d 392, 397 (1970) (regular course of the mail determined by the "frequency or usual course and time of the mail between the mailing place and place of purported receipt of letter"); *In re Terry*, 317 N.C. 132, 136, 343 S.E.2d 923, 925 (1986); 31A C.J.S. *Evidence* § 136d (1964). Evidence of nonreceipt of the letter by the addressee or by his agent, *see Passmore v. Woodard*, 37 N.C. App. 535, 541, 246 S.E.2d 795, 800 (1975) (notice to agent is notice to principal); *see also* 58 Am. Jur. 2d *Notice* § 4, at 573 (1989), is some evidence that the letter was not mailed and raises a question of fact for the trier of fact. 1 *Brandis* § 65, at 216.

In this case, there is evidence that Selective sent to Sanders, by certified mail, a properly addressed, postage pre-paid notice of its intent to cancel Sanders' workers' compensation insurance policy. There is also some evidence that Sanders did not personally receive the letter. There is, however, no evidence that Sanders' agent, his secretary whose duties included handling the mail, did not receive the letter. Thus, because there is no evidence that Sanders' secretary did not receive the letter, the inference created by the establishment of

the prima facie case—that the letter was received by Sanders—is not rebutted. Accordingly, the Commission erred in finding that Sanders did not have notice of the cancellation.

Furthermore, the evidence in this case supports a finding that the notice was received by Sanders at least ten days prior to 11 September 1989, the date of the cancellation of the policy of insurance. The notice was mailed by Selective from its office in Branchville, New Jersey on 25 August 1989 to both Sanders and Winecoff. Winecoff received the notice on 27 or 28 August. This evidence supports a finding that the regular course of the mail, or the time necessary for the transmission of a letter, from Branchville, New Jersey to Highlands, North Carolina (a town located approximately thirty miles from Franklin) was three or four days and that Sanders received his letter within three or four days of the 25 August mailing.

Accordingly, the opinion of the Commission is

Reversed.

Chief Judge ARNOLD and Judge McCRODDEN concur.

MAE DELL GEORGE, PLAINTIFF/APPELLEE v. JAMES C. GEORGE, DEFENDANT/APPELLANT

No. 9312DC1035

(Filed 21 June 1994)

Divorce and Separation § 129 (NCI4th)— equitable distribution—military retirement benefits—vesting

The trial court erred in an equitable distribution action by finding that defendant's retirement pension was vested as of the date the parties separated where defendant was not guaranteed the right to receive retirement benefits at the time the parties separated because he had served only seventeen years in the military. The retirement benefits of an enlisted member of the United States Army vest after twenty years of service. The defendant here was not guaranteed the right to remain in service until he qualified for retirement, unlike the plaintiff in *Milam v. Milam*, 92 N.C. App. 105.

Am Jur 2d, Divorce and Separation § 909.

Appeal by defendant from judgment entered 11 August 1993, *nunc pro tunc* 6 July 1993 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 25 May 1994.

No brief filed by plaintiff-appellee.

Larry J. McGlothlin for defendant-appellant.

JOHNSON, Judge.

The facts of this appeal are as follows: Plaintiff, Mae Dell George and defendant, James C. George, married on 28 December 1966 and separated on 4 August 1983. On 1 February 1984, plaintiff filed an action seeking alimony, alimony pendente lite, custody and support for the parties' minor children. Defendant counterclaimed, seeking a divorce from bed and board.

On 8 July 1985 plaintiff and her counsel stipulated with defendant to an order resolving all issues of custody and support, visitation, and equitable distribution. Additionally, the order provided that the equitable distribution of defendant's retirement pension and benefits would not be determined until the benefits vested or defendant retired from the military.

On 18 December 1992, plaintiff filed a motion asserting a claim for relief for equitable distribution, claiming a portion of defendant's military pension pursuant to the earlier order of equitable distribution and North Carolina General Statutes § 50-20(b)(1) (1987).

After a hearing on 6 July 1993, in Cumberland County District Court, before Judge Keever, plaintiff was awarded thirty-one percent of defendant's military pension. From this order, defendant appealed to our Court.

Defendant assigns error to the trial court's classification of defendant's military pension as marital property based upon the trial court's finding that defendant's military pension was vested as of the date the parties separated.

North Carolina General Statutes § 50-20(b)(1) provides that marital property includes "all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the Federal Uniformed Services Former Spouses' Protection Act." While our equitable distribution statute specifically refers to "vested" pension and retirement rights, the statute does not define

the term "vested." Our Court, however, in *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), *disc. review denied*, 324 N.C. 247, 377 S.E.2d 755 (1989) adopted the definition of "vested" followed by Colorado courts: " '[v]esting' occurs when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future. . . ."

"The military retirement system is noncontributory, funded by annual appropriations from Congress and administered by the Department of Defense." *Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506, *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987). The vesting of military retirement benefits does not occur until a member has been in the military for a minimum prescribed period. *Id.* Under 10 U.S.C. § 3914 (1983), an enlisted member of the United States Army's right to retirement benefits vests when he/she has completed twenty years of service.

At the time the parties separated, defendant, an enlisted man, was not guaranteed the right to receive retirement benefits because defendant had served only seventeen years in the military. Defendant, prior to completing twenty years of service, could have lost his retirement benefits either because of voluntary activity (i.e. misconduct) or involuntary termination (i.e. failure to meet weight requirements). Therefore, we find that defendant did not have a vested right to retirement benefits at the time the parties separated.

It appears that the trial court relied on *Milam* in determining that defendant's retirement benefits were vested at the time the parties separated. However, the facts of the case *sub judice* and *Milam* are substantially different. In *Milam* our Court found that the plaintiff was assured of eventually receiving his military pension at the time he and his wife separated; this necessitated classifying the pension as vested for the purpose of equitable distribution. The plaintiff in *Milam* was guaranteed the right to his retirement benefits pursuant to 10 U.S.C. § 564(a)(2) (1983) which guarantees permanent regular warrant officers with at least eighteen years active service, who are twice passed over for promotion, the right to remain in service for up to two additional years until they qualify for retirement. In the case *sub judice*, defendant, as an enlisted man, was not entitled to such a guarantee.

Therefore, we find that the trial court erred in finding that defendant's retirement pension was vested as of the date the parties

separated. Accordingly, we remand the case for a new order of equitable distribution.

Reversed and remanded.

Judges ORR and WYNN concur.

VICKI HILL, PLAINTIFF v. R.W. MORTON, AREA DIRECTOR, FORSYTH-STOKES AREA MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY, DEFENDANT

No. 9321SC397

(Filed 21 June 1994)

Administrative Law and Procedure § 65 (NCI4th)— dismissal of state employee—State Personnel Commission decision—superior court review

A superior court judgment was vacated and remanded where plaintiff was dismissed; had a hearing before an administrative law judge; another hearing before the State Personnel Commission, which adopted the administrative law judge's findings that the dismissal be left undisturbed; filed an action in superior court requesting a trial on the record developed before the administrative law judge pursuant to N.C.G.S. § 126-37(b); and the superior court conducted a hearing on the record and made its own findings and conclusions, deciding that plaintiff was not dismissed for just cause. The superior court treated the statute as creating a cause of action in which the court could make its own findings of fact and substitute its own judgment for the Commission's and, in doing so, exceeded its jurisdiction over state employee grievances. Allowing a new cause of action at this point, after prior administrative hearings have been conducted, is senseless in that it interrupts the logical progression on an employee's action from the administrative hearing to appellate review in the superior court. *Mitchell v. Thornton*, 94 N.C. App. 313, was implicitly overruled by *Harding v. North Carolina Dept. of Correction*, 334 N.C. 414.

Am Jur 2d, Administrative Law §§ 559, 582.

Appeal by defendant from judgment entered 8 January 1993 by Judge Joseph R. John, Sr. in Forsyth County Superior Court. Heard in the Court of Appeals 3 February 1994.

Plaintiff was employed by defendant from February 1982 until her dismissal in June 1988. After her dismissal plaintiff requested and received a hearing before an administrative law judge to determine if she was dismissed for just cause. The administrative law judge recommended that plaintiff's dismissal be left undisturbed. Afterwards, the State Personnel Commission (the Commission) held a hearing on the matter and adopted the administrative law judge's findings and conclusions.

Plaintiff finally filed an action in superior court requesting (1) a trial on the record developed before the administrative law judge pursuant to N.C. Gen. Stat. § 126-37(b) or (2) judicial review pursuant to N.C. Gen. Stat. § 150B-43. Using the record developed in the office of administrative hearings, the superior court conducted a hearing on the record as requested in plaintiff's first cause of action. The superior court made its own findings of fact and conclusions of law, decided that plaintiff was not dismissed for just cause, and ordered that she be reinstated. Plaintiff's claim for judicial review under Chapter 150B was dismissed. Defendant appeals from this judgment.

Forsyth County Attorney, by Bruce E. Colvin, for defendant appellant.

Robert E. Winfrey for plaintiff appellee.

ARNOLD, Chief Judge.

Defendant argues, correctly in our view, that the superior court erred in conducting what amounted to a new trial on the propriety of plaintiff's dismissal.

This action was initiated and tried under N.C. Gen. Stat. § 126-37(b) (1990) which provides:

> An action brought in superior court by an employee who is dissatisfied with an advisory decision of the State Personnel Commission or with the action taken by the local appointing authority pursuant to the decision shall be heard upon the record and not as a trial de novo. In such an action brought by a local employee under this section, the defendant shall be the local

> appointing authority. If superior court affirms the decision of the Commission, the decision of superior court shall be binding on the local appointing authority.

Judging from the record, the superior court treated this section as creating a cause of action in which the court could make its own findings of fact and substitute its judgment for the Commission's. In doing so the superior court exceeded its jurisdiction over state employee grievances. This section does not create a cause of action but instead refers to judicial review provided by N.C. Gen. Stat. § 150B-43 (1991). In particular, the language in G.S. § 126-37(b), which states that plaintiff "shall be heard upon the record and not as a trial de novo," rings of judicial review, and is a reference to the "whole record test" found in Chapter 150B. This section does not grant the superior court authority to make its own findings of fact and conclusions of law, or to charge one party with attorney fees, as the court did in this case. Allowing a new cause of action at this point, after prior administrative hearings have been conducted, is senseless in that it interrupts the logical progression of an employee's action from the administrative hearing level, G.S. § 126-37(a), to appellate review in the superior court pursuant to Chapter 150B.

We are aware of this Court's opinion in *Mitchell v. Thornton*, 94 N.C. App. 313, 380 S.E.2d 146 (1989), which holds that G.S. § 126-37(b) creates a cause of action. That opinion was implicitly overruled, however, by the Supreme Court's decision in *Harding v. North Carolina Dep't of Correction*, 334 N.C. 414, 432 S.E.2d 298 (1993).

In *Harding*, the Supreme Court defined the boundaries of the superior court's jurisdiction over final decisions of the Commission. The Supreme Court held that "[j]urisdiction of the superior courts over final decisions of the Commission derives not from Chapter 126, but from Chapters 7A and 150B." *Id.* at 418, 432 S.E.2d at 301. Chapters 7A and 150B "confer on the superior courts only appellate jurisdiction over final decisions of the Commission on state employee grievances," *id.* at 419, 432 S.E.2d at 301, and moreover, these chapters constitute "the only authority to sue the State for an employee grievance." *Id.*

We conclude then that *Mitchell* is overruled and that plaintiff's only recourse is judicial review in the superior court pursuant to

Chapter 150B. Therefore, the superior court's judgment is vacated in full, and the case is remanded to the superior court for review pursuant to Chapter 150B.

So that there will be no question on remand we address defendant's jurisdiction argument. We hold that the superior court did not lack personal jurisdiction over defendant. Even if service of the amended complaint was not properly executed, that leaves the court with jurisdiction over defendant via the original complaint, in which plaintiff included her petition for judicial review pursuant to Chapter 150B. *See, e.g., International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 54 L. Ed. 2d (1978); *Beckham v. Grand Affair, Inc.*, 671 F. Supp. 415 (W.D.N.C. 1987).

Vacated and remanded.

Judges WYNN and MARTIN concur.

JOHNNY BRANTLEY, PLAINTIFF v. DARRELL CROCKET WATSON, CO-EXECUTOR OF THE ESTATE OF RACHEL A. BRANTLEY AND WILLIAM WOODWARD WEBB, CO-EXECUTOR OF THE ESTATE OF RACHEL A. BRANTLEY, DEFENDANTS

No. 9310SC526

(Filed 21 June 1994)

1. Executors and Administrators § 86 (NCI4th)— decedent's estate—income tax refund—division between estate and surviving spouse

The trial judge did not err by dividing an income tax refund between a surviving spouse and the estate where plaintiff and defendants filed a joint income tax return for plaintiff and his deceased wife for 1991; defendants, the executors, had made an advance payment of $25,000 out of the wife's estate; the I.R.S. determined that the tax had been overpaid by $28,652; and plaintiff demanded $14,576 of the refund check. The funds in question fall squarely under the control of N.C.G.S. §§ 28A-15-6 and N.C.G.S. § 28A-15-9 and the trial judge divided the funds precisely by the terms of those statutes.

Am Jur 2d, Executors and Administrators §§ 487 et seq.

2. Costs § 28 (NCI4th)— action to determine division of income tax refund—attorney's fees—not granted

The trial court did not err by denying plaintiff's claim for attorney's fees under N.C.G.S. § 6-21(2) in an action against an estate involving the division of an income tax refund. N.C.G.S. § 6-21(2) permits a trial judge to award attorney's fees in a caveat proceeding, in a proceeding to construe a will, or in a proceeding to fix the rights of a party under a will, but this case does not fall into any of those categories.

Am Jur 2d, Costs §§ 72-86.

Appeal by plaintiff and defendants from order entered 10 March 1993 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 3 March 1994.

This is an appeal from a declaratory judgment action in which plaintiff sought division of a federal income tax refund pursuant to N.C. Gen. Stat. §§ 28A-15-6 and 28A-15-9 (1984). Defendants are the co-executors of plaintiff's wife's estate. In April 1992, plaintiff and defendants filed a joint income tax return for plaintiff and his deceased wife for the 1991 tax year. Prior to filing the return, defendants mailed an advance payment of $25,000.00 out of the wife's estate to the Internal Revenue Service. After processing the return, the Internal Revenue Service determined that plaintiff and his wife's estate overpaid their income tax by $28,652.00 and mailed a refund check for that amount to plaintiff and defendants.

Plaintiff demanded $14,576.00 out of the refund check, but defendants refused to pay, claiming that plaintiff was not entitled to any portion of the $25,000.00 advance payment. Plaintiff then filed this declaratory judgment action seeking division of the refund check and an award of attorney fees. The trial judge entered an order allowing plaintiff's motion for judgment on the pleadings, but he denied plaintiff's claim for attorney fees. From the portion of the judgment dividing the $25,000.00 advance payment defendants appeal. From the portion of the judgment denying plaintiff's request for attorney fees plaintiff appeals.

Broughton, Wilkins, Webb & Jernigan, by Charles P. Wilkins, for defendant appellant-appellees.

Sink, Powers, Sink & Potter, by Charles F. Powers III, for plaintiff appellee-appellant.

ARNOLD, Chief Judge.

[1] Judgment on the pleadings may be granted when the movant establishes that no material issues of fact exist and that the movant is entitled to judgment as a matter of law. *Minor v. Minor*, 70 N.C. App. 76, 318 S.E.2d 865, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984). Defendants admitted all the material factual allegations in the complaint, and no unresolved factual issues are otherwise raised by the pleadings. In the absence of any factual issues or defenses raised in defendants' answer, the application of N.C. Gen. Stat. §§ 28A-15-6 and 28A-15-9 was clear, and the judge's decision was one of law.

G.S. § 28A-15-6 provides that:

> Upon the determination by the United States Treasury Department of an overpayment of income tax by a married couple filing a joint federal income tax return, one of whom has died since the filing of such return or where a joint federal income tax return is filed on behalf of a husband and wife, one of whom has died prior to the filing of the return, any refund of the tax by reason of such overpayment, if not in excess of five hundred dollars ($500.00), shall be the sole and separate property of the surviving spouse.

Regarding the amount of a refund in excess of $500.00, G.S. § 28A-15-9 provides that "one half of any additional sums shall be the sole and separate property of the surviving spouse." The funds in question cannot be considered anything other than an income tax refund. Plaintiff and his wife's estate filed a joint income tax return, defendants mailed the $25,000.00 check to the Internal Revenue Service to be applied in advance toward income tax liability, and the Internal Revenue Service applied the funds toward the parties' joint income tax liability. Therefore, the funds in question fall squarely under the control of G.S. §§ 28A-15-6 and 28A-15-9. The trial judge divided the funds precisely by the terms of those statutes, and no error resulted. This panel expresses no opinion on whether or not the result was equitable and fair.

We reject defendants' argument that the trial judge erred by not considering affidavits filed by defendants. We reviewed the affidavits, and, even if considered, they do not affect our decision on the disposition of the funds pursuant to G.S. §§ 28A-15-6 and 28A-15-9. We do not consider defendant's claim of unjust enrichment because it was not raised by the pleadings or addressed by the trial judge.

[2] Plaintiff appeals and argues that the trial judge erred in not allowing his request for attorney fees pursuant to N.C. Gen. Stat. § 6-21(2) (1986). G.S. § 6-21(2) permits a trial judge to award attorney fees in a caveat proceeding, in a proceeding to construe a will, or in a proceeding to fix the rights of a party under a will. Because this case does not fall into any of these categories, plaintiff's reliance on G.S. § 6-21(2) is misplaced. The trial court's order is affirmed.

Affirmed.

Judges COZORT and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 21 JUNE 1994

ATKINSON v. TOWN OF CARY No. 9310SC139	Wake (90CVS05904)	Reversed & remanded
BINKELMAN v. BINKELMAN No. 9326DC556	Mecklenburg (90CVD16564)	Affirmed in part, reversed in part & remanded
CARTWRIGHT v. APPALACHIAN SKI MOUNTAIN No. 9324SC273	Watauga (91CVS684)	Affirmed
CLEVENGER v. CRAVEN REGIONAL MEDICAL CENTER No. 933SC303	Craven (90CVS345)	No Error
DONOHUE v. CONE MILLS CORP. No. 9310IC1027	Ind. Comm. (007056)	Affirmed
EDGECOMBE COUNTY ex rel. SEXTON v. SEXTON No. 937DC875	Edgecombe (86CVD449)	Vacated
ELLIS v. HODGES No. 9318SC1013	Guilford (92CVS8833)	Affirmed
FORREST v. PITT No. 9310IC942	Ind. Comm. (527937)	Affirmed
GLIDDEN v. GLIDDEN No. 931DC738	Pasquotank (88CVD195)	Affirmed
HEDGEPETH v. NORTH RIDGE ESTATES ASSOC. No. 9310SC205	Wake (88CVS8702)	Reversed in part & remanded for a new trial on the issue of damages
HEGE v. PARSONS No. 9323SC775	Wilkes (92CVS1249)	Affirmed
HENSLEY v. ISRAEL No. 9328DC1009	Buncombe (92CVD02312)	Affirmed
HOLDSCLAW v. BENNETT No. 9321SC715	Forsyth (92SP306)	Affirmed
IN RE McKINNEY No. 9318DC192	Guilford (79J240) (92J148)	Vacated
IN RE SETTLES v. VARIETY WHOLESALERS No. 9310SC853	Wake (93CVS2238)	Affirmed

MINTON v. LOWE'S FOOD STORES No. 9325SC1094	Caldwell (92CVS270)	Affirmed
MORGAN v. N.C. FARM BUREAU MUT. INS. CO. No. 9320SC1080	Richmond (92CVS619)	Affirmed
MOSER v. BROWN No. 9310IC839	Ind. Comm. (852964)	Affirmed
MURRELLE v. KRUMNACHER No. 9318DC795	Guilford (93CVD4272)	Reversed
MUSSELWHITE v. HOUSEHOLD INTERNATIONAL, INC. No. 9310IC686	Ind. Comm. (974966)	Affirmed
NEWTON v. FAMILY SERVICES, INC. No. 9321SC158	Forsyth (92CVS5774)	Affirmed
RAMSEUR v. STATE AUTOMOBILE MUT. INS. CO. No. 9325SC311	Catawba (92CVS1023)	Affirmed
ROBERTI v. DAVIS No. 9314SC350	Durham (91CVS1078)	Reversed & remanded for trial
SHIELDS v. EVANS No. 9317SC540	Rockingham (92CVS422)	Affirmed
SIZEMORE v. MACFIELD TEXTURING, INC. No. 9310IC562	Ind. Comm (873647)	Affirmed
SMITH v. N.C. DEPT. OF TRANSPORTATION No. 9310IC763	Ind. Comm. (025079)	Reversed & remanded
STATE v. CARD No. 9319SC1137	Randolph (92CRS8609)	No error
STATE v. CHAMBERS No. 9318SC491	Guilford (91CRS20541)	No error in trial; remanded for resentencing
STATE v. CORNETT No. 9324SC575	Watauga (92CRS3986)	No error
STATE v. DALE No. 9318SC201	Guilford (90CRS30187) (90CRS30188)	No error
STATE v. ELLISON No. 935SC1170	New Hanover (93CRS3533)	No error

STATE v. HOLDER No. 9318SC955	Guilford (88CRS36133)	Affirmed
STATE v. MILLER No. 938SC859	Wayne (92CRS4796)	No error
STATE v. PARKER No. 9316SC1077	Robeson (91CRS7918)	No error
STATE v. RITCHIE No. 9324SC954	Watauga (92CRS3436)	New Trial
TOWN OF CALABASH v. MILLIKEN No. 9313DC339	Brunswick (92CVD538)	Reversed & remanded
TRABER v. FORD No. 9328DC730	Buncombe (90CVD3905)	Affirmed
WEST v. CRISWELL No. 9314DC396	Durham (91CVD1800)	Dismissed
WILSON v. WILSON No. 935DC1042	New Hanover (89CVD1402)	Reversed & remanded

JACKSON COUNTY, BY AND THROUGH THE CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. DORIS SMOKER, PLAINTIFF v. OWEN SMOKER, JR., DEFENDANT

No. 9330DC289

(Filed 5 July 1994)

1. Indians § 7 (NCI4th)— actions to recover public assistance—child support—concurrent jurisdiction of state and tribal courts

The state and tribal courts exercise concurrent jurisdiction over actions to recover debts arising from payment of past public assistance, and, likewise, actions for the establishment of future child support.

Am Jur 2d, Indians § 63.

2. Indians § 7 (NCI4th)— action for reimbursement of public assistance—issue not addressed in tribal court—subject matter jurisdiction in state court

Institution of a state court action for reimbursement for public assistance would not unduly infringe upon tribal sovereignty, since the prior tribal court order involved only child support, not reimbursement for public assistance; the two cases involved different causes of action; the State was not a party to the tribal court action; the issue of reimbursement could not have been raised by either parent; and the tribal court therefore could not have adjudicated a claim of the State to recover public assistance.

Am Jur 2d, Indians § 63.

3. Indians § 7 (NCI4th)— child support—exercise of subject matter jurisdiction by state court—no infringement of tribal sovereignty

It would not unduly infringe upon tribal sovereignty if the state court were permitted to exercise subject matter jurisdiction over the issue of child support where that issue had been litigated previously in the tribal court without notice to the State, since the importance of the AFDC program outweighs the potential infringement, and orders of child support are typically non-permanent and transitory in nature, with states often modifying orders initially rendered in another state.

Am Jur 2d, Indians § 63.

Appeal by plaintiff from order entered 17 September 1992 by Judge Danny E. Davis in Jackson County District Court. Heard in the Court of Appeals 8 December 1993.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith and Associate Attorney General Sybil Mann, for the State.

Gary E. Kirby for defendant.

Haire, Bridgers & Spiro, P.A., by Ben Oshel Bridgers, for Eastern Band of Cherokee Indians, amicus curiae.

LEWIS, Judge.

As in the companion case of *State ex rel. West v. West*, No. 9330DC223 (N.C. App. July 5, 1994), this case involves the issue of concurrent jurisdiction between the Court of Indian Offenses of the Eastern Band of Cherokee Indians (hereinafter "the tribal court") and the North Carolina state courts. Owen Smoker and Doris Smoker, estranged husband and wife, as well as their three children, are members of the Eastern Band of Cherokee Indians and reside on the Cherokee reservation.

Prior to the initiation of any lawsuit in the state courts, Doris Smoker brought an action in the tribal court for custody of and support for her three minor children. In a judgment entered 5 November 1991 and signed 25 November 1991, the tribal court awarded Doris Smoker possession of the marital home and custody of the three children. The court determined that Owen Smoker did not owe any child support and that he retained a vested interest in the home as equity.

As of 3 December 1991, Doris Smoker had received Aid to Families with Dependant Children (hereinafter "AFDC") benefits totalling $5,967.00. The record does not reveal how much had been received at the time the tribal court entered its order on 5 November 1991. Under North Carolina law, acceptance of public assistance benefits creates a debt to the State in the amount of public assistance paid. N.C.G.S. § 110-135 (1991). Also, by accepting the benefits, Doris Smoker assigned to the State her right to child support from Owen Smoker, and the State became subrogated to her right to initiate an action for child support. N.C.G.S. § 110-137 (1991). The State has a duty to "take appropriate action" to ensure that the responsible parent or parents support the child. N.C.G.S. § 110-138 (1991). Because the IV-D child support enforcement program in North Carolina is administered by state agencies in some counties, and by county agencies in other

counties, for ease of reference in this opinion we will refer to the administrative authority as "the State." *See* N.C.G.S. §§ 110-129(5), -137, -138, -141 (1991).

On 10 January 1992, the County of Jackson, by and through its Child Support Enforcement Agency (hereinafter "the State"), filed a complaint in Jackson County District Court on behalf of Doris Smoker, seeking reimbursement from Owen Smoker (hereinafter "defendant") for past public assistance paid and for all future sums paid as of the date of the hearing in district court, as well as an order for reasonable child support. The State's complaint alleged that defendant was financially able to support his children and that he had failed and refused to execute a voluntary support agreement with plaintiff.

In his answer to the complaint, defendant alleged that he had been providing support in "cash and merchandise" until the tribal court ended his future obligations for child support as part of an equitable distribution settlement. On 13 February 1992, defendant filed a motion to dismiss the state court action for lack of subject matter jurisdiction on the basis that the tribal court had already adjudicated issues concerning child support in November 1991. We note that the State had no notice of and did not participate in the prior tribal court action.

On 17 September 1992 the state court filed an order dismissing the State's action for lack of subject matter jurisdiction. The court noted that the tribal court had entered a judgment determining the issue of child support, and that the judgment was filed prior to the institution of the state court action. The court recognized that the tribal court and the state court had concurrent jurisdiction over child support matters, and that the State's claim for support "is a subrogation from the claim of Doris S. Smoker, the recipient of the public assistance benefits." The court concluded that although both courts would have "current" jurisdiction, the tribal court had exercised jurisdiction first and remained the proper forum for the resolution of matters involving child support. The State now appeals from the dismissal of its case.

On appeal the State argues that it should not be bound by the tribal court judgment, because it was not a party to the tribal court action and was not in privity with any of the parties. The State contends that it is the real party in interest in actions to recover amounts of public assistance paid and to collect future support. *See Settle v. Beasley*,

309 N.C. 616, 618, 308 S.E.2d 288, 289 (1983). Defendant, on the other hand, contends that the State should have proceeded in the tribal court, as it apparently has in the past. Defendant points out that Doris Smoker had the right to sue for child support on her own behalf, because she may have been entitled to money beyond the amount owed to the State. *See State ex rel. Crews v. Parker*, 319 N.C. 354, 358, 354 S.E.2d 501, 504 (1987).

We note that the only issue before us is whether the state trial court had subject matter jurisdiction. Defendant has not raised any objections to the state court's assertion of personal jurisdiction over him, and we will not address that issue here. After examining statutory authority and caselaw, we conclude that in this case the state court did have subject matter jurisdiction over the State's action for reimbursement and the establishment of child support.

I.

[1] It is clear that in North Carolina the tribal courts and the state courts exercise concurrent jurisdiction over actions to collect debts owed to the State for payment of past public assistance and to obtain judgments for future support. *Jackson County Child Support Enforcement Agency ex rel. Jackson v. Swayney*, 319 N.C. 52, 60-61, 352 S.E.2d 413, 418 (actions involving paternity, however, cannot be tried in state courts if defendant is an Indian and resides on reservation), *cert. denied*, 484 U.S. 826, 98 L. Ed. 2d 54 (1987). In *Swayney* the North Carolina Supreme Court set forth the analysis to be used in addressing the issue of the assertion of state court jurisdiction over actions involving Indian defendants. The Court first examined whether the exercise of state court jurisdiction over Indian defendants was pre-empted by federal law, and concluded that it was not. 319 N.C. at 57-58, 352 S.E.2d at 416-17. The Court then considered whether the exercise of state court jurisdiction would unduly infringe on the tribe's right of self-governance, and adopted the three-part infringement test set forth in *New Mexico ex rel. Department of Human Services v. Jojola*, 660 P.2d 590, *appeal dismissed and cert. denied*, 464 U.S. 803, 78 L. Ed. 2d 69 (1983). The three criteria are: "(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of the interest to be protected." 319 N.C. at 59, 352 S.E.2d at 417 (citing *Jojola*, 660 P.2d at 592-93).

Applying the first two criteria, the *Swayney* Court noted that the action for reimbursement and child support involved the county, a

non-Indian plaintiff, and that the application for AFDC benefits occurred on the reservation, where the mother, father, and child resided. *Id.* at 59-60, 352 S.E.2d at 418. Under the third criterion, the Court compared the State's interest in providing an AFDC program with the tribe's interest in self-governance. *Id.* at 60, 352 S.E.2d at 418. The Court found that there was "nothing which suggests that the tribe's interest in self-governance would be significantly affected by the exercise of concurrent state and tribal court jurisdiction over actions to collect debts lawfully owed to the State." *Id.* Thus, the Court concluded that there was no undue infringement and that the state and tribal courts exercised concurrent jurisdiction over actions to recover debts arising from payment of past public assistance, and, likewise, actions for the establishment of future child support. *Id.* at 60-61, 352 S.E.2d at 418.

The *Swayney* Court's conclusion regarding the pre-emption issue is binding upon us, and we need not address it here. However, we are unable to adopt, without discussion, *Swayney's* conclusion regarding the infringement issue, because the facts here differ from those in *Swayney*. Here, the tribal court had already acted on the issue of current child support before the State attempted to institute an action in state court. We note that the State had no notice of and did not participate in the tribal court proceeding. The issue before us, then, is whether institution of an action by the State in state court would unduly infringe upon tribal rights of self-governance in light of the prior tribal court proceeding. Although the State sued for both reimbursement and the establishment of child support in the later action in Jackson County District Court, for the purposes of this opinion we will address each contention separately. The two issues involved in this case are: (1) the State's right to sue a responsible parent for reimbursement for past public assistance paid, and (2) the State's right to sue for the establishment of current or future child support.

II.

[2] The State's right to sue for reimbursement for public assistance arises from N.C.G.S. § 110-135 (1991), which provides:

> Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the

> time of receipt of public assistance, the debt shall be limited to the amount specified in such court order.

The State's right to recover amounts paid in public assistance does not depend upon a prior support order or the establishment of current or future support. Although section 110-135 refers to orders of child support, the reference is only in the context of limiting the amount the State may recover. Thus, in those cases where public assistance was paid during a time period covered by an existing order for child support, the statute places a cap on the amount the State may recover. Otherwise, in the absence of any child support orders, the mere fact that public assistance benefits were paid entitles the State to sue the responsible parent for reimbursement.

In the case at hand, the prior tribal court order regarding child support had no bearing on the subject matter jurisdiction of the state court over the State's action for reimbursement under section 110-135. The two cases involve different causes of action. The State was not a party to the tribal court action, the issue of reimbursement could not have been raised by either parent, and the tribal court, therefore, could not have adjudicated a claim of the State to recover public assistance. Because there is no prior tribal order regarding reimbursement, this claim is indistinguishable from the situation in *Swayney*. Thus, according to *Swayney*, we find that institution of a state court action for reimbursement would not unduly infringe upon tribal sovereignty. We note that we are only concerned with the issue of subject matter jurisdiction, and we need not address the issue of whether the State would be limited in the amount it may recover by the prior tribal court support order. We therefore reverse the trial court's dismissal of the State's claim for reimbursement under section 110-135.

III.

The State's right to seek reimbursement for the amount of public assistance paid is separate and distinct from its ability to recover accrued child support payments, enforce a child support obligation, and sue for the establishment of reasonable child support. The right to bring an action regarding child support arises from N.C.G.S. § 110-137 (1991), which provides:

> By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assist-

> ance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state.

Under this section, if any child support payments were owed at the time of acceptance of assistance, those payments are assigned to the State, and the State may institute an action to recover them. If no support was owed, the State is subrogated to the right of the child or custodian to initiate an action for child support. *See State ex rel. Crews v. Parker*, 319 N.C. 354, 360, 354 S.E.2d 501, 505 (1987) (stating that AFDC recipient and State have concurrent interests in defendant's support obligation.) According to N.C.G.S. § 110-138 (1991), the State is required to take action to ensure that the responsible parent or parents support the child. That section provides:

> Whenever a county department of social services receives an application for public assistance on behalf of a dependent child, and it shall appear to the satisfaction of the county department that . . . the responsible parent(s) has failed to provide support for the child, the county department shall without delay notify the designated representative who shall take appropriate action under this Article to provide that the parent(s) responsible supports the child.

Unlike the reimbursement claim, the State's action to establish current and future support in this case does involve the same cause of action as the tribal court proceeding. Thus, in order to determine whether the State may bring a support action in state court, we must apply the infringement test adopted in *Swayney* and examine (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the reservation, and (3) the nature of the interests to be protected. 319 N.C. at 59, 352 S.E.2d at 417.

The first two parts of the infringement analysis yield the same result in this case as in *Swayney*. This case also involves a non-Indian plaintiff, the State, and an Indian defendant; and, although not clear from the record, Doris Smoker presumably applied for and received the AFDC benefits from the Department of Social Services on the reservation. The third factor, therefore, is the most significant portion of our analysis: weighing the State's interest in maintaining its AFDC program against the tribe's interest in self-governance.

We note that the State's interest in this case is the same as in *Swayney*: the maintenance of the AFDC program. In *Swayney*, the Court pointed out that as a condition of participating in the AFDC program, the state is required to operate a Child Support Enforcement Program to secure support for the child from the parents or other persons responsible for the child's support. 319 N.C. at 60, 352 S.E.2d at 418; 42 U.S.C. § 602(a)(27) (Cum. Supp. 1994). The program must be operated on a statewide basis. 319 N.C. at 60, 352 S.E.2d at 418; 45 C.F.R. 302.10(a) (1993). The *Swayney* Court questioned whether reliance upon tribal courts would satisfy this requirement, and noted that failure to comply with the requirements of the AFDC program could result in a loss of federal funding. 319 N.C. at 60, 352 S.E.2d at 418. Furthermore, the State points out that child support collections directly benefit the taxpayers by offsetting AFDC costs. *See* 42 U.S.C. § 657(b) (1991); 45 C.F.R. § 302.51(b) (1993).

The potential intrusion upon tribal sovereignty here, however, differs from that in *Swayney*. This situation is complicated by the prior tribal order regarding child support. Although it is clear that an initial assertion of jurisdiction in state court over child support cases involving Indian defendants does not infringe upon tribal sovereignty, the answer is not so clear when a child support order has previously been entered in the tribal court. Assertion of state court jurisdiction over an action for future support could potentially undermine the child support order entered in the tribal court.

Although there are no North Carolina cases directly on point, we find it instructive to compare the manner in which North Carolina courts treat child support orders entered in other states. Generally, one state may not directly modify a child support order entered in another state. *Thomas v. Thomas*, 248 N.C. 269, 103 S.E.2d 371 (1958). However, according to N.C.G.S. § 50-13.7(b) (1987), a court of this state may enter an order of child support either modifying or superseding an order from another state if two conditions are satisfied: (1) the North Carolina court must have subject matter and personal jurisdiction, and (2) there must be a showing of changed circumstances. *Morris v. Morris*, 91 N.C. App. 432, 371 S.E.2d 756 (1988). The statute itself gives the North Carolina courts subject matter jurisdiction to modify child support orders entered in another state. *Id.* at 434, 371 S.E.2d at 758. The existence of changed circumstances does not affect the initial determination of subject matter jurisdiction. According to *Morris*, if jurisdiction is obtained, but the showing of changed circumstances is inadequate, the North Carolina

court must give full faith and credit to the order from the other state. *Id.* We are only concerned with the issue of subject matter jurisdiction in the case at hand. *See Morris*, 91 N.C. App. at 758-59, 371 S.E.2d at 434 (Court only determined issue of subject matter jurisdiction and remanded to trial court for further proceedings). We note, however, that the receipt of public assistance after entry of an order for child support constitutes sufficient changed circumstances to justify modification of a child support order. *Cartrette v. Cartrette*, 73 N.C. App. 169, 170-71, 325 S.E.2d 671, 673 (1985).

[3] The fact that this State may modify child support orders entered in other states reveals that orders of child support are not viewed as permanent orders, but are continuing and transitory in nature. *See Williams v. Williams*, 91 N.C. App. 469, 372 S.E.2d 310 (1988). *See also Wilkes County ex rel. Nations v. Gentry*, 311 N.C. 580, 319 S.E.2d 224 (1984) (stating that Department of Social Services not bound by previous lump sum award because support is a continuing obligation). It is not considered an undue burden upon another state's sovereignty to allow assertion of jurisdiction over and modification of its child support orders. We find nothing which suggests that it would be an undue infringement upon tribal sovereignty to permit a state court to assert subject matter jurisdiction over the issue of child support where the issue previously had been litigated in tribal court, but without notice to the State.

A brief look at cases from several other jurisdictions leads us to the conclusion that there is no consensus regarding the issue of subject matter jurisdiction over tribal domestic matters. We note that some states have enacted statutes governing consideration of tribal matters, *see, e.g., State ex rel. Joseph v. Redwing*, 429 N.W.2d 49 (S.D. 1988) (citing South Dakota statute regarding recognition of tribal court orders in state court), *cert. denied*, 490 U.S. 1069, 104 L. Ed. 2d 636 (1989), and some states are subject to federal laws such as Public Law 280, a law which ceded to various states jurisdiction over named Indian tribes. *See Swayney*, 319 N.C. at 58 n.4, 352 S.E.2d at 417 n.4; *Becker County Welfare Dep't v. Bellcourt*, 453 N.W.2d 543 (Minn. Ct. App. 1990) (review denied 23 May 1990). Although North Carolina is not subject to any similar state statutes or federal laws, we find it instructive to look briefly at those cases addressing the issue of jurisdiction between the state and tribal courts, because they often raise the same concerns involved here.

Cases concluding that a state court had subject matter jurisdiction include *Harris v. Young*, 473 N.W.2d 141 (S.D. 1991), in which the South Dakota Supreme Court concluded that the tribal and state courts had concurrent jurisdiction over a non-Indian's petition to modify a child custody decree, entered in another state, based on a change of circumstances which occurred on the reservation, where the Indian mother and child resided. *See also Redwing*, 429 N.W.2d at 51 (determining that the state court had subject matter jurisdiction over the issue of child support where both parents were Indians and where previous orders had been entered in tribal court, because minor has an "inherent right" to support from her parents, a right which existed at common law and which is separate from any statutory obligation); *First v. State ex rel. LaRoche*, 808 P.2d 467, 471 (Mont. 1991) (applying infringement analysis, determined that state tribunals have subject matter jurisdiction over the state's action to enforce a child support order, emphasizing AFDC program and its importance); *County of Inyo v. Jeff*, 277 Cal. Rptr. 841 (Cal. Ct. App. 1991) (review denied 18 April 1991) (concluding that state court had subject matter jurisdiction over child support matter even though both the defendant-mother and custodian-grandmother were Indians).

On the other hand, several states have concluded that their state courts do not have jurisdiction over tribal domestic matters. In *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988), the Indian mother and non-Indian father lived on the reservation. They separated, and obtained several temporary orders, one of which concerned custody, from the tribal court. The father then left the reservation and filed for a divorce in state court, which entered several orders, while the mother filed for divorce in the tribal court, which also entered several orders. The mother appealed from the state court orders, asserting that the state court had no jurisdiction because the tribal court had entered first-in-time temporary orders, and that the exercise of state court jurisdiction would unduly infringe upon tribal sovereignty. The North Dakota Supreme Court agreed, noting that domestic relations were an area of "traditional tribal control." *Id.* at 399.

Byzewski is distinguishable from the case at hand, because it involved neither the state nor the AFDC program. In this case, the State is a party and has a significant interest to protect: maintenance of the AFDC program. *Cf. State ex rel. Flammond v. Flammond*, 621 P.2d 471 (Mont. 1980) (refusing to exercise jurisdiction over URESA proceeding initiated by nonmember spouse residing out of state

against member spouse residing on reservation, because no off-reservation acts in Montana); *Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D. 1980) (refusing to exercise jurisdiction over action to modify state court custody decree where custodial spouse and child had subsequently established residence on reservation). *See generally American Indian Law Deskbook*, Conf. of W. Att'ys Gen. (Nicholas J. Spaeth et al. eds., 1993); Margaret Campbell Haynes and June L. Melvin, *Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support*, A.B.A. Center for Children & the Law (1991).

IV.

We conclude that, in the case at hand, it would not unduly infringe upon tribal sovereignty if the state court were permitted to exercise subject matter jurisdiction over the issue of child support, where that issue had been litigated previously in the tribal court without notice to the State. Although the existence of the tribal court support order renders the assertion of state court jurisdiction in this case more intrusive upon tribal sovereignty than in *Swayney*, we find that the importance of the AFDC program outweighs the potential infringement. The State's interest in maintaining the AFDC program is significant, and the ability to institute actions establishing support is an important part of that program. The members of the tribe and others residing on the reservation benefit from the AFDC program in the same manner as other citizens of the state. Since they receive the benefits of the program, and certainly are interested in its continuation, we do not find undue infringement upon tribal sovereignty in permitting the state court to exercise subject matter jurisdiction over the issue of child support. *See First v. State ex rel. LaRoche*, 808 P.2d 467, 471 (Mont. 1991) (stating that "[b]esides the possible financial sanctions against Montana, if Montana's tribunals were not allowed to utilize income withholding proceedings against off-reservation income payable to absent Indian parents, Montana's recovery of AFDC benefits provided to children whose absent parents are Indian would be negatively affected").

Moreover, orders of child support are typically non-permanent and transitory in nature, and states often modify orders initially rendered in another state. We do not believe that treating the Cherokee tribal court as we would the courts of Virginia, Georgia, Tennessee or South Carolina would rise to the level of undue infringement in cases

involving child support and the State's interest in maintaining the AFDC program.

Our holding does not alter the general rule from *Swayney* that the state and tribal courts possess concurrent jurisdiction over the issues involved. The State may proceed in tribal court, as before, on issues of reimbursement and the establishment of child support. We only hold that under the facts of this case, assertion of subject matter jurisdiction would not unduly infringe upon tribal sovereignty.

We note that we are only presented with the narrow issue of subject matter jurisdiction. We are not asked to determine the issue of the treatment of the tribal court order in state court or what effect the tribal court order may have upon the state court proceeding. However, we note that tribal court orders may be entitled to comity or full faith and credit in state courts. *See generally Gordon K. Wright, Recognition of Tribal Decisions in State Courts*, Note, 37 Stan. L. Rev. 1397 (1985); *American Indian Law Deskbook* at 148 n.137 (listing various law review articles on this topic). We also note that there are choice of law issues which may arise in the state court. *See American Indian Law Deskbook* at 141 n.106 (listing cases addressing choice of law issues).

We conclude that the state district court has subject matter jurisdiction over the State's action for reimbursement, because that issue was not addressed in the tribal court. We further conclude that the state court has subject matter jurisdiction over the State's action for the establishment of child support and that this assertion of jurisdiction does not unduly infringe upon tribal sovereignty. We therefore reverse the dismissal of this case and remand to the Jackson County District Court for further proceedings.

Reversed and remanded.

Judges ORR and JOHN concur.

STATE OF NORTH CAROLINA v. DEANO DONDAY FLOYD

No. 9312SC764

(Filed 5 July 1994)

1. Jury § 260 (NCI4th)— discrimination in jury selection—prima facie case rebutted—reasons for exclusion of blacks not pretextual

Though defendant made out a *prima facie* case of racial discrimination in the jury selection process, the trial court did not err in finding and concluding that the prosecutor rebutted defendant's *prima facie* case and that the prosecutor's reasons for excusing the black jurors were not pretextual, where one prospective black juror seemed to have trouble understanding the burden of proof and her duty should the State prove defendant's guilt beyond a reasonable doubt, and she had a son defendant's age who was involved in a breaking and entering; the second juror was evasive and did not reveal his involvement in various crimes; the third juror seemed very headstrong and not amenable to deliberation; the fourth juror had been arrested on drug charges and concealed convictions for writing worthless checks; and the fifth juror was charged with driving while impaired and had a discipline problem in the military.

Am Jur 2d, Jury § 235.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

2. Criminal Law § 313 (NCI4th)— joinder of robbery cases—no error

The trial court did not err in joining armed robbery cases for trial and in denying defendant's motion to sever where the two robberies were separated by less than twenty-four hours; both robberies took place at Quik Stop convenience stores in the Fayetteville area; in both robberies the perpetrator used a silver automatic handgun; in both the robber walked up to the counter and distracted the store clerk with a transaction before revealing his weapon and demanding money; the evidence was not compli-

cated; and the court adequately separated the offenses in the jury charge. N.C.G.S. § 15A-926(a).

Am Jur 2d, Actions § 159.5.

Consolidated trial upon several indictments or informations against same accused, over his objection. 59 ALR2d 841.

3. Evidence and Witnesses § 403 (NCI4th)— altercation with eyewitness—identity of eyewitness speculative—evidence inadmissible

Although evidence of a prior altercation with an eyewitness is relevant as a general rule, that evidence loses its relevance when, as here, the identity of the person with whom defendant argued is merely speculation.

Am Jur 2d, Evidence §§ 307 et seq., 560 et seq.

4. Evidence and Witnesses § 1708 (NCI4th)— photographic evidence improperly excluded—defendant not prejudiced

Though photographic evidence was improperly excluded, defendant was not prejudiced, since the scene depicted in the photographs was described for the jury, and it was not a difficult scene for the jury to imagine.

Am Jur 2d, Evidence §§ 960 et seq.

Judge GREENE dissenting.

Appeal by defendant from judgments entered 16 February 1993 by Judge Joe Freeman Britt in Cumberland County Superior Court. Heard in the Court of Appeals 12 April 1994.

On 5 August 1991 the Quick Stop 95 and the Quick Stop 31 in Fayetteville were robbed. A customer was robbed and shot during the Quick Stop 31 robbery. One clerk was on duty in each store during the robberies. They each closely observed the robber, and each gave police a description. After the robberies, the Quick Stop 31 clerk transferred to Quick Stop 95. On 9 August 1991 both clerks were on duty at the Quick Stop 95 when defendant entered the store to purchase a gallon of gasoline. At this time both clerks separately identified defendant as the robber and the police were called.

Defendant was tried on three charges of robbery with a dangerous weapon and one charge of assault with a deadly weapon with

intent to kill inflicting serious injury. The jury found defendant guilty of all charges, and the court sentenced him to consecutive twenty, twenty, and twenty-five year terms and a concurrent twenty-five year term. From this judgment defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General William F. Briley, Associate Attorney General Elizabeth Leonard McKay, and Associate Attorney General Lisa C. Bland, for the State.

Appellate Defender Malcolm R. Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first argues that the prosecutor impermissibly used peremptory challenges to excuse prospective jurors based upon their race. The record reveals that the prosecutor challenged five of five prospective black jurors, and that defendant timely objected to each challenge.

When asserting a claim of racial discrimination in jury selection defendant must first make out a prima facie case of racial discrimination. Defendant makes a prima facie case by showing that (1) he is a member of a racial minority, (2) that members of his race were peremptorily excused, and (3) that racial discrimination appeared to be the motivation for excusing the members of his race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990). The court found that defendant made a prima facie case, and the State does not argue to the contrary. Because defendant made his prima facie case, the State was required to articulate race neutral reasons which were " 'clear and reasonably specific' . . . [and] 'related to the particular case to be tried.' " *Porter*, 326 N.C. at 497, 391 S.E.2d at 150 (citing *Batson*). After the State's rebuttal defendant had the right of surrebuttal, which he exercised, to show that the State's reasons were pretextual. *Id.* The court found and concluded that the prosecutor rebutted defendant's prima facie case and that the prosecutor's reasons for excusing the black jurors were not pretextual.

On review, the trial judge's findings are entitled to great deference, rightly so because he is present when the jurors are examined. He is able to judge the prosecutor's credibility and to gain a first hand impression of the prosecutor's demeanor. Based upon these factors

as well as his experience and the prosecutor's statements and questions, the trial judge determines if the prosecutor excused prospective jurors based on their race. *See State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991).

Our examination of the transcript revealed valid race neutral reasons, articulated by the prosecutor, for excusing the prospective black jurors, and, giving the trial judge's findings due deference, we are compelled to affirm the judge's ruling.

The prosecutor excused the first prospective black juror because she seemed to have trouble understanding the burden of proof and her duty should the State prove defendant's guilt beyond a reasonable doubt. This prospective juror also had a son approximately defendant's age who was involved in a breaking and entering. The prosecutor excused the next prospective black juror because he was evasive in that he was reluctant to reveal his involvement in an assault on his wife and sister-in-law. This prospective juror concealed two other charges against him of assault and communicating threats. He also had a relative involved in an armed robbery.

The next prospective black juror seemed very head-strong, according to the prosecutor, and not amenable to deliberation. The prosecutor drew this conclusion from the prospective juror's statements about her involvement in her adult daughter's affairs, which ultimately resulted in her daughter being unemployed. The prosecutor further supported his perception of the prospective juror with her responses to job-related questions. The prosecutor also had difficulty making eye contact with this prospective juror.

The fourth prospective black juror was excused because she had been arrested on drug charges, and she concealed convictions for writing worthless checks. The final prospective black juror was excused because he was charged with driving while impaired, and the prosecutor concluded from the juror's statements that he had a discipline problem in the military.

Defendant's efforts to show that these reasons were pretextual are not sufficient to persuade us to reverse the trial judge's ruling. Part of defendant's strategy consists of comparing traits of excused jurors with traits of jurors accepted by the prosecutor. It has long been recognized that this strategy is of little use because it "fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the

State." *Porter*, 326 N.C. at 501, 391 S.E.2d at 152-53. " '[M]erely because some of the observations regarding each stricken venireperson may have been equally valid as to other members of the venire who were not challenged [does not] require[] . . . finding the reasons were pretextual.' " *Id.* at 501, 391 S.E.2d at 153. The cold record before us does not provide enough support for defendant's remaining arguments to convince us to disregard the trial judge's conclusion that the prosecutor was not motivated by racial discrimination.

[2] Defendant argues next that the trial court erred in joining the cases for trial and in denying his motion to sever. Two or more offenses may be joined for trial when the offenses "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (1988). The decision to join offenses for trial is in the trial judge's discretion and will not be disturbed absent an abuse of that discretion. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981). In deciding whether or not to join offenses it is appropriate to consider commonality of facts, *see State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981), and the nature of the joined offenses. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978).

The two robberies were separated by less than twenty-four hours. Both robberies took place at Quick Stop convenience stores in the Fayetteville area, and in both robberies the perpetrator used a silver automatic handgun, although the clerk at Quick Stop 95 testified that it was a 9mm, and a spent shell casing established that a .25 caliber was used at the Quick Stop 31. In both robberies the robber walked up to the counter and distracted the store clerk with a transaction before revealing his weapon and demanding money. Based upon these facts and our review of pertinent case law we conclude that these offenses were properly joined for trial. *See Bracey*, 303 N.C. 112, 277 S.E.2d 390; *State v. Powell*, 297 N.C. 419, 255 S.E.2d 154 (1979).

We also conclude that joinder of these offenses was not prejudicial to defendant.

> The court is required to grant a severance motion if it is necessary for "a fair determination of the defendant's guilt or innocence of each offense." G.S. 15A-927(b). The court must determine whether "in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able

to distinguish the evidence and apply the law intelligently as to each offense." G.S. 15A-927(b)(2).

Bracey, 303 N.C. at 116, 277 S.E.2d at 394. The test on review is are the offenses "so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Cummings*, 103 N.C. App. 138, 141, 404 S.E.2d 496, 498 (1991). As indicated, the circumstances were similar and the offenses occurred less than twenty-four hours apart. Furthermore, the evidence was not complicated, and the court adequately separated the offenses in the jury charge. The verdict sheet distinguished each charge by naming the store clerk and the store number involved in each offense. The verdict sheets for the assault and robbery of the customer contained the customer's name. Defendant was, therefore, not prejudiced by the denial of his motion to sever. *See Bracey*, 303 N.C. 112, 277 S.E.2d 390.

[3] Defendant next argues that the trial judge erred in excluding evidence which supported his theory of the case. First, defendant argues that his sister should have been permitted to testify about an incident that occurred prior to the robberies between defendant and the Quick Stop 95 store clerk who identified him. Defendant contends this evidence provided a basis from which the clerk could have identified defendant without his involvement in the robbery, thus strengthening his alibi defense.

On voir dire defendant's sister testified that in July 1991, nearly a month before the robberies, defendant attempted to purchase beer at the Quick Stop 95. The clerk refused to sell defendant beer because he did not have identification. Defendant returned with identification, but the clerk again refused to sell beer to defendant because the identification was expired. Defendant went to his sister's home and told her about this incident. Defendant's sister testified that she knew which clerk defendant was talking about because of defendant's description of the clerk and the name he called the clerk. She testified that "[t]here's only one lady in the store that could—that could be describe as the name that he caller her." Defendant described the clerk as that "dyke-ish bitch" or "bitch dyke."

Although we agree with defendant that evidence of an altercation with an eyewitness is relevant as a general rule, that evidence loses its relevance when the identity of the person with whom defendant argued is merely speculation. We conclude that the court properly

ruled that the identification of the store clerk was too speculative for the evidence to be relevant.

[4] Second, defendant argues the court erred in excluding photographs taken in January 1993, a year and a half after the robberies, showing the distance between the Quick Stop 95 and another convenience store across the street from the Quick Stop 95. The placement of the convenience stores was relevant because defendant was identified by the Quick Stop clerks when he entered the Quick Stop 95 four days after the robberies. The close proximity of another convenience store shows how unlikely it would be for defendant to return to the store he allegedly robbed four days earlier when another convenience store was just across the street.

The prosecutor objected because the photographs did not depict the scene as it appeared in August 1991. Apparently the street between the Quick Stop 95 and the other convenience store was widened between 1991 and 1993. The photographer was unable to say how much the road was widened or how much property, if any, was taken from the convenience store lots. The photographer did testify that the stores were in the same place in 1991. Because the photographs were offered to show the placement of the stores, the modification to the street between them had very little bearing on their relevance. We hold that the photographs were relevant and admissible. Exclusion of the photographs is not reversible error however.

Before defendant offered the photographs into evidence the photographer testified about the contents of the photographs. Therefore, anything the jury would have seen in the photographs was described to them. It is not difficult for jurors to visualize convenience stores on opposite sides of a street, and, therefore, defendant suffered no prejudice from the exclusion of the photographs.

Defendant also argues that the court erred by excluding his expert witness's testimony. Because the State's case was based entirely on eyewitness testimony, defendant put on an expert in the field of eyewitness identification who would have told the jury how unreliable eyewitness testimony is. He also would have explained the factors which affect its accuracy. Because the defendant is black and the State's witnesses are white the expert was specifically prepared to discuss the problems with cross-racial identification. The State objected to the expert's testimony, and, after voir dire, the court ruled the testimony inadmissible.

Although our impression is that the testimony was admissible, we do not address this issue because defendant waived his right to argue it on appeal. The judge found as an alternative reason for excluding the evidence that the defendant waived his right to present the evidence because the expert, who was from South Carolina, left for the airport before the court ruled on the admissibility of his testimony. Defendant did not assign error to this finding and accordingly waived the right to argue the admissibility of the evidence. N.C.R. App. P. 10.

We reviewed defendant's remaining arguments and find no prejudicial error.

No error.

Judge MARTIN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree, for the reasons given below, with the majority's conclusion that "the transcript revealed valid race neutral reasons, articulated by the prosecutor, for excusing the prospective black jurors, and, giving the trial judge's findings due deference, we are compelled to affirm the judge's ruling."

A defendant has "the ultimate burden of persuading the court that intentional racial discrimination has guided the use of peremptory challenges," and our courts have noted several factors for the trial judge to consider in determining whether a defendant has met this ultimate burden. *State v. Porter*, 326 N.C. 489, 497-98, 391 S.E.2d 144, 150 (1990). The trial judge should consider " 'the susceptibility of the particular case to racial discrimination,' " taking into account "[t]he race of the defendant, the victims, and the key witnesses," "the prosecutor's demeanor to determine whether the prosecutor is 'engaging in a careful process of deliberation based on many factors,' " and "the explanation itself." *Id.* at 498, 391 S.E.2d at 150-51. In evaluating the prosecutor's explanation, reference to objective and subjective criteria is involved, and "[t]he trial judge should consider whether 'similarly situated white veniremen escaped the State's challenges' and 'the relevance of the State's justification' to the case at trial." *Porter*, 326 N.C. at 498, 391 S.E.2d at 151. In addition, "[t]he trial judge should evaluate the explanation 'in light of the explanations offered

for the prosecutor's other peremptory strikes' and 'the strength of the prima facie case.' " *Id.* at 498-99, 391 S.E.2d at 151. "In reviewing both the substantive validity of the State's proffered reasons and the prosecutor's credibility in so offering them, the trial judge should take great care to assure that these reasons are bona fide and not simply 'sham excuses belatedly contrived to avoid admitting acts of group discrimination . . . .' " *State v. Sanders*, 95 N.C. App. 494, 499-500, 383 S.E.2d 409, 413, *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989). The prosecutor's questions and statements during jury selection are also relevant, and "the prosecution's 'use of a disproportionate number of peremptory challenges to strike black jurors in a single case' " is "indicative of racial discrimination." *State v. Thomas*, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991).

The circumstances of this case and the transcript of the *voir dire* reveal that the prosecutor used five of his six peremptory challenges to exclude every African-American called into the jury box and that "similarly situated white veniremen escaped the State's challenges" due to disparate treatment of similarly situated veniremembers of different races. Therefore, the prosecutor's reasons for using peremptory challenges against prospective black jurors were merely pretextual. For example, the prosecutor gave two reasons for challenging the first prospective black juror. First, the prosecutor stated the first prospective black juror had trouble understanding the burden of proof. Second, she had a son about defendant's age who had committed a breaking and entering.

Under the first reason, the following exchange took place between the prosecutor and the first prospective black juror:

> MR. STIEHL: . . . you heard [J]udge Britt earlier talking about the state has the burden of proving guilt beyond a reasonable doubt. Do you recall those words?
>
> JUROR #5: Yes.
>
> MR. STIEHL: Okay. And do you understand that that does not require the state to prove guilt beyond all doubt or all shadow of a doubt?
>
> JUROR #5: Yes.
>
> MR. STIEHL: Okay. Do you understand what your duty as a juror would be should the state prove guilt beyond a reasonable doubt in this case?

JUROR #5: Yes.

MR. STIEHL: And what would that be?

JUROR #5: That, um—after you said it—um, for me to be fair about everything that I hear and say.

The prosecutor then ended her *voir dire* and did not explain what would happen in such a situation or ask the trial judge for additional instructions. For the non-African American prospective jurors, the prosecutor did not ask any open-ended questions about the reasonable doubt standard; rather, he either asked close-ended questions or none at all. A typical exchange when the prosecutor asked a prospective white juror about the reasonable doubt standard is as follows:

MR. STIEHL: . . . Do you understand that as [J]udge Britt was mentioning to all of the jurors earlier, that the defendant is before you and other jurors and he's presumed innocent? In other words, it's up to the state of North Carolina to prove guilt through this trial beyond a reasonable doubt? Do you remember those words?

JUROR #4: I understand that.

MR. STIEHL: Okay. And I think in fact you may have even seen a video earlier, probably yesterday if you reported yesterday, where they talked about criminal cases and civil cases and "your role as a juror" I believe is how it's presented?

JUROR #4: Yes, sir.

MR. STIEHL: Anything about any of the presumption of innocence, proof of guilt beyond a reasonable doubt, anything that you've heard thus far that you feel you and I need to talk about, or you feel comfortable with everything?

JUROR #4: No, I feel comfortable, sure.

The prosecutor also asked the prospective jurors if "either yourselves or a close friend or relative [had been] charged with armed robbery, some type of theft, or an assault such as assault with a deadly weapon with intent to kill inflicting serious injury or some type of lesser assault." The following exchange took place between the first prospective black juror and the prosecutor:

JUROR #5: Yes. It was a, uh—(pause)—uh, a robbery. Uh, and my son was involved in it somehow. I didn't even know—

MR. STIEHL: Was that here in Cumberland County?

JUROR #5: Yes. No, I have that wrong. That was a breaking and entering.

MR. STIEHL: Okay.

JUROR #5: It wasn't no robbery.

MR. STIEHL: And was it allegedly a home or a business that was involved?

JUROR #5: I don't even know.

MR. STIEHL: Okay. Thank you, ma'am.

When the prosecutor questioned a prospective white juror about her husband's acquittal for felonious assault, however, he asked her detailed questions and made statements such as "did your husband have a belief that possibly he was going to be robbed," "[s]o it was a jury trial," and "[he was found] not guilty." In addition, he asked this prospective white juror, "Is there anything about that experience that—that would prevent you from being fair to either side in this case?" The prosecutor told the trial judge that his reason for challenging the first prospective black juror but not the prospective white juror is as follows:

> Additionally, [the first prospective black juror] said her son had been involved in a breaking or entering—she didn't come down here—that was involved in it. Apart from [the prospective white juror] who went into a length—lengthy explanation about how she in fact had been the victim in a case, and how she and her husband had—or her husband had been found not guilty, uh, whereby it was a two on one confrontation that took place out on the roadway versus, uh, [the first prospective black juror]'s son who, uh, either was caught red handed or tied to a break-in and there being no excuse offered or tendered by [the first prospective black juror] concerning her son's activities. Uh, that is what distinguished [the prospective white juror] from [the first prospective black juror].

The prosecutor, however, did not question the first prospective black juror about the incident with her son and did not ask her "[i]s there anything about that experience that—that would prevent you from being fair to either side in this case" as he did the prospective white juror.

I find it unnecessary to recite the transcript for each prospective black juror excused by the prosecutor because the disparate treatment of this juror alone, coupled with the fact that the prosecutor used five of his six peremptory challenges to exclude every African-American called into the jury box, shows that the prosecutor's reasons were not "bona fide" and were "sham excuses belatedly contrived to avoid admitting acts of group discrimination" and therefore violated defendant's right to a jury selected without regard to race. *See generally Gamble v. State*, 357 S.E.2d 792, 795 (Ga. 1987). For these reasons, I would grant defendant a new trial.

EDWARD WAYNE MOOSE, PLAINTIFF v. NISSAN OF STATESVILLE, INC., DEFENDANT v. JOHN GREEN, EXECUTOR OF THE ESTATE OF ALGA GREEN, DECEASED, THIRD PARTY DEFENDANT

No. 9319SC625

(Filed 5 July 1994)

Appeal and Error § 119 (NCI4th)— summary judgment on punitive damages—substantial right not affected—order interlocutory and not appealable

Plaintiff's appeal from the trial court's order granting defendant partial summary judgment on the issue of punitive damages is interlocutory and is dismissed, since an interlocutory order is appealable if delaying the appeal will result in the prejudice of any substantial rights of the parties; the Court of Appeals specifically eliminates the application of the doctrine of substantial rights to cases wherein partial summary judgment has been granted denying a claim for punitive damages; if plaintiff were ultimately successful on the appeal of the summary judgment issue, he would not be required to undergo separate trials on the same issues; there would not be a possibility of inconsistent verdicts should plaintiff prevail on a later appeal; and plaintiff's right to pursue punitive damages would not be lost, prejudiced, or not fully and adequately protected by taking exception to the order's entry.

Am Jur 2d, Appeal and Error § 104.

Appeal by plaintiff from order entered 15 February 1993 by Judge Russell G. Walker, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 21 March 1994.

This case arises out of a multiple vehicle accident that occurred on the morning of 26 October 1990. One day before the accident, the sales manager for the Nissan automobile dealership contacted third party defendant John Green and asked him if he was interested in traveling to a dealership in Manchester, Tennessee to pick up a vehicle and return it to the Nissan dealership in Statesville. Mr. Green, a fifty-nine year old retiree who, on occasion, drove vehicles for Nissan to either deliver or pick up vehicles, agreed to make the delivery and enlisted his sixty-five year old wife, Alga Green, to accompany him because two drivers were needed to complete the trip.

The Greens departed from the dealership about 1:00 p.m. on 25 October 1990, and they arrived at the Tennessee dealership at approximately 7:45 p.m. Mr. Green called the Nissan sales manager in Statesville and told the manager that he and his wife were tired, and one of the wheels on the 1990 Sentra they were driving was making a "roaring" sound. Mr. Green suggested to the manager that the Greens stay in a motel overnight and return the following morning. The manager replied that the truck Green was delivering had to be in Lumberton the following morning. He told Mr. Green to bring the car to Statesville where he would be waiting for them at the Nissan dealership between 7:30 and 8:00 a.m.

The Greens followed the manager's advice and returned to their home in Statesville around 4:30 or 5:00 a.m. on 26 October 1990, and then went to the dealership around 6:30 a.m. and met with the manager. The manager thought that the Greens "appeared fine." After exchanging the Sentra for another one, Mr. and Mrs. Green departed for Lumberton at approximately 7:30 a.m., driving the pick-up truck and Sentra respectively.

At approximately 10:40 a.m., plaintiff was operating a tractor-trailer owned by Ronald Rogers Trucking in the course and scope of his employment, and was traveling, fully loaded, in a northerly direction on U.S. Highway 52, a two-lane highway, about four miles north of Wadesboro. At the same time, Mrs. Green was traveling the same highway in a southerly direction. Mr. Green was following Mrs. Green. At some point immediately prior to the accident, the vehicle driven by Mrs. Green partially crossed the center line of U.S. Highway 52 into the northbound lane of travel. Despite plaintiff's effort to move over as far as he could in the right lane without dropping off into the shoulder, Mrs. Green's car struck his vehicle head on, shearing off the left front wheel and causing his tractor-trailer to veer

across the road into the southbound lane, missing Mr. Green's pick-up truck, but into the path of another tractor-trailer owned by Ronald Rogers Trucking and driven by Ricky Earnhardt. The two tractor-trailers collided. Plaintiff was thrown from his vehicle into a utility pole and suffered back, head, neck and shoulder injuries. Mrs. Green was killed in the crash. No autopsy was performed.

Plaintiff appellant Moose sued defendant appellee Nissan for compensatory and punitive damages arising from personal injuries he suffered as a result of the accident. Defendant answered and impleaded John Green as the personal representative of Alga Green. Defendant Nissan moved for partial summary judgment on the issue of punitive damages by motion on 29 September 1992. After a hearing on the motion, the trial court granted partial summary judgment in favor of defendant. Plaintiff appeals.

Wallace & Whitley, by Michael S. Adkins, for plaintiff appellant.

Cranfill, Sumner & Hartzog, by Robert W. Sumner and Robert H. Griffin, for defendant appellee Nissan of Statesville, Inc.

ARNOLD, Chief Judge.

Plaintiff's appeal from the trial court's order granting partial summary judgment is interlocutory. It "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Generally there is no right to appeal from an interlocutory order. *Id.*

An interlocutory order may, however, be appealed by one of two avenues. First, where more than one claim for relief is presented in an action or the action involves multiple parties, and the court enters a final judgment as to one or more but fewer than all of the claims or parties, the judgment may be subject to review upon certification by the trial court that there is no just reason to delay the appeal. N. C. Gen. Stat. § 1A-1, Rule 54(b) (1990). In the case before us, plaintiff did not request, nor did the trial court supply, certification under Rule 54(b).

Despite the absence of certification by the trial court, a second avenue to appellate review is available if the interlocutory order qualifies under the provisions of N.C. Gen. Stat. § 1-277 (1983) and N.C. Gen. Stat. § 7A-27(d)(1) (1989). *Oestreicher v. Stores*, 290 N.C. 118,

225 S.E.2d 797 (1976). The most common application of these statutes arises in the issue of whether delaying the appeal will result in the prejudice of any substantial rights of the parties. *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 376 S.E.2d 488, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). Thus, prior to our review of the merits of plaintiff's appeal, we must determine whether a substantial right will be prejudiced absent immediate appellate review.

It has been noted that "the 'substantial right' test . . . is more easily stated than applied." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). The nebulous nature of the doctrine has become a particularly frustrating problem for this Court. Illustrative of this is the fact that despite an enormous period of time spent addressing this issue, two lines of cases regarding the guidelines for determining whether a substantial right has been affected have emerged from the decisions of our appellate courts.

In *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976), it was determined that regardless of the nature of the issues involved, a plaintiff had a substantial right to have all his causes against the same defendant(s) tried at the same time by the same judge and jury. *See also Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976); *Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 331 S.E.2d 205, *disc. review denied*, 314 N.C. 542, 335 S.E.2d 316 (1985).

N.C. Gen. Stat. §§ 1-277 and 7A-27(d)(1) were later interpreted by the Supreme Court in *Waters* to require that the affected party's ability to enforce the substantial right absent immediate appeal must be *lost* before the doctrine could be applied. *Waters*, 294 N.C. 200, 240 S.E.2d 338.

In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the Supreme Court further defined both holdings. First, the *Green* Court held that generally the right to avoid a trial is not a substantial right, but avoiding two trials on the same *issues* may be. The Court then created what we believe to be a two-part test by stating that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.* at 608, 290 S.E.2d at 596. In other words, not only must the same issues be present in both trials, but it must be shown that a possibility of inconsistent verdicts may result before a substantial right is affected. Adapting this rule to the *Waters* requirement that the right in question

be lost absent immediate review, the *Green* Court held that appellate review could be warranted in those instances where the right might be lost, prejudiced, or not fully and adequately protected by taking exception to the order's entry. *Id.*

Thus, cases which rely on *Oestreicher* have found substantial rights to be affected merely on the grounds of a party's right to have all claims or causes determined in one proceeding. Subsequent cases relying on *Green* require the appellant to demonstrate the possibility of inconsistent verdicts resulting from separate trials on the same factual issues. These discrepancies were addressed by this Court in detail in *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987). In *Slurry*, while not expressly overruling the *Oestreicher* line of cases, this Court indicated its support for the *Green* line of cases requiring a showing that separate trials would result in the possibility of inconsistent verdicts, thereby prejudicing the substantial right in question, in order to warrant application of the substantial right exception. An examination of the cases to come after *Slurry* tends to show that this is the current path most often followed. *See Taylor v. Brinkman*, 108 N.C. App. 767, 425 S.E.2d 429, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 30 (1993); *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 376 S.E.2d 488, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); *Lamb v. Lamb*, 92 N.C. App. 680, 375 S.E.2d 685 (1989); *Nance v. Robertson*, 91 N.C. App. 121, 370 S.E.2d 283, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988); *Vaughan v. Moore*, 89 N.C. App. 566, 366 S.E.2d 518 (1988); *Whitehurst v. Corey*, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

In the case before us, plaintiff relies on *Oestreicher* and its progeny to support the immediate appealability of an order granting defendant summary judgment as to punitive damages. For the following reasons, we feel it is time to establish the requirements contained in *Green* as controlling in its redefining of *Oestreicher*. Further, based upon the reasoning in *Green*, we take this opportunity to eliminate specifically the application of the doctrine of substantial rights to cases wherein partial summary judgment has been granted denying a claim for punitive damages.

First, we examine whether the facts before us dictate that plaintiff would be required to undergo separate trials on the same issues, and, if so, whether there is a possibility of inconsistent verdicts,

should he be ultimately successful on the appeal of the summary judgment issue. We find he would not.

In order to establish liability on the part of defendant, plaintiff must show (1) that defendant was negligent, and (2) that defendant's negligence was the proximate cause of plaintiff's injury. *Dixon v. Taylor*, 111 N.C. App. 97, 431 S.E.2d 778 (1993). To prevail on a claim for punitive damages, plaintiff must show that defendant's *established* negligence which proximately caused his injury reached a higher level than ordinary negligence; that it amounted to wantonness, willfulness, or evidenced a reckless indifference to the consequences of the act. *Ingle v. Allen*, 69 N.C. App. 192, 317 S.E.2d 1, *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984). Therefore, despite being based on the same facts, the issues before the jury are separate.

Because the issues are separate, there is no possibility of inconsistent verdicts should plaintiff prevail on a later appeal. If the jury at the initial trial determines that defendant was negligent and plaintiff is therefore entitled to compensation, a retrial on the issue of punitive damages wherein defendant's negligence has already been established, may be won or lost without inconsistency in the verdicts. Should plaintiff lose at trial on the issues of negligence and proximate cause, he would not be eligible for recovery based on punitive damages, and a significant amount of time and effort expended at the appellate level will have been avoided. Again, there is no possibility of inconsistent verdicts.

Nor will plaintiff's right to pursue punitive damages be lost, prejudiced, or not fully and adequately protected by taking exception to the order's entry. As stated above, if he is successful at trial on the issues of negligence and proximate cause, he may still proceed with the issue of punitive damages on retrial following a successful appeal. If plaintiff is unsuccessful at trial, he will have lost nothing in his pursuit of punitive damages, because the jury verdict would preclude the award.

The immediate appealability of summary judgment of punitive damages claims was established in *Oestreicher*. It was based on the Supreme Court's initial explanation of the doctrine of substantial rights and grounded in the general, broad-range language contained therein establishing that a plaintiff has a substantial right to have all his causes against the same defendant(s) tried at the same time by the same judge and jury regardless of the nature of the issues involved. Although many refinements to the rules warranting the application of

the doctrine have occurred since that time, in case after case involving summary judgment of punitive damages, *Oestreicher* has been cited too often by rote. It is the opinion of this Court that the rulings during the nearly two decades following *Oestreicher* have effectively eliminated the application of the doctrine to this issue.

Beyond the application of case law as a basis for eliminating summary judgment of punitive damage claims as warranting immediate appellate review, we believe that there are sound reasons grounded in public policy, fairness and judicial economy, for doing so.

The present case is not the first in which this Court has considered and weighed the detrimental effects of an interlocutory appeal against its possible benefits. In *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981), the plaintiff appealed from an interlocutory order awarding alimony pendente lite, child support pendente lite, and attorney fees pendente lite. Prior to *Stephenson*, this Court had held that such orders affected a substantial right, and therefore were subject to immediate appellate review under G.S. §§ 1-277 and 7A-27(d). *See Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E.2d 915 (1970), *overruled by Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981) (concurred in by all members of the Court). The *Stephenson* Court, however, dismissed the plaintiff's appeal, holding that "orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. § 7A-27(d)." *Stephenson*, 55 N.C. App. at 252, 285 S.E.2d at 282. In our decision to overrule *Peeler* and its progeny, the Court relied on the following rationale:

> Today the situation is quite different. In the majority of appeals from pendente lite awards it is obvious that a final hearing may be had in the district court and final judgment entered much more quickly than this Court can review and dispose of the pendente lite order. In this appeal, for instance, the matter could have been heard on its merits and a final order entered by the District Court in Hertford County months before the appeal reached this Court for disposition.
>
> There is an inescapable inference drawn from an overwhelming number of appeals involving pendente lite awards that the appeal too often is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable. . . . As

> stated by our Supreme Court in *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1949), "[t]here 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." *Id.* at 363.

Id. at 251-52, 285 S.E.2d at 282.

We think that the reasoning announced by this Court in *Stephenson* applies with equal force to the issue presented to us today. The increased litigation in our state has created a tremendous number of interlocutory appeals for this Court. The overwhelming burden and expense which interlocutory appeals like the one at bar cause this Court, this state, and the parties should not be ignored. Nor should we continue to allow parties to use Rule 54(b) as a mere delay tactic rather than for its intended use of expediting the administration of justice. The trial court's decision to grant defendant's motion for partial summary judgment was rendered over one year before the appeal could even be calendared for hearing before this Court. Had plaintiff not appealed the order, his case could have gone to trial long before the date of this decision. There would then be before this Court a whole appeal rather than a fragment, and the first of what is likely to be multiple appeals.

While the "same judge, same jury" rationale is generally a strong argument, it should be emphasized that our courts have been guided by the principle of reviewing interlocutory appeals on a case-by-case basis. *Waters*, 294 N.C. 200, 240 S.E.2d 338. "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." *Id.* at 208, 240 S.E.2d at 343. As we have previously discussed, the particular facts and procedural history of the case at bar warrant a dismissal.

Dismissed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. ALLEN WYLIN HAUSER

No. 9321SC665

(Filed 5 July 1994)

Searches and Seizures §§ 14, 106 (NCI4th)— garbage behind defendant's house—expectation of privacy—trash collector as police agent—illegal search of garbage—search warrant based on informant's statements—search of house constitutional

Defendant's garbage which was placed behind his house, adjacent to the house itself, in an area barely visible from the road and which was contained in secured garbage bags and a roll-out cart with a closed lid was not exposed to public access such that his objective expectation of privacy in the garbage was destroyed, and the trash collector who picked up the garbage and turned it over to police was acting as their agent; therefore the search and seizure of defendant's garbage was unconstitutional. However, information supplied by four informants, separate and apart from the illegal search of defendant's garbage, provided a substantial basis for probable cause necessary to support a search warrant for defendant's house and the trial court therefore did not err in refusing to suppress contraband taken from defendant's house pursuant to the warrant.

Am Jur 2d, Searches and Seizures §§ 36, 37, 120, 121.

What is within "curtilage" of house or other building, so as to be within protection from unreasonable searches and seizures, under Federal Constitution's Fourth Amendment—Supreme Court cases. 94 L. Ed. 2d 832.

Applicability of "plain view" doctrine and its relation to Fourth Amendment prohibition against unreasonable searches and seizures—Supreme Court cases. 110 L. Ed. 2d 704.

Judge ORR concurs in the result only.

Appeal by defendant from guilty plea entered 18 March 1993 by Judge Donald W. Stephens in Forsyth County Superior Court. Heard in the Court of Appeals 7 March 1994.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Daniel C. Oakley, for the State.

Wright, Parrish, Newton & Rabil, by Carl F. Parrish and Nils E. Gerber, for defendant-appellant.

WYNN, Judge.

On 13 July 1992, Detective T. L. Phelps of the Winston-Salem Police Department submitted an application for a warrant to search the premises of 5350 Sunrise Terrace in Winston-Salem, North Carolina for illegal drugs. In that application, Detective Phelps stated that he had received reliable information regarding defendant's drug sale operation from four individuals and had found cocaine in a garbage bag that was seized from the premises on 10 July 1992. The warrant was issued. In the ensuing search, officers found more than a pound of cocaine in defendant's home. Defendant was arrested and indicted by a grand jury for trafficking in cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3)(a); maintaining a building for the use and sale of controlled substances in violation of N.C. Gen. Stat. § 90-108(a)(7)(b), and for possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22. Defendant moved to suppress the items of contraband seized from his residence pursuant to the search warrant. The motion was denied. On 18 March 1993 defendant entered notice of appeal from the order denying the motion to suppress and pled guilty to the three charges. He received a sentence of ten years imprisonment and a $50,000 fine.

Defendant argues that the contraband should have been suppressed because the warrant under which it was seized was based on an unconstitutional search and seizure of his garbage. We conclude that the search and seizure of defendant's garbage violated the Fourth Amendment, however, the information from the four individuals, separate and apart from the search of defendant's garbage, provided probable cause for the search warrant.

Several days before defendant's garbage was seized, Detective Phelps contacted the Winston-Salem Sanitation Department. He advised a supervisor, Mr. Marion Belton, that the police department wanted a sanitation worker to collect the trash at defendant's residence and give it to the police. On the morning of 10 July 1992, Mr. Belton introduced Detective Phelps and Detective Southern to Mr. Nelson Dowd, who normally collected the trash from 5350 Sunrise Terrace. Detective Phelps told Mr. Dowd that they were police offi-

cers conducting an investigation. He asked Mr. Dowd to keep the trash from that residence separate from the other trash he collected and to give it to them and Mr. Dowd agreed. Trash at that residence was placed for collection in a roll-out garbage cart on a grassy area adjacent to the house. It was customary for Mr. Dowd to walk onto the premises, take the roll-out cart off of the grassy area and out to the street, dump its contents into his garbage truck, and leave the empty cart at the end of the driveway. If additional garbage bags had been placed for collection, Mr. Dowd would place them in his own cart and roll both carts out to the truck. On 10 July 1992, a roll-out cart and two garbage bags had been placed for collection. Mr. Dowd took an empty cart from his truck and rolled it up to the house. He put the two garbage bags in his cart and rolled it out to the street along with defendant's cart. Instead of depositing the contents of defendant's cart into the garbage truck's collection bin, he deposited them into his own cart, along with the two bags. He left defendant's empty cart on the sidewalk at the end of the driveway as usual. He then drove the truck to the next corner, where he gave the cart containing defendant's garbage to the officers. He requested that they return the cart to the city yard when they finished with it. The officers found material containing cocaine residue inside one of the two plastic trash bags. This evidence was used as a basis for the search warrant which led to the confiscation of the cocaine and defendant's arrest.

Defendant argues that the search and seizure of his garbage was unreasonable, in violation of the Fourth Amendment. The United States Supreme Court's test for reasonableness is whether the defendant had a subjective expectation of privacy that society accepts as objectively reasonable. *California v. Greenwood*, 486 U.S. 35, 100 L. Ed. 2d 30 (1988); *Maine v. Thornton*, 466 U.S. 170, 80 L. Ed. 2d 214 (1984); *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The Supreme Court addressed the expectation of privacy in garbage in *California v. Greenwood*. In *Greenwood*, a police officer was conducting surveillance of defendants' home in Laguna Beach, California. *Greenwood*, 486 U.S. at 37, 100 L. Ed. 2d at 35. The officer asked the neighborhood's regular trash collector to collect the defendants' garbage bags and turn them over to her without mixing their contents with garbage from other houses. The trash collector collected the plastic garbage bags defendants had left on the curb in front of their house and turned them over to the police. *Id.* at 37, 100 L. Ed. 2d at 35. The Supreme

Court held that this activity did not violate the Fourth Amendment because society does not accept the defendants' expectation of privacy in the garbage as objectively reasonable. *Id.* at 40, 100 L. Ed. 2d at 36.

Before *Greenwood*, the "expectation of privacy" test had not generally been used by the federal circuit courts in garbage search cases. Instead, these courts had used a property abandonment theory to conclude that the Fourth Amendment does not protect garbage because it has been abandoned. *See United States v. Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959, 59 L. Ed. 2d 772 (1979) ("The act of placing [garbage] for collection is an act of abandonment"). *See also United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. O'Bryant*, 775 F.2d 1528 (11th Cir. 1985); *United States v. Kramer*, 711 F.2d 789 (7th Cir.), *cert. denied*, 464 U.S. 962, 78 L. Ed. 2d 339 (1983); *United States v. Terry*, 702 F.2d 299 (2d Cir.), *cert. denied sub nom. Williams v. United States*, 461 U.S. 931, 77 L. Ed. 2d 304 (1983); *United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981); *United States v. Vahalik*, 606 F.2d 99 (5th Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 1081, 62 L. Ed. 2d 765 (1980); *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976) (per curiam); *United States v. Mustone*, 469 F.2d 970 (1st Cir. 1972).

Greenwood makes clear that the proper inquiry is not whether an individual abandoned his property but whether he exhibited an objectively reasonable expectation of privacy in the property. "The Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy." *Greenwood*, 486 U.S. at 51, 100 L. Ed. 2d. at 44 (Brennan, J., dissenting).

In *Greenwood*, the Court found that the defendants did not have an objectively reasonable expectation of privacy in their garbage because they left it exposed and accessible to the public:

> [R]espondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having

> deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Greenwood, 486 U.S. at 40-41, 100 L. Ed. 2d at 36-7 (citations omitted) (footnotes omitted).

Although this discussion of the defendants' objective expectation of privacy mentions their intent to convey the trash to a third party, we note that the Court's grounds for finding no expectation of privacy was the accessibility of the garbage, not the defendants' intent to convey it to a third party. *See United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir.), *cert. denied*, —— U.S. ——, 116 L. Ed. 2d 113 (1991). ("[T]he Court has never held that the intent to convey an object or conversation to a third-party renders any expectations of privacy unreasonable simply because the third-party could then convey the object or information to the police."). We echo this distinction. Fourth Amendment protections would be severely curtailed if the expectation of privacy hinged on whether there was an intention to transfer the object to a third party.

In *Greenwood*, garbage had been placed at the curb, and the holding was explicitly limited to the expectation of privacy "outside the curtilage of a home." *Greenwood*, 486 U.S. at 37, 100 L. Ed. 2d at 34. In the case *sub judice*, however, defendant's garbage had been placed within the curtilage of his home. Curtilage has been defined as "the area around the home to which the activity of home life extends." *Maine v. Thornton*, 466 U.S. 170, 182, 80 L. Ed. 2d 214, 226, n. 12 (1984). The curtilage is an area that has always received special constitutional protection. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." *Id.* at 180, 80 L. Ed. 2d at 225 (citation omitted). The Supreme Court has recognized the curtilage of a private house as "a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L. Ed. 2d 226, 235 (1986).

Defendant's garbage was placed behind his house, adjacent to the house itself, in an area that is barely visible from the road. It was contained in secured garbage bags and a roll-out cart with a closed lid.

We hold that defendant's garbage was not exposed to public access such that his objective expectation of privacy in the garbage was destroyed.

The next step in our analysis is to determine whether the garbage collector was acting as an agent of the police. The Fourth Amendment protects citizens from unreasonable searches and seizures carried out by the government. However, it has long been recognized that a truly private search and seizure is not regulated by or subject to the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 80 L. Ed. 2d 85 (1984). Where a search is conducted by a private citizen, but only after the government's initiation and under their guidance, it is in reality a search by the sovereign, and is subject to the Fourth Amendment. *State v. Keadle*, 51 N.C. App. 660, 277 S.E.2d 456 (1981). We look to the facts of this case to determine whether Mr. Dowd was acting as an agent of the police.

The Winston-Salem Police Department, through two of its officers, solicited the help of the city garbage collector, Mr. Dowd. Several days before the actual search and seizure of defendant's garbage, Detective Phelps contacted Mr. Marion Belton, a supervisor in the Sanitation Department of the City of Winston-Salem. Detective Phelps told Mr. Belton that he wanted one of Mr. Belton's employees to assist him in an investigation; specifically, he wanted one of Mr. Belton's employees to collect the trash from 5350 Sunrise Terrace and then turn it over to the police. On the day of the search and seizure, one of Mr. Belton's garbage collectors, Mr. Dowd, was picked up in a car by Mr. Belton and transported a mile off his regular route to talk with the police. Detective Phelps instructed Mr. Dowd to seize trash from defendant's residence, keep the trash separate, and then turn the trash over to the police. Mr. Dowd agreed to participate and complied with these instructions. He went onto defendant's property, put defendant's trash in a separate container, and transferred it to the detectives.

If the government coerces, dominates, or directs the action of a private person, a resulting search and seizure may violate the guarantees of the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971). The North Carolina Supreme Court has recognized that the Fourth Amendment applies when a private party conducts a search while acting as an instrument or agent of the State. *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990), *cert. denied*, 498 U.S. 1051, 112

L. Ed. 2d 782 (1991). In determining whether the Fourth Amendment applies to a search involving a private person, all the facts and circumstances must be considered. *Id.* at 334, 395 S.E.2d at 422; *Coolidge*, 403 U.S. at 489, 29 L. Ed. 2d at 596. Factors to be considered in this inquiry include the citizen's motivation for the search and seizure; the degree of governmental involvement, such as advice, encouragement, or knowledge about the nature of the citizen's activities; and the legality of the conduct encouraged by the police. *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422. The application of these factors to the instant case clearly establish an agency relationship between the police and Mr. Dowd.

Mr. Dowd had the authority to remove defendant's property and he would have collected the trash regardless of police involvement. However, it was the manner in which he kept the trash separate and turned it over to the police that is at issue. Mr. Dowd stated that if he had not received contrary instructions from Detective Phelps, he would have "dumped [the trash] in my truck and went right on."

This search had substantial governmental involvement. The police initiated all contact with the Sanitation Department. The police arranged to have Mr. Dowd pulled a mile off his route. The police met with Mr. Dowd and informed him that they wanted defendant's trash seized and kept separate. They observed Mr. Dowd seizing the trash and then met him and collected the items that had been seized. Mr. Dowd's actions were both orchestrated and observed by the police officers.

We conclude that Mr. Dowd acted as an agent of the police. Therefore, this search and seizure is regulated by the Fourth Amendment. Given the defendant's expectation of privacy already discussed, we find that the search and seizure was unconstitutional.

Finally, we must determine whether the warrant would have been validly issued absent the unconstitutional search and seizure. If the warrant demonstrated probable cause through legally-obtained information, the illegal search and seizure would be harmless error. The standard for a court reviewing the sufficiency of probable cause for a search warrant is "whether there is substantial evidence in the record supporting the . . . decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L. Ed. 2d 721, 724 (1984). Under *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983), the issuing judicial official is called upon to consider the "totality of the circumstances." *Gates*, 462 U.S. at 230, 76

L. Ed. 2d at 543. North Carolina has adopted the *Gates* "totality of the circumstances" approach for reviewing a determination of the existence of probable cause. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). "Under this test the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989).

In addition to the evidence seized from defendant's residence, the affidavit supporting the search warrant summarizes information received from four informants. One of the informants stated that defendant had sold him cocaine at defendant's residence. A statement against penal interest carries its own indicia of credibility sufficient to support a finding of probable cause to search. *Beam*, 325 N.C. at 221, 381 S.E.2d at 330. In addition, Detective Phelps stated in the affidavit for the search warrant that the four informants had never given false or misleading information and that several of the informants had provided information which had led to arrests in the past. The fact that statements from an informant had led to arrests in the past is sufficient to show the reliability of the information. *Arrington*, 311 N.C. at 642, 319 S.E.2d at 260. We therefore conclude that the information supplied by the informants, separate and apart from the illegal search of defendant's garbage, provides a substantial basis for probable cause necessary to support a search warrant. The trial court properly denied defendant's motion to suppress, and we therefore find

No error.

Judges WELLS concurs.

Judge ORR concurs in the result only.

PHYLLIS TANT BRAY AND HUSBAND, WILBUR GLOVER BRAY, PLAINTIFFS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. 932SC517

(Filed 5 July 1994)

1. Insurance § 515 (NCI4th)— business auto policy—applicability of UM coverage to owner's wife

There was no merit to defendant's contention that, because of a "family member/household-owned vehicle" provision which

excluded coverage for bodily injury sustained by an insured who was injured while occupying a vehicle owned by the named insured but not insured under the policy, plaintiff wife was not covered under the UM section of defendant's business auto policy, since the policy's "family member" exclusion for UM coverage is repugnant to the purpose of UM and UIM coverage and is therefore invalid, as the definition of "persons insured" for UM/UIM coverage strongly suggests that the UM/UIM coverage follows the person rather than the vehicle, and plaintiff wife, an insured person of the first class, would be entitled to benefits under the policy whether she was riding in the insured vehicle or walking down the street.

Am Jur 2d, Automobile Insurance §§ 276, 277, 294.

Who is "member" or "resident" of same "family" or "household," *within no-fault or uninsured motorist provisions* of motor vehicle insurance policy. 96 ALR3d 804.

Validity of exclusion in automobile insurance policy precluding recovery of *no-fault* benefits for injuries arising out of the ownership, maintenance, or use of an uninsured vehicle owned by an insured. 18 ALR4th 632.

Validity, under insurance statutes, of coverage exclusion for injury to or death of insured's family or household members. 52 ALR4th 18.

2. **Insurance § 515 (NCI4th)— business auto policy—statutory minimum UM coverage provided**

Plaintiff husband's business auto policy provided UM coverage to plaintiff wife, but such coverage was limited to the statutory minimum of $25,000 per person/$50,000 per accident, since coverage beyond the statutory minimum was voluntary and governed by the terms of the policy which included a "family member" exclusion.

Am Jur 2d, Automobile Insurance § 294.

3. **Insurance § 536 (NCI4th)— UM coverage under garage policy—endorsement**

There was no merit to defendant's contention that plaintiff wife was not entitled to UM coverage under plaintiff husband's garage policy because the requirements of N.C.G.S.

§ 20-279.21(b)(3) did not apply, since an endorsement to the policy provided UM coverage of $25,000 per person/$50,000 per accident.

Am Jur 2d, Automobile Insurance §§ 218 et seq.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like. 93 ALR2d 1047.

Appeal by defendant from order entered 26 March 1993 by Judge James R. Strickland in Beaufort County Superior Court. Heard in the Court of Appeals 8 February 1994.

G. Henry Temple, Jr. for plaintiffs-appellees.

Poyner & Spruill, by George L. Simpson, III, and Randall R. Adams, for defendant-appellant.

WYNN, Judge.

On 10 July 1990, plaintiff Phyllis Tant Bray was injured in an accident while driving a 1985 Nissan automobile owned by her husband, plaintiff Wilbur Glover Bray. Mrs. Bray was struck by an automobile driven by Stacy Katherine Gold, an uninsured motorist. It is undisputed that Ms. Gold's negligence was the sole proximate cause of the accident.

The Brays' Nissan automobile was insured under a personal auto policy issued by Allstate Insurance Company (Allstate) in Mr. Bray's name which provided uninsured motorist (UM) coverage in the amount of $25,000 per person/$50,000 per accident and medical payments coverage of $500. Mr. Bray also had two insurance policies with defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) for his automobile repair business. The two policies, a business auto policy and a garage policy, both provided coverage up to $300,000 per person/per accident.

Plaintiffs brought an action against Ms. Gold seeking to recover damages for Mrs. Bray's personal injuries and Mr. Bray's loss of consortium. Plaintiffs served Allstate and Farm Bureau as their UM carriers pursuant to N.C. Gen. Stat. § 20-279.21(b)(3) and both insurance companies filed answers in Ms. Gold's name. Allstate then paid Mrs. Bray its $25,000 UM policy limit and its $500 medical payments limit and Mrs. Bray signed a release in favor of Allstate which preserved her right to seek further recovery against Ms. Gold and Farm Bureau. At trial, Farm Bureau stipulated Ms. Gold's liability and

defended solely on the issue of damages. The jury returned a verdict for plaintiffs awarding $285,000 to Mrs. Bray and $15,000 to Mr. Bray. The trial court entered judgment on the verdict and assessed costs against Farm Bureau in the amount of $1,171.62.

Plaintiffs then brought this action against Farm Bureau which sought recovery of the judgment under the UM provisions in Mr. Bray's two policies, alleged Farm Bureau committed unfair trade practices, and asked for punitive damages. Plaintiffs moved for partial summary judgment alleging that they are entitled to $274,500.00 plus costs and interest under the UM provisions of Mr. Bray's two insurance policies. The trial court granted plaintiff's motion and ruled under N.C. Gen. Stat. § 1A-1, Rule 54(b) that this order was a final judgment as to that claim. From this order, Farm Bureau appeals.

I.

[1] Farm Bureau first argues that the trial court erred by granting summary judgment for plaintiffs because Mr. Bray's business auto policy contains a "family member/household-owned vehicle" provision which excludes coverage for bodily injury sustained by an insured who is injured while occupying a vehicle owned by the named insured but not insured under the policy. Farm Bureau contends that because of this "family member/household-owned vehicle" exclusion, plaintiffs are not covered under the UM section of Farm Bureau's business auto policy. We disagree.

In determining whether coverage is provided by a particular automobile liability insurance policy, "careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991); *Wiggins v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 26, 434 S.E.2d 642 (1993). In the instant case, the type of coverage at issue is UM coverage. The relevant statute at the time of the accident is N.C. Gen. Stat. § 20-279.21(b)(3) (1989).

The UM coverage section of the business auto policy issued by Farm Bureau to Mr. Bray contains the following provisions:

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as damages from the owner or driver of:

   a. an "uninsured motor vehicle" because of "bodily injury" sustained by the "insured" and caused by an "accident," . . . .

B. WHO IS AN INSURED

1. You

2. If you are an individual, any "family member."

. . .

C. EXCLUSIONS

This coverage does not apply to:

. . .

4. "Bodily injury" sustained by you or any "family member" while "occupying" or struck by any vehicle owned by you or any "family member" that is not a covered "auto."

. . .

F. ADDITIONAL DEFINITIONS

The following are added to the DEFINITIONS Section:

1. "Family member" means a person related to you by blood, marriage, or adoption who is a resident of your household, including a ward or foster child.

When a statute is applicable to the terms of an insurance policy, the provisions of the statute become the terms of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails. *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). At the time of the accident, N.C. Gen. Stat. § 20-279.21(b)(3) provided in relevant part:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, express or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

N.C. Gen. Stat. § 20-279.21(b)(3) (1989).

> Under this statute there are two classes of "persons insured:"
>
> (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Crowder v. N.C. Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 554, 340 S.E.2d 127, 129-30, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986); *Smith*, 328 N.C. at 143, 400 S.E.2d at 47; *Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991). Members of the first class are "persons insured" for the purposes of UM coverage regardless of whether the insured vehicle is involved in their injuries. Smith, 328 N.C. at 143, 400 S.E.2d at 47. Members of the second class are "persons insured" only when the insured vehicle is involved in the insured's injuries. *Id.* In the instant case, Mrs. Bray is a member of the first class.

The purpose of UM and underinsured motorist (UIM) coverage is to compensate the innocent victims of financially irresponsible motorists. *See Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973). While the purpose of liability coverage is to protect covered persons from their own negligence, UM/UIM coverage is intended to protect covered persons from the negligence of others. *Smith*, 328 N.C. at 146, 400 S.E.2d at 49. Therefore, liability coverage is essentially vehicle oriented while UM/UIM coverage is essentially person oriented. *Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993).

In *Smith*, our Supreme Court addressed the question of whether a "family member" or "household-owned" vehicle exclusion in a policy's liability section was effective to limit UIM coverage. *Smith*, 328 N.C. at 149, 400 S.E.2d at 51. The Court, after noting the difference between liability insurance and UM/UIM insurance, concluded that the "family member" or "household-owned" exclusion in the liability coverage section is not effective to deny UIM coverage to a family member injured while a passenger in a family-owned vehicle not listed in the policy. *Smith*, 328 N.C. at 149, 400 S.E.2d at 51. The Court in *Smith* declined to decide whether a "family member" or "household-owned" exclusion clearly stated in the UM/UIM section of a policy is contrary to the statute since there was no such exclusion in the UM/UIM section in that case. *Smith*, 328 N.C. at 150, 400 S.E.2d at 51.

In the instant case, the question is whether the "family member" exclusion in the policy's UM endorsement is effective to deny coverage for Mrs. Bray's injuries. In *Smith*, the Supreme Court indicated that such a provision would contradict the coverage mandated by N.C. Gen. Stat. §20-279.21(b)(3). *Smith*, 328 N.C. at 148, 400 S.E.2d at 50. The Motor Vehicle Safety and Financial Responsibility Act is a remedial statute to be liberally construed in order that the beneficial purpose intended by its enactment may be accomplished. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763; *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 535, 155 S.E.2d 128, 130-131 (1967). We therefore conclude that the policy's "family member" exclusion for UM coverage is repugnant to the purpose of UM and UIM coverage and is therefore invalid. As the Court stated in *Smith*, "the definition of 'persons insured' for UM/UIM coverage strongly suggests that the UM/UIM coverage follows the person rather than the vehicle." *Smith*, 328 N.C. at 149, 400 S.E.2d at 50. As a person insured of the first class, Mrs. Bray is entitled to UM benefits under the policy regardless of whether she is riding in the insured vehicle or walking down the street. *See Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992) (plaintiff, a member of the first class, injured on his motorcycle may recover under the UIM provision in his automobile/truck policy). Mrs. Bray is therefore entitled to UM coverage under her husband's business auto policy.

II.

[2] Farm Bureau next argues that if Mr. Bray's business auto policy provides UM coverage to Mrs. Bray, such coverage is limited to the statutory minimum of $25,000 per person/$50,000 per accident. Farm Bureau contends that coverage beyond this $25,000/$50,000 requirement is voluntary coverage and governed by the terms of the policy which includes the "family member" exclusion. We agree.

N.C. Gen. Stat. § 20-279.21(g) provides:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

N.C. Gen. Stat. § 20-279.21(g) (1989).

The statute requires that UIM coverage be in an amount equal to the policy limits for bodily injury liability as stated in the policy. *Sutton*, 325 N.C. at 268, 382 S.E.2d at 765; N.C. Gen. Stat. § 20-279.21(b)(4) (1989). At the time of the accident, however, there was no such requirement for UM coverage. The UM statute was amended in 1991 to provide: "If the named insured in the policy does not reject uninsured motorist coverage and does not select different coverage limits, the amount of uninsured motorist coverage shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy." N.C. Gen. Stat. § 20-279.21(b)(3) (1993). This provision was not in effect at the time of the accident in 1990. Therefore, the statutory minimum for UM coverage at the time of the accident was $25,000 per person/$50,000 per accident. N.C. Gen. Stat. § 20-279.21(b)(3) (1989). To the extent that coverage provided by the insurance policy exceeds the statutory minimum coverage, the additional coverage is voluntary and governed by the terms of the insurance contract. *Government Employees Ins. Co. v. Herndon*, 79 N.C. App. 365, 339 S.E.2d 472 (1986); *Caison v. Nationwide Insurance Co.*, 36 N.C. App. 173, 243 S.E.2d 429 (1978). In the instant case, the "family member" exclusion is valid as to the coverage beyond the statutory minimum of $25,000. Therefore, the UM coverage available to Mrs. Bray under the business auto policy was $25,000.00 and the trial court erred by holding Mrs. Bray was entitled to $300,000 in UM coverage.

III.

[3] Farm Bureau next argues Mrs. Bray is not entitled to UM coverage under Mr. Bray's garage policy because that policy is an "operator's policy" to which the requirements of N.C. Gen. Stat. § 20-279.21(b)(3) do not apply. This argument is without merit.

The garage policy issued to Mr. Bray contains an endorsement which includes the following section:

> C. CHANGES IN UNINSURED MOTORIST COVERAGE
>
> The LIMIT OF INSURANCE applies except that we will apply the limit shown in the declarations to first provide the separate limits required by North Carolina Law as follows:
>
> 1. $25,000 for "bodily injury" to any one person caused by any one "accident;"

2. $50,000 for "bodily injury" to two or more persons caused by any one "accident;" and

3. $10,000 for "property damage" caused by any one "accident."

This provision will not change the total limit of insurance.

The declarations of the garage policy do not provide for any UM or UIM coverage. We conclude, however, that the subsequent endorsement provides UM coverage of $25,000 per person/$50,000 per accident. Therefore, Mrs. Bray is entitled to UM coverage of $25,000 under the garage policy.

For the forgoing reasons we hold that plaintiffs are entitled to UM coverage of $25,000 under both the business auto policy and the garage policy for a total of $50,000. The trial court's order which held that plaintiffs are entitled coverage of $300,000 under both policies is therefore

Modified and affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

LORNA BRYANT LANE, PLAINTIFF v. HAROLD LEE LANE, DEFENDANT

No. 9312DC731

(Filed 5 July 1994)

1. Quasi Contracts and Restitution § 18 (NCI4th)— bigamous marriage—no unjust enrichment claim—no clean hands

An action based on unjust enrichment may be appropriate in the situation of a bigamous or void marriage; however, in this case the evidence clearly showed that plaintiff knew for a period of over ten years, from the time she received her husband's divorce complaint, that her marriage to defendant was bigamous and she hid that fact from defendant, and plaintiff was therefore estopped from asserting a claim based on unjust enrichment.

Am Jur 2d, Estoppel and Waiver §§ 26-113; Marriage §§ 62-78; Restitution and Implied Contracts § 3.

2. Marriage § 5 (NCI4th)— bigamous marriage—res judicata inapplicable

Res judicata did not preclude defendant's assertion of the invalidity of the parties' marriage in his motion to terminate alimony and dismiss equitable distribution proceedings, since under North Carolina law a bigamous marriage is void and a nullity and may be collaterally attacked at any time.

Am Jur 2d, Marriage §§ 62-78.

3. Estoppel § 13 (NCI4th)— invalidity of marriage—defendant not estopped to assert

Equitable estoppel did not preclude defendant's assertion of the invalidity of the parties' marriage in his motion to terminate alimony and dismiss equitable distribution proceedings, since plaintiff and not defendant should be estopped, as it was she who was not forthcoming and she who was culpably negligent for failing to obtain a copy of a divorce judgment prior to entering into a second marriage.

Am Jur 2d, Estoppel and Waiver § 26-113.

Comment Note— Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.

Appeal by defendant from judgment signed 24 February 1993 by Judge Sol G. Cherry in Cumberland County District Court. Appeal by plaintiff from order signed 30 September 1992 by Judge Patricia Timmons-Goodson in Cumberland County District Court. Heard in the Court of Appeals 14 April 1994.

Reid, Lewis, Deese & Nance, by Renny W. Deese, for plaintiff.

Boose & McSwain, by Michael C. Boose, for defendant.

LEWIS, Judge.

In 1953 plaintiff married Alexander Langston, Jr. Plaintiff and Langston separated in April 1962, and in June 1962 plaintiff married defendant. In January 1990 plaintiff filed a civil action against defendant seeking a divorce from bed and board, temporary alimony and equitable distribution. Defendant answered the complaint and counterclaimed for divorce from bed and board and equitable distribution. In April 1990 the parties entered into a consent order requiring defendant to pay plaintiff $1,000 per month in temporary alimony. In

December 1990 defendant filed an action for an absolute divorce, which the court granted in March 1991.

However, defendant later learned that although plaintiff and Langston had separated in April 1962, no complaint for divorce was filed until 1979, when Langston instituted divorce proceedings. Plaintiff and Langston were not divorced until February 1980. Thus, plaintiff and Langston were still married in June 1962, when plaintiff purportedly married defendant. When that situation came to light, defendant, on 20 July 1992, filed a motion in the cause seeking termination of temporary alimony, reimbursement for temporary alimony payments, and dismissal of the equitable distribution action.

After a hearing, the trial court determined that plaintiff was still married to Langston in 1962 when plaintiff and defendant went through a marriage ceremony. The court concluded that plaintiff's marriage to defendant was bigamous and void ab initio, and ruled that defendant did not owe alimony to plaintiff. The court then allowed plaintiff sixty days to file any further pleadings. Plaintiff filed an alternative claim for relief seeking restitution from defendant for her contributions to his military pension. Plaintiff claimed that defendant had "implicitly promised" her that he would share with her his military retirement benefits. Defendant denied making such a promise. Plaintiff contended that permitting defendant to retain all of his benefits would unjustly enrich him, and that she was entitled to restitution for her contribution to property held by him, including his retirement pay.

Defendant filed a motion for summary judgment and a motion seeking a dismissal based on failure to state a claim, res judicata and collateral estoppel. The motion for summary judgment was denied at the 8 February 1993 trial. At trial, the jury determined that a portion of the pension was held in trust by defendant for the benefit of plaintiff and awarded plaintiff payments of $300 per month from the military pension. Both parties now appeal on various grounds.

Defendant argues on appeal that the court erred in denying his motions for summary judgment, directed verdict, and judgment notwithstanding the verdict (hereinafter "JNOV") on the basis that plaintiff should have been estopped from asserting the unjust enrichment claim, and that plaintiff had failed to prove the value of the services rendered. Defendant also contends the court erred in its instructions to the jury on the elements of unjust enrichment. Finally, defendant contends the court erred in instructing the jury that it

could impose a constructive trust upon defendant's military retirement pay. For the purposes of this opinion, the only argument of defendant's which we need to address is the propriety of the court's disposition of his directed verdict motion.

Plaintiff, on the other hand, claims she is entitled to an equitable lien on defendant's retirement benefits, and that the trial court properly instructed the jury on the theory of constructive trust. According to plaintiff, the "wrongdoing" supporting her unjust enrichment claim was defendant's attempt to retain all of the money without paying anything to plaintiff.

Plaintiff also appeals, arguing that the court erred in denying her res judicata and equitable estoppel defenses to defendant's motion to terminate alimony and dismiss the equitable distribution proceeding. These defenses are applicable, according to plaintiff, because the court had previously entered orders, such as the judgment of divorce, in which it recognized the legality of the marriage. Plaintiff asserts that collateral attacks on a judgment of divorce are not permissible. She also contends that defendant should be equitably estopped from asserting the invalidity of the marriage in an attempt to avoid paying alimony.

[1] At the outset, we note that an action based on unjust enrichment may be appropriate in the situation of a bigamous or void marriage. *See generally* Suzanne Reynolds, *Lee's North Carolina Family Law* § 3.13 (5th ed. 1993). In 1916, the North Carolina Supreme Court indicated that the innocent spouse of a bigamous, void marriage could assert a quantum meruit claim for the money she had lent to her husband and for the value of her services, including waiting on him in his last sickness. *Sanders v. Ragan*, 172 N.C. 612, 90 S.E. 777 (1916). The Court noted that "the plaintiff, being without default, has rendered services of value in ignorance of the essential relevant facts and was induced thereto by the fraud and wrong of [the defendant]." *Id.* at 614, 90 S.E. at 778. The Court affirmed a jury award to the plaintiff.

In the more recent case of *Shepherd v. Shepherd*, 57 N.C. App. 680, 292 S.E.2d 169 (1982), this Court acknowledged:

> The Supreme Court of North Carolina has recognized an action in quantum meruit in favor of one who is fraudulently induced to go through a marriage ceremony with someone having a living lawful spouse, where the still-married party thereafter is unjustly enriched by the innocent party's performance of valuable services.

Id. at 683, 292 S.E.2d at 171 (citing *Sanders*). The services mentioned in *Shepherd* are the wife's contributions of companionship, love, affection and earnings. *Id.* at 681, 292 S.E.2d at 170.

Although the parties to the present case dispute the elements of an unjust enrichment claim, we find it unnecessary to determine that issue here, because we find that plaintiff is barred from proceeding in equity by the clean hands doctrine. Defendant presented credible evidence that plaintiff knew from the beginning that she was not divorced. A friend of plaintiff's testified that plaintiff knew her divorce was not final when she married defendant. Defendant also points out that plaintiff at least knew as of 1979, when Langston served her with the divorce papers. Plaintiff denies that she knew from the beginning.

Viewing the evidence in the light most favorable to plaintiff, as we must when reviewing a directed verdict motion, *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993), it is clear that she knew for a period of over ten years, from the time she received Langston's divorce complaint in 1979, that their marriage was bigamous and that she hid that fact from defendant. Knowing the marriage to be bigamous, she continued to live as defendant's wife, accepted his support, participated in the divorce proceedings, accepted temporary alimony, and apparently would have participated in the equitable distribution proceedings had defendant not discovered the bigamy. Defendant had no knowledge of the bigamy, and supported plaintiff and her children for a period of 27 years. He is an innocent party by any standard.

The fact that plaintiff is the culpable party in this case distinguishes it from other bigamy cases in which claims have been successfully asserted based upon belief in a valid marriage. *See McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937) (husband estopped from asserting invalidity of marriage where he was responsible for obtaining an invalid divorce decree from his first wife); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980) (husband estopped from asserting invalidity of marriage where he was culpably negligent for not obtaining a signed divorce judgment from his first wife); *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659 (husband estopped from asserting invalidity of wife's divorce from her first husband, because he encouraged and facilitated her procurement of the divorce), *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984).

In the case at hand, we find no indication of any culpability, negligence, or bad faith on the part of defendant. The evidence clearly shows that plaintiff knowingly deceived defendant for over ten years, and we find, therefore, that plaintiff is estopped from asserting a claim based on unjust enrichment.

Even if we determined that plaintiff could properly assert an unjust enrichment claim, we would find that she had failed to prove the value of her services to defendant. Plaintiff offered no evidence of the value of housekeeping services, for example, or of any other services rendered throughout their years of cohabitation. The testimony of another woman that she considered her homemaker contribution to her husband's military retirement to be equivalent to forty percent of such pay is insufficient evidence of and irrelevant to the value of plaintiff's contribution to defendant's military retirement.

[2] We now turn to the arguments plaintiff raises on appeal. Plaintiff contends that res judicata and equitable estoppel precluded defendant's assertion of the invalidity of their marriage in his motion to terminate alimony and dismiss equitable distribution proceedings. Plaintiff argues that the court's prior orders, which acknowledge the existence of a valid marriage, bar any subsequent action concerning the same matter.

We note that under North Carolina law, a bigamous marriage is void and a nullity, and may be collaterally attacked at any time. *Taylor v. Taylor*, 321 N.C. 244, 249, 362 S.E.2d 542, 545 (1987). As defendant points out, plaintiff's reliance on a 1957 New York case is misplaced. In *Statter v. Statter*, 143 N.E.2d 10 (N.Y. 1957), the Court of Appeals of New York applied the principle of res judicata to dismiss the wife's claim for an annulment on the basis of bigamy, because the marriage had already been declared valid in an earlier action. The court indicated, however, that a different result may have been reached if the wife had chosen a method other than filing a separate action, for example filing a motion in the cause. In the case at hand, defendant filed a motion in the cause. Thus, even if *Statter* stated the law in North Carolina, defendant's action would not be subject to the defense of res judicata.

[3] Plaintiff also contends that defendant's action is barred by the principal of equitable estoppel. Plaintiff argues that permitting defendant to "escape his obligation" is inconsistent with the fact that for twenty-seven years he "acted, assumed, and conducted himself as though he were lawfully married to [plaintiff]." Plaintiff contends that

defendant was culpably negligent in not ascertaining her marital status prior to their marriage.

Plaintiff's equitable estoppel argument is without merit. The cases cited in her brief, including *Mayer*, *McIntyre* and *Redfern*, all stand for the proposition that she, and not he, should be estopped. Plaintiff refuses to recognize that it is she who was not forthcoming, and it is she who was culpably negligent for failing to obtain a copy of a divorce judgment prior to entering into a second marriage. *See Redfern*, 49 N.C. App. at 97, 270 S.E.2d at 608-09.

From the evidence presented, it is clear that plaintiff's claim is barred on the basis of the doctrine of unclean hands and equitable estoppel. We conclude that the court erred in denying defendant's motion for a directed verdict. We find it unnecessary to address defendant's other assignments of error, including whether or not the court erred in denying defendant's summary judgment and JNOV motions. For the reasons stated, this case is reversed and remanded for entry of a directed verdict in favor of defendant.

Reversed and remanded.

Judges EAGLES and WYNN concur.

DENISE STREETER, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR DANAE LUCILLE FARMER, PLAINTIFF v. GREENE COUNTY BOARD OF EDUCATION, DEFENDANT

No. 938SC988

(Filed 5 July 1994)

Schools § 86 (NCI4th)— exit tuition fee—no constitutional or statutory authorization

Defendant board of education could not require the payment of an exit tuition fee of $200.00 as a condition to approving the transfer of a Greene County resident student to a school system in a different county, since such exit tuition fee is not provided for by the constitution and statutes of this state. N.C.G.S. §§ 115C-366(d) and 115C-366.1; N.C. Const. art. IX, § 2.

Am Jur 2d, Schools § 212.

Appeal by defendant from amended order entered 7 July 1993 by Judge William C. Griffin, Jr., in Greene County Superior Court. Heard in the Court of Appeals 12 May 1994.

Everett, Everett, Warren & Harper by Edward J. Harper, II; and Lewis and Burti, by Christopher L. Burti, for plaintiff appellee.

Lonnie Carraway for defendant appellant.

COZORT, Judge.

The issue presented by this appeal is whether or not the Greene County Board of Education may require the payment of an exit tuition fee of $200.00 as a condition to approving the transfer of a Greene County resident student to a school system in a different county. We hold the exit tuition fee is not provided for by the constitution and statutes of this state, and we uphold the trial court's order enjoining the enforcement of the exit tuition fee policy.

The essential facts are not in dispute. Greene County is a small rural county with a rapidly declining public school student enrollment. A significant percentage of the county's population resides in small communities close to the county's boundaries. Many of these residents work in nearby counties and take their children to schools in the neighboring counties where they work. The loss of students has a significant impact on the Greene County Schools, in terms of both student resources and economic resources. The State's allocation to local school units is based on the number of students enrolled. The transfer of students to surrounding counties results in significant funding losses for Greene County.

In an effort to reduce the number of students transferring out of the county, the Greene County Board of Education (hereinafter "Board") adopted, on 20 July 1992, a student transfer policy imposing a fee as a condition of transfer approval. The policy states, in pertinent part:

II. Release of Greene County Residents to Other School Systems

A. Contractual agreements are required. Students must be released by the Greene County Board of Education and accepted by receiving systems. Release of Greene County students to other systems results in a decreased enrollment for the Greene County Schools and a subsequent loss of state funding for the Greene County Schools. Therefore,

any release of students to other units will require the payment of an exit tuition fee subject to the provisions below.

1. All requests from handicapped students will be received by the Director of Exceptional Children. Students requiring services not available in Greene County will be released without fee for 1992-93 only.

2. Students who are entering the final year in a given school (example: 6th grade in a K-6 school or 12th grade in a high school) will be released without fee for 1992-93 only.

3. All other Greene County residents requesting transfer to other systems for 1992-93 will be assessed an exit tuition fee of $200, equal to 2/3 of the minimum amount of loss in state funding to Greene County (in 1991-92 dollars) for each pupil released to other units. In subsequent years the exit tuition fee will be the full amount of funding lost. This amount is based on research cited by the Rural Education Institute of East Carolina University. In subsequent years, the exit tuition fee will be based on the dollar amount of state funding per pupil for the preceding year. The Greene County Board of Education hereby authorizes the superintendent to issue letters of release to receiving units upon collection of the above exit tuition fees.

III. These regulations will apply to all student transfers beginning with any transfers for the 1992-93 school year.

Plaintiff lives in Greene County and is employed as an Assistant Principal of J. H. Rose High School in Pitt County. Her daughter, Danae Lucille Farmer, has attended Rose High School since 1991, having enrolled there as a freshman. On 31 July 1992 plaintiff applied for the release of her child to the Pitt County school unit. She did not submit the $200.00 fee. On or about 3 August 1992, the Board denied plaintiff's request. On 24 August 1992 plaintiff appeared before the Board to renew her request. The Board declined to act on this request.

On 28 August 1992, plaintiff sued the Board to enjoin the enforcement of the exit tuition fee policy. Judge David E. Reid, Jr., issued a preliminary injunction, dated 2 October 1992 for 8 September 1992, enjoining the enforcement of the exit tuition fee policy. On 7 July 1993

Judge William C. Griffin, Jr., entered an amended judgment permanently enjoining the enforcement of the policy at issue. The defendant Board appeals.

Defendant Board contends that its exit tuition policy is appropriate under N.C. Gen. Stat. § 115C-366(d) (1991). That statute provides:

> A student domiciled in one local school administrative unit may be assigned either with or without the payment of tuition to a public school in another local school administrative unit upon the terms and conditions agreed to in writing between the local boards of education involved and entered in the official records of the boards. The assignment shall be effective only for the current school year, but may be renewed annually in the discretion of the boards involved.

We find defendant's reliance on this statute misplaced. Section 115C-366(d) must be read in conjunction with § 115C-366.1 (1991), which makes specific provisions for the charging of tuition:

> (a) Local boards of education may charge tuition to the following persons:
>
> (1) Persons of school age who are not domiciliaries of the State.
>
> (2) Persons of school age who are domiciliaries of the State but who do not reside within the school administrative unit or district.
>
> (3) Persons of school age who reside on a military or naval reservation located within the State and who are not domiciliaries of the State. Provided, however, that no person of school age residing on a military or naval reservation located within the State and who attends the public schools within the State may be charged tuition if federal funds designed to compensate for the impact on public schools of military dependent persons of school age are funded by the federal government at not less than fifty percent (50%) of the total per capita cost of education in the State, exclusive of capital outlay and debt service, for elementary or secondary pupils, as the case may be, of such school administrative unit.
>
> (4) Persons who are 21 years of age or older before the beginning of the school year in which they wish to enroll.

(b) The tuition charge for a student shall not exceed the amount of per pupil local funding.

(c) The tuition required in this section shall be determined by the local boards of education each August 1 prior to the beginning of a new school year.

Reading § 115C-366(d) together with § 115C-366.1, we find the General Assembly provided for local boards to charge tuition only for students who do not reside within the particular board's unit or district, and that such tuition shall not exceed the amount of per pupil local funding. There is no authority for a school board to charge tuition to a student transferring to another school unit. This result is consistent with our state constitution's expressed requirement of free public schools:

(1) *General and uniform system: term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

N.C. Const. art. IX, § 2.

Interpreting that constitutional provision, our Supreme Court stated:

We conclude, therefore, that the 1970 reference in Article IX, Section 2(1) to "a general and uniform system of free public schools" requires no substantive change in the state's long standing policy of providing its citizens with a basic *tuition free* education. So long as public funds are used to provide the physical plant and personnel salaries necessary for the maintenance of a "general and uniform" system of basic public education, our public school system is "free"—that is, without tuition—within the meaning of our state constitution. *That the administrative boards of certain school districts require those pupils or their*

parents who are financially able to do so to furnish supplies and materials for the personal use of such students does not violate the mandate of Article IX, Section 2(1). Nor do we perceive any constitutional impediment to the charging of modest, reasonable fees by individual school boards to support the purchase of supplementary supplies and materials for use by or on behalf of students.

Sneed v. Greensboro Board of Education, 299 N.C. 609, 617, 264 S.E.2d 106, 112-13 (1980) (latter emphasis added).

The fee imposed by the Board below goes far beyond a modest fee or charge for supplementary supplies and cannot stand. The trial court correctly enjoined its enforcement.

In coming to this decision, we are mindful of the difficulties facing small rural school districts, such as Greene County. Nonetheless, we must interpret the constitutional provisions and the statutes as we find them. The relief sought by Greene County is simply not available without specific legislative authority.

In its second argument, defendant Board contends the trial court erred "by permanently enjoining appellant from denying any request for reassignment without full consideration of the best interest of the individual child involved in such request." Defendant contends it is inappropriate for the court to require the Board to apply the best interest of the child test. We dismiss this argument. In amending the judgment, the trial court deleted any reference to "the best interest of the individual child." The section to which the defendant objects reads, in its amended form: "5. That the defendant be, and is hereby, permanently enjoined from denying a request for reassignment of Danae Lucille Farmer without complying with North Carolina General Statutes Section 115C-366."

We find the decree in question fails to present any justiciable issue concerning the "best interest of the child." Rather, it merely directs the defendant Board to comply with the correct section of the General Statutes in considering plaintiff's request for reassignment.

Affirmed.

Judges ORR and MARTIN concur.

RICHARD E. HOWARD, A MINOR, AND THROUGH HIS GUARDIAN AD LITEM, JOYCE M. SIGMON, CHARLES E. HOWARD, INDIVIDUALLY, AND JOYCE M. SIGMON, INDIVIDUALLY, PLAINTIFFS v. THE TRAVELERS INSURANCE COMPANIES, TROY D. UNDERWOOD, BEVERLY I. UNDERWOOD AND SAMUEL BRYANT UNDERWOOD, DEFENDANTS

No. 9325SC881

(Filed 5 July 1994)

Insurance § 686 (NCI4th)— injury to minor child—no bodily injury to parents—parents' claim derivative—no recovery for parents

The trial court properly determined that plaintiffs were entitled to an aggregate award of $100,000 under an insurance policy issued by defendant rather than $100,000 per appellant where the policy limited liability to $100,000 for each person injured in an accident, since the term "all damages" used in the policy's "Limit of Liability" section was all inclusive; plaintiff parents' claim for plaintiff child's medical expenses was derivative in nature; and the parents could not recover since they themselves sustained no bodily injury within the meaning of the policy.

Am Jur 2d, Automobile Insurance § 425.

Consortium claim of spouse, parent or child of accident victim as within extended "per accident" coverage rather than "per person" coverage of automobile liability policy. 46 ALR4th 735.

What constitutes single accident or occurrence within liability policy limiting insurer's liability to a specified amount per accident or occurrence. 64 ALR4th 668.

Appeal by plaintiffs from order and judgment filed 7 June 1993 by Judge Julia V. Jones in Catawba County Superior Court. Heard in the Court of Appeals 21 April 1994.

Plaintiff Richard E. Howard, a minor (hereinafter "the child"), is the son of plaintiffs Charles E. Howard and Joyce M. Sigmon. On 28 September 1990, the child was riding as a passenger in a vehicle driven by Samuel Bryant Underwood, also a minor. Samuel Bryant Underwood's parents, Troy D. Underwood and Beverly I. Underwood, were listed as the named insureds under a Personal Auto Policy issued by defendant The Travelers Insurance Companies ("hereinafter Travelers") which provided inter alia as follows:

DEFINITIONS

. . . .

"Bodily injury" means bodily harm, sickness, or disease, including death that results.

. . . .

LIABILITY COVERAGE

Coverage A—Bodily Injury
Coverage B—Property Damage

INSURING AGREEMENT

We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident.

. . . .

LIMIT OF LIABILITY

. . . .

1. The limit of liability shown in the Declarations for each person for Coverage A [$100,000 each person/$300,000 each accident] is our maximum limit of liability for all damages for "bodily injury," including damages for care, loss of services or death, sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Coverage A is our maximum limit of liability for all damages for "bodily injury" resulting from any one auto accident.

. . . .

The limits of liability shown in the Declarations for this coverage are our maximum limits of liability for all damages resulting from any one auto accident. This is the most we will pay regardless of the number of:

1. "Insureds";
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the auto accident.

(Alterations added.)

In their 14 April 1993 complaint for declaratory judgment, plaintiffs alleged inter alia that the child has incurred "necessary medical expenses" of $305,919.09 and that "as the parents of . . . [the] minor child, [the parents] are liable for the necessary medical expenses of [the minor child], and each has thus been damaged in the aggregate amount of Three Hundred Five Thousand Nine Hundred Nineteen Dollars and Nine Cents ($305,919.09) by reason of the injuries to [the minor child]." Plaintiffs further alleged "that the 'Limits of Liability' language of the policy [supra] is ambiguous and should be construed against the defendant Travelers as its drafter, and that the policy should be construed to afford liability coverage for the defendants Troy D. Underwood, Beverly I. Underwood, and Samuel Bryant Underwood to each of the plaintiffs in the maximum amount of One Hundred Thousand Dollars per plaintiff for damages sustained by each plaintiff by reason of the bodily injuries suffered by [the minor child] . . ."

On 5 May 1993, defendant Travelers filed an answer, alleging that "the coverage for the claims of all three plaintiffs, all of which arise from the alleged bodily injury to [the minor child], is limited to $100,000." Further, defendant Travelers moved for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c). On 7 June 1993, the trial court filed an "order and judgment" ruling that plaintiffs were entitled to an aggregate recovery of $100,000.00 under the policy. Plaintiffs appeal.

Corne, Corne & Grant, P.A., by Robert M. Grant, Jr., and Peter R. Gruning, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Richard T. Rice, for defendant-appellees.

EAGLES, Judge.

Plaintiffs contend that the trial court "erroneously declared that the insurance policy at issue in this action affords an aggregate coverage to all of the appellants in the amount of $100,000, rather than $100,000 per appellant, where the language setting the policy's limits is ambiguous." We disagree and affirm.

Regarding the construction of policy language containing allegedly ambiguous terms, our Supreme Court has stated:

> Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured.

Woods, 295 N.C. at 506, 246 S.E.2d at 777. A difference of judicial opinion regarding proper construction of policy language is some evidence calling for application of this rule. *See Maddox v. Insurance Co.*, 303 N.C. 648, 654, 280 S.E.2d 907, 910 (1981); *Electric Co. v. Insurance Co.*, 229 N.C. 518, 521, 50 S.E.2d 295, 297 (1948); Annot., "Insurance—Ambiguity—Split Court Opinions," 4 A.L.R. 4th 1253, 1255 (1981). While "[t]he fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is at best, ambiguous," *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988); *accord Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E.2d 217, 223 (1984), "ambiguity . . . is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

"All parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something." *Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986). *See also Williams v. Insurance Co.*, 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1967) ("each clause and word must be . . . given effect if possible by any reasonable construction"); *Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E.2d 438, 440-41 (1960).

> The terms of a contract must, if possible, be construed to mean something, rather than nothing at all, and where it is possible to do so by a construction in accordance with the fair intendment of a contract, the tendency of the courts is to give it life, virility, and effect, rather than to nullify or destroy it.

17 Am. Jur. 2d *Contracts* § 254, at 648-49 (1964).

Brown v. Lumbermans Mut. Casualty Co., 326 N.C. 387, 392-93, 390 S.E.2d 150, 153 (1990).

We find the language of the policy clear and unambiguous. Plaintiffs have failed to cite North Carolina case authority in support of their argument, and we are not persuaded. Plaintiffs concede that the "Limit of Liability" language used in the policy here is similar to the policy at issue in *South Carolina Insurance Co. v. White*, 82 N.C. App. 122, 124, 345 S.E.2d 414, 415 (1986). In *White*, the physically injured party, Donald Hikes, suffered injuries from a motorcycle acci-

dent in which he was struck by the automobile of Donald and Jane White. The Whites were insured by South Carolina Insurance Company with a policy having limits of $25,000 per person and $50,000 per accident. After the Hikes filed suit against the Whites, Donald Hikes' claim was settled when the insurance company paid him the "per person" policy limits of $25,000 in full settlement of his damage claim. Mrs. Hikes contended that the insurance company was obligated to pay damages to her for loss of consortium arising from Donald Hikes' physical injury. In affirming the trial court's judgment holding that the insurance company had no obligation towards Mrs. Hikes for her derivative claim, this Court stated:

> The term "all damages" used in the policy is all-inclusive. It includes not only direct damages for bodily injury sustained by Donald Hikes, but also any indirect or consequential damages for loss of consortium. Perhaps when the award to the person who sustained the direct bodily injury does not exhaust the maximum policy limits, a consequential or derivative damage claim for the difference may be maintained. But when, as in this case, the policy limit has been exhausted by the settlement of $25,000 paid to the person who sustained the direct bodily injury, all consequential or derivative damage claims for personal injuries are subsumed within the settlement award.
>
> An analysis of the terms "bodily injury" and "personal injury" helps to clarify the point. Bodily injury refers to "[p]hysical pain, illness or any impairment of physical condition." Black's Law Dictionary 707 (5th ed. 1979). "Personal injury," however, is "used . . . in a much wider sense, and . . . includ[es] any injury which is an invasion of personal rights . . . ." *Id.* at 707. . . .
>
> . . . .
>
> Had Donald Hikes suffered no bodily injury, Ethelene Hikes would have suffered no injuries and would have had no claim. Her claim, in our view, is derivative. . . .
>
> . . . .
>
> In sum, because the Insurance Company paid its limit of liability to Donald Hikes for his bodily injury, that damage award necessarily included Ethelene Hikes' claim for loss of consortium under the terms of the policy.

Id. at 124-126, 345 S.E.2d at 415-16. Similarly, here we conclude that the term "all damages" used in the policy's "Limit of Liability" section here is all-inclusive. *Id.* The parents' claim for the child's medical expenses is derivative in nature; accordingly the parents cannot recover since they themselves have sustained no "bodily injury" within the meaning of the policy. *Id.*; *Sheffield v. American Indemnity Company*, 245 S.C. 389, 397, 140 S.E.2d 787, 791 (1965) (finding no recovery wherein plaintiff-husband sought damages for loss of consortium and *reimbursement for medical expenses* arising out of the injury to his wife; cited in *South Carolina Ins. Co., supra*). We note that our holding here is in accord with numerous other jurisdictions. *See, e.g., Eaves v. Boswell*, 852 S.W.2d 353 (Mo.App. 1993); *Carlson v. Mutual Service Ins.*, 494 N.W.2d 885, 887 (Minn. 1993); *Federal Kemper Ins. Co. v. Karlet*, 189 W. Va. 79, 82, 428 S.E.2d 60, 63 (1993) (and cases cited therein); *Kinsella v. Farmers Ins. Exchange*, 826 P.2d 433 (Colo. App. 1992); *Creamer v. State Farm Mut. Auto. Ins. Co.*, 161 Ill. App.3d 223, 514 N.E.2d 214 (1987). *See generally* 8A J. Appleman and J. Appleman, *Insurance Law and Practice*, § 4893, p.60 (1981 and Supp. 1993); Annotation, *Consortium Claim of Spouse, Parent, or Child of Accident Victim as Within Extended "Per Accident" Coverage Rather than "Per Person" Coverage of Automobile Liability Policy*, 46 A.L.R.4th 735 (1986). We further note that the child's medical expenses ($305,919.09) are approximately three times the per person bodily injury limit of the policy. *See South Carolina Ins. Co.*, 82 N.C. App. at 124, 345 S.E.2d at 415 (stating that "[p]erhaps when the award to the person who sustained the direct bodily injury does not exhaust the maximum policy limits, a consequential or derivative damage claim for the difference may be maintained"). We conclude that the trial court correctly determined that plaintiffs are entitled to an aggregate award of $100,000.00 under the insurance policy.

For the reasons stated, the trial court's 7 June 1993 order and judgment is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

GREGORY LEE HUSSEY, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. 9310SC735

(Filed 5 July 1994)

1. Insurance § 514 (NCI4th)— automobile insurance—intrapolicy stacking of UM coverages not allowed

Plaintiff was not entitled to intrapolicy stack the uninsured motorist (UM) coverage of the two vehicles insured by an automobile policy issued prior to the 1991 amendments to N.C.G.S. §§ 20-279.21(b)(3) and (4) where the "limit of liability" clause in the policy clearly indicated that stacking of UM coverage was prohibited.

Am Jur 2d, Automobile Insurance §§ 326 et seq.

Limitation of amount of coverage under automobile liability policy as affected by fact that policy covers more than one vehicle. 37 ALR3d 1263.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

2. Insurance § 514 (NCI4th)— automobile insurance—separate policies—interpolicy stacking of UM coverages allowed

Where plaintiff was injured by an uninsured motorist while riding his motorcycle, insured by defendant under Policy A, plaintiff also owned two vehicles insured by defendant under Policy B, and both policies were issued prior to the 1991 amendments to N.C.G.S. §§ 20-279.21(b)(3) and (4), plaintiff was entitled to interpolicy stack the UM coverages under both policies since (1) the "other insurance" clause in an amendment to Policy A was ambiguous and will not be interpreted as applicable only to underinsured vehicles; (2) the "owned vehicle" exclusion in the uninsured motorist section of Policy B is void as against public policy; and (3) the "other insurance" clause in Policy A was replaced by an endorsement which allows interpolicy stacking.

Am Jur 2d, Automobile Insurance §§ 326 et seq.

Uninsured motorist insurance: validity and construction of "other insurance" provisions. 28 ALR3d 551.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by same insurer to same insured. 25 ALR4th 6.

Appeal by plaintiff and defendant from judgment entered 29 April 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 April 1994.

Barrow, Redwine and Davis, by Paul D. Davis; and Kenneth C. Haywood, for plaintiff appellant-appellee.

Frazier, Frazier & Mahler, by Torin L. Fury, for defendant appellant-appellee.

COZORT, Judge.

Plaintiff and defendant appeal the trial court's judgment allowing plaintiff to interpolicy stack uninsured motorist coverage of one insurance policy with coverage in a second policy, but not permitting plaintiff to intrapolicy stack the coverage in the second policy. We affirm.

On 18 April 1991, plaintiff Gregory Lee Hussey was involved in a collision with an automobile while he was riding a motorcycle. The operator of the vehicle which struck plaintiff's motorcycle was uninsured. Plaintiff's motorcycle was insured by defendant State Farm Mutual Automobile Insurance Company (State Farm) through a policy ("Policy A") having uninsured/underinsured motorist limits of $50,000.00 per person, and $100,000.00 per accident. Plaintiff owned a Ford Bronco and Ford Ranger also insured by State Farm under a separate policy ("Policy B"). Policy B had coverage limits with uninsured/underinsured motorist coverage limits of $100,000.00 per person, and $300,000.00 per accident for each vehicle. Both policies were in effect prior to 1991, when amendments were made to the motorist insurance stacking statutory provisions, N.C. Gen. Stat. § 20-279.21(b)(3) and (4). The parties have stipulated that the plaintiff's injuries exceed $250,000.00. Plaintiff filed a declaratory judgment action on 7 April 1992 to determine the rights between the parties. The trial court entered a judgment on 29 April 1993 which concluded that plaintiff could aggregate the $50,000.00 uninsured motorist coverage in Policy A with the $100,000.00 limit of Policy B

for a total of $150,000.00. The trial court disallowed intrapolicy stacking as to Policy B. Both plaintiff and defendant appealed.

[1] Plaintiff contends the trial court erred by failing to permit him to intrapolicy stack the uninsured motorist (UM) coverage of Policy B. The trial court's decision disallowing the aggregation was based on a section of the policy which reads: "If this policy and any other insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a ***family member's*** injuries shall be the sum of the limits of liability for this coverage under all such policies."

Plaintiff argues the trial court erred in its interpretation of the policy language, contending the coverages in Policy B should have been stacked. Plaintiff cites *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991) to support his argument. In *Smith*, our Supreme Court held the plaintiff could intrapolicy stack underinsured motorist (UIM) coverage. *Smith*, however, applied to UIM rather than UM coverage, distinguishing that case from the case before us.

We find this case is instead controlled by *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992). The *Lanning* case held that N.C. Gen. Stat. § 20-279.21, prior to the 1991 amendments, does not require nor prohibit intrapolicy stacking of UM coverage. The Court in *Lanning* explained, "[w]hen policies written before the 1991 amendments to the Act contain language that may be interpreted to allow stacking of UM coverages on more than one vehicle in a single policy, insureds are contractually entitled to stack." *Id.* at 316, 420 S.E.2d at 185.

Here, a review of the "Limit of Liability" clause in Policy B issued by State Farm indicates clearly that stacking of UM coverage is prohibited. The provision states in pertinent part:

> The limit of bodily injury liability shown in the Declarations for each person for Uninsured Motorists Coverage is our maximum limit of liability for all damages for ***bodily injury***, including damages for care, loss of service or death, sustained by any one person in any one auto accident.
>
> Subject to this limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of liability for all damages for ***bodily injury*** resulting from any one accident. . . . This is the most we will pay for ***bodily injury*** . . . regardless of the number of:

1. ***Insureds;***

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the accident. (Emphasis in original).

Accordingly, the trial court was correct in refusing to permit plaintiff to stack the UM coverage of the two vehicles covered by Policy B.

[2] We next turn to the issues defendant raises on appeal. First, defendant claims the trial court erred in finding the "Other Insurance" clause in an amendment to Policy A is applicable only to underinsured vehicles. The amendment provides in pertinent part:

> With respect to damages you or a **family member** are legally entitled to recover from the owner or operator of an **uninsured motor vehicle** as defined in Section 5 of the definition of an **uninsured motor vehicle**, the first paragraph of the Other Insurance provision is replaced by the following:
>
> If this policy and any other insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a **family member's** injuries shall be the sum of the limits of liability for this coverage under all such policies. (Emphasis in original.)

The trial court found that the policy language is ambiguous and rejected State Farm's interpretation that the clause applied only to underinsured vehicles. We agree with the trial court that the "Other Insurance" language is unclear as to whether the replacing paragraph was intended to apply solely to UIM coverages.

> The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.

Woods v. Insurance Co., 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). Accordingly, defendant's argument as to this issue is overruled.

Next, defendant claims the trial court erred in failing to hold that an exclusion in the UM coverage section of Policy B prohibited coverage and stacking under that policy. The exclusion reads:

A. We do not provide Uninsured Motorists Coverage for ***property damage or bodily injuries*** sustained by any person:

* * * *

7. While ***occupying*** or when struck by, any motor vehicle owned by you or any ***family member*** which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

We reject defendant's argument and find coverage under Policy B.

The "owned vehicle" exclusion is clear and unambiguous, however, the exclusion's effect renders it void against public policy. The effect of the exclusion, to deny coverage to an injured person who is a named insured, is contrary to the purpose underlying the North Carolina Financial Responsibility Act. "The avowed purpose of the Financial Responsibility Act . . . is to compensate the innocent victims of financially irresponsible motorists." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) (citing *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986)). The exclusion works to deny UM protection to Class I insureds, thereby subverting the legislative policies articulated in the Financial Responsibility Act. Plaintiff, and other insureds, should not be penalized for being involved in an accident while operating their own vehicles.

We are persuaded in reaching this result by decisions in other jurisdictions which have found similar "owned vehicle" or "homeowners vehicle" exclusions null and void. *See, e.g., Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980); and *Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 697 P.2d 684 (1985). If we were to allow the exclusion to apply, an insured who has paid premiums for UM coverage would be denied coverage completely under the policy. We therefore agree the trial court did not err in allowing coverage under Policy B, as the "owned vehicle" exclusion is void against public policy.

Finally, defendant contends the trial court erred in determining that the "Other Insurance" clause in the endorsement was intended to replace the anti-stacking language in Section C of Policy A, thereby allowing interpolicy stacking of Policy A with Policy B. As noted earlier, the endorsement reads as follows: "If this policy and any other insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a ***family member's*** injuries shall be

the sum of the limits of liability for this coverage under all such policies." This Court has held that if an "Other Insurance" clause in a policy prohibits stacking, the insured may not stack policies. Conversely, where an "Other Insurance" clause allows stacking, the insured may engage in interpolicy stacking. *Dungee v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 599, 424 S.E.2d 234, *disc. review denied*, 333 N.C. 537, 429 S.E.2d 555 (1993). Here, the "Other Insurance" clause was replaced by the endorsement which allows interpolicy stacking. The replacement paragraph applies to UM coverage, and thus supports interpolicy stacking between Policy A and Policy B. As a result, plaintiff is entitled to aggregate the $50,000.00 UM limits of Policy A with the $100,000.00 UM limits of Policy B for a total coverage of $150,000.00.

The trial court's judgment is

Affirmed.

Judges ORR and MARTIN concur.

IN THE MATTER OF: THE APPEAL OF CAMEL CITY LAUNDRY COMPANY FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1990

No. 9310PTC965

(Filed 5 July 1994)

1. Taxation § 100 (NCI4th)— Property Tax Commission's identification of witness—no indication of weight attached to testimony

There was no merit to appellant's contention that the manner in which the Property Tax Commission identified its expert witness in the record indicated the weight the Commission attached to his opinion, since the witness was qualified, admitted, and testified as an expert witness, and there was no reason to believe that the Commission understood him to be otherwise.

Am Jur 2d, State and Local Taxation §§ 704 et seq.

2. Taxation § 82 (NCI4th)— valuation of property—nonstatutory factors considered—error

The Property Tax Commission overstepped its statutory authority in determining a property's value where it considered

the ability of the subject property to produce income in its contaminated state and the cost to cure the contamination; the Commission did not link these factors to the price a buyer would pay for the property; and none of appellee's witnesses provided the Commission with a statement of the fair market value of the property.

Am Jur 2d, State and Local Taxation §§ 704 et seq.

Appeal by Forsyth County and its tax assessor from final decision entered 23 April 1993 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 12 May 1994.

Stern, Graham & Klepfer, by James W. Miles, Jr. for petitioner-appellee.

Office of Forsyth County Attorney, by Bruce E. Colvin, for respondent-appellant.

WYNN, Judge.

For several decades, Taxpayer, Camel City Laundry Company ("Camel City") owned and operated a commercial dry-cleaning business at 501 East Third Street, Winston-Salem, Forsyth County, North Carolina. The property is also known in Forsyth County as Tax Block 40, Lot 301. The property is 53,600 square feet (1.23 acres) and contains one 25,486-square foot building surrounded by a paved, 56-space asphalt parking lot.

From 1900 until purchased by Camel City, the property was successively owned by Winston-Salem Gas & Lighting Company, Duke Power Company, and Piedmont Natural Gas Company, and was used as an industrial site. Between 1910 and 1920, the facility was used to produce gas by coal and water gasification. The owners all used and stored various chemicals on the property for the operation of the gasification plant, for a creosote pit to coat power line poles, and for on-site waste disposal. Over the years, fuel storage tanks and an underground mineral spirits tank were used on the property. Coal was also stored on the property.

Camel City has owned the property since the late 1950's or early 1960's. It was a dry-cleaning and laundry processing plant until 1989, when the building was converted into office space and a laundry and customer service facility.

In 1988, pursuant to N.C. Gen. Stat. § 105-286, appellant Forsyth County ("County") reappraised all real property within Forsyth County in accordance with N.C. Gen. Stat. §§ 105-283 and 105-317. Camel City's property was appraised at $639,000, effective 1 January 1988.

In 1989, Camel City received an offer to purchase the property for $750,000, contingent on a satisfactory environmental assessment. An environmental assessment concluded that both subsurface soils and the shallow groundwater table appeared to be contaminated by pollutants. Upon learning of the contamination, the offer to purchase was withdrawn.

While the subsurface of the property is contaminated, there is no evidence in the record that the interior of the building or the parking lot have been negatively affected.

On 29 May 1990, Camel City appealed the $639,000 valuation to the Forsyth County Board of Equalization and Review. The Board unanimously affirmed the $639,000 valuation. Camel City appealed this decision to the Property Tax Commission. On 23 April 1993, the Commission granted Camel City's petition for a reduction in the assessment of the property and entered its Final Decision, setting the value of the property at $125,000. The County appeals from that decision.

I.

[1] During the course of the Commission's 12 November 1992 hearing, the County tendered its only witness, John Potter, the lead commercial tax appraiser in Forsyth County. After establishing Potter's credentials in the field of real estate appraisal, the County's counsel stated, "At this time I tender Mr. Potter as an expert witness in real estate appraisal." Camel City's counsel said, "No objection," and the Commission's Acting Chairman stated, "Let him be admitted."

The County contends that the Commission failed to consider Mr. Potter's testimony to be that of an expert witness. The County's only basis for this contention is that the Commission's Final Decision listed "oral testimony of Mr. John G. Potter" among the evidence presented by the County, while for Camel City's evidence it listed "oral testimony of Mr. John McCracken. Admitted to testify as an expert witness in the field of real estate appraisal." The County contends that because the Commission did not identify Mr. Potter as an expert when listing the County's evidence, it did not give Mr. Potter's testimony the weight normally given to that of an expert witness.

We do not accept the notion that the manner in which the Commission identifies a witness in the record indicates the weight the Commission attached to his opinion. Mr. Potter was qualified, admitted, and testified as an expert witness. There is no reason to believe that the Commission understood him to be otherwise. We find no reversible error in the Commission's consideration of Mr. Potter's testimony.

II.

[2] The County next argues that the Commission overstepped its statutory authority in determining the property's value because it considered factors that are not authorized by statute. The Commission's Finding of Fact No. 19 reads, "After carefully considering both the ability of the subject property to produce income in its contaminated state and the cost to cure the contamination, the Commission finds that the true value in money of the subject property as of 1 January 1990 was $125,000."

The Machinery Act, which controls the listing, appraisal, and assessment of property, sets forth uniform standards for property appraisal and assessment throughout the State. The statute provides:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (1992). The North Carolina General Assembly, and no one else, determines how property in this State should be valued for the purposes of ad valorem taxation. *In re Appeal of Amp*, Inc., 287 N.C. 547, 215 S.E.2d 752 (1975). The Machinery Act does not provide for consideration of property's income-producing ability nor for the cost to conduct environmental remediation on the property in determining property value. This is not to say that these factors do not play a part in the value of the property. No doubt a buyer would take them into account when deciding upon a price to offer for the property. However, the Commission relied on these factors without linking them to the price a buyer would pay for the property, which is

the statutorily-required measure of true value. Not one of Camel City's three witnesses provided the Commission with a statement of the fair market value of the property. Thus, even assuming the existence of a buyer who had considered the property's income-producing ability and the cost of remediation, we have no way of knowing whether this buyer would purchase the property for $125,000. The Commission did hear some evidence about the difficulty of selling the property, and found that "uncertainties concerning the costs of cleaning up the site (if it can be completely remediated) and who might ultimately have to pay these costs would make the subject property extremely difficult to sell." However, it appears from the record that the Commission did not base its decision on this finding.

A Property Tax Commission decision is reversible where its "findings, inferences, conclusions or decisions are . . . in excess of statutory authority or jurisdiction of the Commission" or "unsupported by competent, material and substantial evidence in view of the entire record as submitted" such that they prejudice the appellant's substantial rights. N.C. Gen. Stat. § 105-345.2 (1992). Absent evidence that the Commission's decision was based on statutorily-mandated criteria, we find that the Commission exceeded its statutory authority and that its decision is unsupported by competent evidence, resulting in prejudice to the County's substantial rights.

We reverse the Commission's decision and remand so that the Commission may consider appropriate evidence of the property's true value as defined by N.C. Gen. Stat. § 105-283.

III.

The County also assigns error to the Commission's consideration of materials which were not submitted ten days before the hearing, as required by the Commission's rules. Because we remand for rehearing on other grounds, we need not address this assignment of error.

Reversed and remanded.

Judges LEWIS and MARTIN concur.

MEDFORD v. HAYWOOD COUNTY HOSPITAL FOUNDATION

[115 N.C. App. 474 (1994)]

BARBARA ELLEN MEDFORD, ADMINISTRATOR OF THE ESTATE OF CONNIE SUE MEDFORD, DECEASED; HEATHER NICOLE MEDFORD, BY AND THROUGH HER GUARDIAN AD LITEM, BARBARA ELLEN MEDFORD; AND BARBARA ELLEN MEDFORD, AND ROY GENE MEDFORD, INDIVIDUALLY v. HAYWOOD COUNTY HOSPITAL FOUNDATION, INC.

No. 9328SC358

(Filed 5 July 1994)

Pleadings § 378 (NCI4th)— wrong defendant named—misnomer rule inapplicable—addition of defendant not allowed under Rule 15(c)

In a malpractice action where plaintiffs named Haywood County Hospital Foundation, Inc. as defendant instead of Haywood County Hospital, the trial court did not err in refusing to add the Hospital to the action pursuant to the misnomer rule, since Haywood County Hospital Foundation, Inc. and the Hospital were separate and distinct entities, and the Hospital was not served with summons and complaint; furthermore, plaintiffs could not add the Hospital as a defendant pursuant to N.C.G.S. § 1A-1, Rule 15(c), since plaintiffs provided no evidence indicating that the Hospital had notice that they had filed the complaint prior to the running of the statute of limitations.

Am Jur 2d, Pleading § 323.

Appeal by plaintiff from order entered 28 January 1993 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 31 January 1994.

On 16 November 1992, plaintiffs filed a complaint stating a wrongful death action against defendant Haywood County Hospital Foundation, Inc. They served the complaint by certified mail on Daniel E. Gossett, registered agent for Haywood County Hospital Foundation, Inc. Plaintiffs also mailed a copy of the complaint to Haywood County Hospital's attorney, Russell Brannon. On 18 December 1992, defendant filed an answer, asserting that plaintiffs had named the wrong defendant and that, in fact, Haywood County Hospital had provided care to the deceased.

On 21 December 1992, plaintiffs filed a motion to amend the complaint to "correct . . . the name of the defendant from Haywood County Hospital Foundation, Inc. to Haywood County Hospital." Thereafter on 30 December 1992, defendant filed a motion for judgment on the pleadings. After a hearing on both parties' motions, the trial judge

entered an order on 28 January 1993, denying plaintiffs' motion and granting defendant's motion. From the dismissal of the complaint, plaintiffs appeal.

Devere Lentz and Associates, by John M. Olesiuk, for plaintiffs-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon and Michelle Rippon, for defendant-appellee.

McCRODDEN, Judge.

The issue determinative of this appeal is whether the trial court erred in denying plaintiffs' motion to add Haywood County Hospital as a party defendant. After review of the record before us, we have concluded that the trial court properly denied plaintiffs' motion and dismissed the complaint.

Plaintiffs first contend that the naming of Haywood County Hospital Foundation, Inc. as defendant was simply a misnomer or misdescription of the intended defendant, Haywood County Hospital (the Hospital). On the basis of this, they argue that they should have been allowed to amend the complaint to correct the misnomer or misdescription of the Hospital.

Ordinarily, the trial court, in its discretion, may allow an amendment of process and pleading to correct a misnomer or mistake in the name of a party. *Bailey v. McPherson*, 233 N.C. 231, 235, 63 S.E.2d 559, 562 (1951). The general rule regarding a misnomer or mistake is that when a misnomer "does not leave in doubt the identity of the party intended to be sued, or, even where there is room for doubt as to identity, if service is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage in the suit." *Tyson v. L'eggs Products, Inc.*, 84 N.C. App. 1, 8, 351 S.E.2d 834, 838 (1987) (quoting *Paramore v. Inter-Regional Financial Group Leasing Co.*, 68 N.C. App. 659, 662, 316 S.E.2d 90, 91 (1984)). Substitution in the case of a misnomer is not considered a substitution of new parties, but merely "a correction in the description of the party or parties actually served." *Electric Membership Corp. v. Grannis Brothers*, 231 N.C. 716, 720, 58 S.E.2d 748, 751 (1950). If, however, the amendment amounts to a substitution or entire change of parties, the trial court will not allow the amendment. *Bailey*, 233 N.C. at 235, 63 S.E.2d at 562.

Plaintiffs misplace their reliance on the misnomer rule to amend their complaint because they are not attempting to correct the description of Haywood County Hospital Foundation, Inc., but are attempting to substitute an entirely different party. The record reveals that Haywood County Hospital Foundation, Inc. and the Hospital are separate and distinct entities. Furthermore, the intended defendant, the Hospital, was not served with the summons and complaint and has, therefore, never been subject to the lower court's jurisdiction. The trial court did not err in refusing to add the Hospital to the action pursuant to the misnomer rule.

In the alternative, plaintiffs argue that they were entitled to add the Hospital as a defendant in the lawsuit because the Hospital had notice of plaintiffs' intent to file a lawsuit against it prior to the expiration of the statute of limitations. Specifically, plaintiffs refer to their letter of 4 September 1991, which notified the Hospital of their intent to file a wrongful death lawsuit against the Hospital, and they point out that they had engaged in negotiations with counsel for the Hospital a year prior to the tolling of the statute of limitations. This notice, plaintiffs assert, enables their claim against the Hospital to relate back to the original complaint.

Rule 15(c) of the North Carolina Rules of Civil Procedure, which governs a party's ability to add a new defendant after the statute of limitations has expired, provides:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990). Under the rule, the trial court may allow the addition of a party defendant after the applicable limitations period has expired if the new defendant had notice of the claim so as not to be prejudiced by the untimely amendment. *Ring Drug Co. v. Carolina Medicorp Enterprises*, 96 N.C. App. 277, 283, 385 S.E.2d 801, 806 (1989). The *Ring Drug* Court adopted the following test used by federal courts for determining when a new defendant may be added after the limitations period has expired:

> 1)[T]he basic claim arises out of the conduct set forth in the original pleading, 2) the party to be brought in receives such notice that it will not be prejudiced in maintaining its defense, 3) the

party knows or should have known that, but for a mistake concerning identity, the action would have been brought against it, and 4) the second and third requirements are fulfilled within the prescribed limitations period.

Id. (citation omitted). Although Congress revised Federal Rule 15(c) in 1991, subsequent to the decision in *Ring Drug*, this Court is bound by the *Ring Drug* decision. *Crossman v. Moore*, 115 N.C. App. 372, 444 S.E.2d 630 (1994).

The amendment to add the Hospital as a party to the action does not relate back to the original complaint, because it does not fulfill the fourth element in the *Ring Drug* test. That element requires that, for an amended complaint to relate back to the original complaint, the party to be added must have notice of the institution of the civil action within the statute of limitations period. *Crossman v. Moore*, 115 N.C. App. 372, 444 S.E.2d 630. Therefore, notice received after the running of the statute of limitations is insufficient.

The record in the instant case shows that the deceased died on 17 November 1990. Plaintiffs filed the complaint and issued the summons to Haywood County Hospital Foundation, Inc. on 16 November 1992. The statute of limitations expired one day later, on 17 November 1992. *See* N.C. Gen. Stat. § 1-53(4) (1983). The record is devoid of any evidence showing when Haywood County Hospital Foundation, Inc. was actually served with the summons and complaint. More importantly, plaintiffs provide no evidence indicating that the Hospital had notice that they had filed the complaint prior to the running of the statute of limitations on 17 November. Although plaintiffs' letter of 4 September 1991 and the negotiations with the Hospital may have notified the Hospital of a potential lawsuit, they failed to provide notice of the institution of the action. Since the Hospital did not receive notice that plaintiffs had filed a lawsuit before the tolling of the statute of limitations, we conclude that plaintiffs failed to satisfy Rule 15(c).

Since the amendment to the complaint could not relate back to the original pleading, plaintiffs' claim against the Hospital is barred by the statute of limitations. The trial court correctly denied plaintiffs' motion to add the Hospital as a defendant in the action and properly granted defendant's motion for judgment on the pleadings.

We affirm the order of the trial court.

Affirmed.

Judges WELLS and JOHN concur.

PAMELA T. (NANTZ) LAWRENCE v. JOHN CHARLES NANTZ, JR.

No. 9310DC272

(Filed 5 July 1994)

1. **Divorce and Separation § 409 (NCI4th)— failure of father to maintain medical insurance—father not personally liable for medical expenses**

There was no merit to plaintiff's contention that the trial court should have ordered defendant to pay medical expenses incurred on behalf of the parties' minor child because defendant violated the parties' 1978 consent judgment when he allowed his insurance coverage to lapse, since plaintiff presented no evidence that any portion of the outstanding medical bills would have been paid if defendant had maintained health insurance on the minor child and since the consent agreement contained no provision that defendant would be personally liable for medical expenses if he failed to maintain medical insurance. N.C.G.S. § 50-13.11(e) did not apply to the 1978 consent judgment.

Am Jur 2d, Divorce and Separation §§ 1037, 1038.

2. **Divorce and Separation § 447 (NCI4th)— child's hospitalization—substantial change of circumstances—father's obligation to pay expenses—effect of child's majority**

A minor child's hospitalization constituted a change of circumstances, and the trial court had the authority to apportion the cost between plaintiff and defendant, taking into account their respective incomes, assets, and expenses, and the fact that the child reached the age of eighteen one month after plaintiff filed her motion had no effect on this result. N.C.G.S. § 50-13.7(a).

Am Jur 2d, Divorce and Separation §§ 1078 et seq.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

Postmajority disability as reviving parental duty to support child. 48 ALR4th 919.

Appeal by plaintiff from order entered 24 November 1992 by Judge Fred M. Morelock in Wake County District Court. Heard in the Court of Appeals 10 January 1994.

Plaintiff Pamela T. (Nantz) Lawrence and defendant John Charles Nantz were married on 3 June 1972 and separated on 16 January 1978. In February 1978, plaintiff brought an action seeking custody of and support for John Charles Nantz, III (hereinafter the minor child), born on 28 September 1974. Plaintiff and defendant entered into an 18 May 1978 consent judgment wherein defendant agreed, *inter alia*, to maintain for the minor child the medical insurance coverage that he had with his employer. He further agreed that in the event he changed employers he would obtain and keep in effect a medical insurance policy with coverage equivalent to that in effect at the time of the consent judgment. On 30 August 1991, plaintiff discovered that the minor child had intentionally injured himself. Plaintiff took him to Pembroke Psychological Services to see Armand Ochetti, C.C.S.W., M.S.S.A., who insisted that the child be hospitalized immediately because he might try to hurt himself further. Armand Ochetti recommended that the child be placed in Holly Hill Hospital, which admitted the minor child on 31 October 1991.

The total cost for treating the minor child was $19,812.17. Of that amount, plaintiff's insurance carrier paid $5,593.54, the hospital discounted the total bill by $4,908.23, and defendant paid nothing. Defendant had no medical insurance for the child since he had discontinued his insurance coverage in violation of the consent agreement. Plaintiff filed a motion on 4 August 1992, requesting that the trial court enter an order requiring defendant to assist with the payment of the outstanding medical expenses. From the denial of this motion, plaintiff appeals.

Lawrence and Holbrook, by Gary S. Lawrence, for plaintiff-appellant.

Sidney P. Jessup for defendant-appellee.

McCRODDEN, Judge.

Plaintiff assigns error to the trial court's refusal to order defendant to pay the medical expenses incurred on behalf of the minor child. Specifically, she argues that the trial court should have granted her motion for payment of such expenses because (1) defendant violated the consent judgment when he allowed his insurance coverage to lapse, and (2) the minor child's hospitalization constituted a change of circumstances warranting modification of the support order.

[1] As support for her first contention, plaintiff relies on N.C. Gen. Stat. § 50-13.11(e) (Supp. 1993), which provides:

> If the party who is required to provide medical insurance fails to maintain the insurance coverage for the minor child, the party shall be liable for any medical, hospital, or dental expenses incurred from the date of the court order or agreement that would have been covered by insurance if it had been in force.

Section 50-13.11(e), however, became effective 1 October 1990, and is applicable only to court orders and written agreements entered on or after that date. *See* Editor's Note, N.C.G.S. § 50-13.11. Since plaintiff and defendant executed the consent judgment on 18 May 1978, before section 50-13.11(e) became operative, the statute does not apply to the instant case.

Assuming *arguendo* that N.C.G.S. § 50-13.11 were operative at the time the consent judgment was executed, plaintiff's argument still fails. Pursuant to section 50-13.11(e), defendant would be liable for the expenses that would have been covered by his insurance if it had been in force. Plaintiff presented no evidence showing that any portion of the outstanding medical bills would have been paid if defendant had maintained health insurance on the minor child. Indeed, the evidence was that plaintiff's insurance had coverage substantially similar to that provided by defendant's lapsed policy.

Furthermore, the consent judgment does not grant the relief sought by plaintiff. Although it orders defendant to maintain medical insurance coverage for the child, the consent agreement contains no provision that defendant will be personally liable for medical expenses if he fails to maintain medical insurance. The defendant is not liable under the consent judgment for any of the remaining medical expenses.

[2] Plaintiff next disputes the trial court's refusal to modify a prior support order to require defendant to help pay for the medical bills incurred on behalf of the minor child. She contends that the child's hospitalization constituted a substantial and material change of circumstances.

Section 50-13.7(a) of the North Carolina General Statutes provides that a district court may modify an order for support of a minor child at any time, upon motion in the cause and a showing of changed circumstances by either party, subject to the limitations of N.C. Gen. Stat. § 50-13.10 (1987). N.C. Gen. Stat. § 50-13.7 (1987). Section 50-13.10, entitled "Past due child support vested; not subject to retroactive modification; entitled to full faith and credit," states:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due or
>
> (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.

N.C.G.S. § 50-13.10.

The statute does not define retroactive payments. Reading the words of this statute in conjunction with its title and common sense, we are convinced that the General Assembly did not intend to equate retroactive payments with expenses already incurred, as defendant would have us believe. Defendant reads section 50-13.10 to require plaintiff to file a motion to modify the support order before the minor child was hospitalized and had incurred medical expenses. This interpretation would unreasonably require plaintiff to possess a prescience that no one possesses, *i.e.*, the ability to predict in advance the expenses the child would incur while hospitalized so that she could seek modification of the consent judgment prior to the defendant's payment of support during the months of hospitalization. Sec-

tion 50-13.10 is not applicable to the facts of this case, and the trial court's reliance on it was error.

Without the limitations of section 50-13.10, we return to section 50-13.7. The minor child's hospitalization and its resulting costs constituted, as the trial court found, a substantial change in circumstances. The record discloses that plaintiff's own insurance paid over a fourth of this amount and that plaintiff was able to negotiate a further reduction of the outstanding debt, on condition that she make regular monthly payments to erase the remaining debt. Shortly thereafter, having had no success in her requests for assistance from defendant, she filed her motion in the cause. The trial court had the authority to apportion the balance of medical expenses between plaintiff and defendant, taking into account their respective incomes, assets and expenses, N.C.G.S. § 50-13.7, and to order defendant to pay his pro rata share of the monthly payments. The fact that a month *after* plaintiff filed the motion, the child reached the age of 18, the age at which defendant's support was to cease, has no effect on this result.

We remand this case to the lower court to take into account the parties' abilities to provide support for the minor child's medical expenses and to enter an order modifying the support order. N.C. Gen. Stat. § 50-13.4 (Supp. 1993); N.C.G.S. § 50-13.7(a) . The current order is reversed.

Reversed and remanded.

Judges WELLS and JOHN concur.

GERALD ZENNS AND, WALTON JONES QUINBY, PLAINTIFF-APPELLANTS v. HARTFORD ACCIDENT AND INDEMNITY COMPANY AND SENTRY INSURANCE, A MUTUAL COMPANY, DEFENDANT-APPELLEES

No. 9326SC832

(Filed 5 July 1994)

Insurance § 622 (NCI4th)— failure to pay premium—automobile insurance terminated by insured—accident not covered

Where plaintiff disregarded a premium notice from his automobile insurer, demonstrating his intention not to pay the

premium by the cancellation date of 17 March 1990, his policy was not in effect and his 28 March 1990 accident was not covered, even though defendant insurer mailed plaintiff a reinstatement offer on 27 March 1990 and plaintiff gave the insurance premium payment to his agent within two days after 28 March 1990.

Am Jur 2d, Insurance §§ 36 et seq.

Insurer's acceptance of defaulted premium payment or defaulted payment on premium note, as affecting liability for loss which occurred during period of default. 7 ALR3d 414.

Appeal by plaintiffs from judgment signed 14 June 1993 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 April 1994.

Plaintiffs appeal from the trial court's entry of summary judgment, G.S. 1A-1, Rule 56, for defendant Sentry Insurance (hereinafter "Sentry"). On 28 March 1990, Gerald Zenns, while riding as a passenger on a motorcycle, was struck by a pickup truck driven and owned by Walton J. Quinby, Sentry's insured. Mr. Zenns suffered multiple injuries as a result of the accident. Mr. Zenns sued Mr. Quinby and received a judgment (in 90 CVS 724) for $425,000.00 on 9 November 1992. Sentry refused to pay the judgment.

Sentry's refusal to pay the judgment was based upon an alleged lapse of the policy arising from Mr. Quinby's failure to pay the premium at the end of the policy period. Mr. Quinby's policy period was from 17 September 1989 to 17 March 1990. On 15 February 1990, Sentry sent Mr. Quinby a "Premium Notice" stating that payment of the policy's premium was due on 17 March 1990 (listed as the "due date" on the notice). The notice further stated that "[y]our policy will expire if payment is not made by the due date." Sentry did not receive a payment by 17 March 1990, the stated due date. On 27 March 1990, Sentry sent Mr. Quinby another "Premium Notice," stating as follows:

REINSTATMENT OFFER

Your insurance coverage has expired. This notice is being sent to give you the opportunity to reinstate your insurance protection.

Reinstatement can be made only if payment is postmarked within 15 days of the STATEMENT DATE shown above. Your insurance protection will begin when we receive your payment.

> Won't you please take care of this matter today? Your cancelled check will be your receipt.

On 28 March 1990, the accident occurred. Sometime within the next two days, Mr. Quinby gave the premium payment to his insurance agent, John Hall, who forwarded the payment to Sentry's accounting department.

On 16 November 1992, Mr. Zenns and Mr. Quinby filed a complaint against defendant Sentry and against Hartford Accident and Indemnity Company, Mr. Zenns' underinsured motorist liability carrier.

Following plaintiffs' motion for summary judgment, on 14 June 1993 the trial court granted summary judgment for defendant Sentry. On 29 July 1993, plaintiffs voluntarily dismissed their claims against defendant Hartford with prejudice. Plaintiffs appeal.

J. Douglas Moretz, P.A., by J. Douglas Moretz, for plaintiff-appellants.

Parker, Poe, Adams & Bernstein, by Josephine H. Hicks, for defendant-appellee Sentry Insurance, A Mutual Company.

EAGLES, Judge.

Plaintiffs argue that the trial court erred in granting summary judgment for defendant Sentry because plaintiff Quinby's policy with defendant Sentry remained in effect at the time the accident occurred. We disagree.

G.S. 20-310 (1989) provides:

> (f) *No cancellation or refusal to renew* by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:
>
> (1) Be approved as to form by the Commissioner of Insurance prior to use;
>
> (2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be 15 days from the date of mailing or delivery when it is being can-

celed or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;

(3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;

(4) Advise the insured of his right to request in writing, within 10 days of the receipt of the notice, that the Commissioner of Insurance review the action of the insurer; and the insured's right to request in writing, within 10 days of receipt of the notice, a hearing before the Commissioner of Insurance;

(5) Either in the notice or in an accompanying statement advise the insured that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specifying the penalties for such violation.

(g) *Nothing in this section shall apply*:

(1) If the insurer has *manifested its willingness to renew by issuing or offering to issue a renewal policy*, certificate or other evidence of renewal, or has manifested such intention by any other means, including the mailing by first-class mail of a *premium notice* or expiration notice, and the insured has failed to pay the required premium prior to the premium due date;

. . . .

(Emphasis added.)

In *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 337 S.E.2d 569 (1985), our Supreme Court held that the expiration of a policy for nonpayment of a premium is not a "cancellation" or "refusal to renew by an insurer" as those terms are utilized under G.S. 20-310(f). Here, defendant Sentry did not undertake a "cancellation," G.S. 20-310(f), of plaintiff Quinby's policy because the policy was not unilaterally terminated by defendant Sentry prior to the end of the stated term. *Smith*, 315 N.C. at 268, n.2, 337 S.E.2d at 573, n. 2; *compare Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 382 S.E.2d 745 (1989) (mid-term cancellation by the insurer governed by provisions of G.S. 20-310(f)). By sending a "Premium Notice" to Mr. Quinby on 15 February 1990, Sentry manifested its willingness to renew the policy. *Smith*, 315 N.C. 262, 337 S.E.2d 569. Plaintiff Quinby's failure to pay

the premium by the due date was a termination of the policy by the insured (plaintiff Quinby), not by the insurer. *See Insurance Co. v. Cotten*, 280 N.C. 20, 27, 185 S.E.2d 182, 188 (1971). Since plaintiff Quinby disregarded the premium notice, demonstrating his intention not to pay the premium, his policy was not in effect and his 28 March 1990 accident was not covered. *Id.*; *Smith*, 315 N.C. at 268, 337 S.E.2d at 575. *See also Nationwide Mutual Ins. Co. v. Choice Floor Covering Co.*, 112 N.C. App. 801, 436 S.E.2d 851 (1993). Accordingly, summary judgment was properly entered for defendant Sentry.

For the reasons stated, the trial court's 14 June 1993 judgment is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. WILLIAM H. PEACE, III

No. 9310SC477

(Filed 5 July 1994)

Costs § 25 (NCI4th)— jurisdiction of court erroneously invoked by agency—authority of court to award attorney fees—findings required

Where respondent filed a claim for unemployment benefits which the Commission denied, respondent appealed the adverse decision, an independent Deputy Commissioner retained by the Commission heard the appeal and reversed the initial determination and awarded respondent benefits, the Commission appealed the Deputy Commissioner's decision to the superior court, and the superior court judge affirmed the decision of the Deputy Commissioner and ordered the Commission to pay respondent's attorney's fees, the Commission's appeal was not a proceeding under Chapter 96, and N.C.G.S. § 96-17(b1) was inapplicable to require respondent to pay his own legal fees. Rather, by virtue of N.C.G.S. § 6-19.1, the trial court could order attorney's fees in this case in which an agency erroneously invoked the jurisdiction of

the court, but the court was required to make findings pertaining to whether the Commission acted without substantial justification or whether there were special circumstances which would make the award of fees unjust.

Am Jur 2d, Costs §§ 72-86.

Appeal by petitioner from order entered 18 February 1993 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 9 February 1994.

Petitioner, the Employment Security Commission of North Carolina (the Commission), discharged respondent, an equal opportunity officer. Respondent filed a claim for unemployment insurance benefits which the Commission denied. Respondent appealed the adverse decision. An independent Deputy Commissioner retained by the Commission to hear the appeal reversed the initial determination and awarded respondent benefits. The Commission then appealed the Deputy Commissioner's decision to Wake County Superior Court. On 18 February 1993, Judge Gregory A. Weeks affirmed the decision of the Deputy Commissioner and ordered the Commission to pay respondent's attorney's fees. From the order to pay attorney's fees, the Commission appeals.

Staff Attorney Fred R. Gamin for petitioner-appellant.

Thomas Hilliard, III for respondent-appellee.

McCRODDEN, Judge.

Based upon its lone assignment of error, the Commission argues only that the trial court erred in awarding attorney's fees because N.C. Gen. Stat. § 96-17(b1) (1993) prohibits such an award.

Respondent filed his claim under Article 2 of the Employment Security Law, N.C. Gen. Stat. §§ 96-8 to -19 (1993). Section 96-17(b1) states, "[e]xcept as otherwise provided in this Chapter . . . in any court proceeding under this Chapter each party shall bear its own costs and legal fees." This statute "directly addresses the issue of attorneys' fees . . . [and] is specific to actions under Chapter 96." *Doyle v. Southeastern Glass Laminates*, 104 N.C. App. 326, 332, 409 S.E.2d 732, 735 (1991), *rev'd on other grounds*, 331 N.C. 748, 417 S.E.2d 236 (1992). Such a statute will prevail over other, more general statutes, absent clear legislative intent to the contrary. *Id.* (citing

Whittington v. N.C. Department of Human Resources, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990)).

Respondent insists, however, that N.C.G.S. § 96-17(b1) is not applicable here because the appeal to the superior court was not a "court proceeding under this Chapter." His point is well taken. In *In re Employment Security Comm.*, 234 N.C. 652, 68 S.E.2d 311 (1951), our Supreme Court held that no appeal lies from an order of an administrative agency of the State unless granted by statute. Since the Commission itself considers a decision of one of its deputy commissioners to be a decision of the Commission, Regulations of the Employment Security Commission of North Carolina § 21.18(D) (Adjudication and Appeals for Former Commission Employees) (1986), it defies logic to allow the Commission to appeal its own decision. We conclude that the Commission's appeal was not a proceeding under Chapter 96 and that N.C.G.S. § 96-17(b1) is, therefore, inapplicable to this case.

This does not, however, end our inquiry. We address now the issue of whether a trial court may order attorney's fees in a case in which an agency erroneously invokes the jurisdiction of the court. We believe that the court in this instance had such authority by virtue of N.C. Gen. Stat. § 6-19.1 (1986). It is difficult to imagine a situation more befitting the award of fees than one in which a citizen is forced to defend an improper appeal by a State agency. To find otherwise would be to allow an agency of the State to take action beyond its power and then to hide behind jurisdictional bars to avoid attorney's fees.

At common law neither party could recover costs in a civil action. *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972). "Today in this State, 'all costs are given in a court of law by virtue of some statute.' The simple but definitive statement of the rule is: '[C]osts in this State, are entirely creatures of legislation, and without this they do not exist.' " *Id.* (citations omitted). More specifically, attorney's fees, in the absence of express statutory authorization, are not allowable. *Id.* at 695, 190 S.E.2d at 187. In an action for judicial review of a decision made by an administrative agency, the court may award the prevailing party reasonable attorney's fees against the agency only under N.C.G.S. § 6-19.1, which provides:

> In any civil action . . . unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to

recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

Hence, three criteria must exist before a trial court can exercise its statutory discretion to award fees under section 6-19.1. First, the party moving for attorney's fees must be a "prevailing party." Second, the court must find that the agency acted without substantial justification; and finally the court must find that there are no special circumstances making a fee award unjust. S.E.T.A. *UNC-CH v. Huffines*, 107 N.C. App. 440, 443, 420 S.E.2d 674, 676 (1992).

Although we believe that attorney's fees are permissible in this case, the court's order is deficient. The court never made findings pertaining to whether the Commission acted without substantial justification or whether there were special circumstances that would make the award of fees unjust, as it must under section 6-19.1. *See Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). We remand for findings on these issues.

Based upon the foregoing, we reverse that portion of the trial court's judgment ordering petitioner to pay respondent's attorney's fees and remand for findings dispositive of the propriety of such fees.

Reversed and remanded.

Judges WELLS and JOHN concur.

PROVIDENCE WASHINGTON INSURANCE COMPANY v. MARIO LOCKLEAR, BY HIS GUARDIAN AD LITEM, C. CHRISTOPHER SMITH; MARVIN LOCKLEAR; AND TARENCE DALE HAMMONDS

No. 9316SC405

(Filed 5 July 1994)

Insurance § 617 (NCI4th)— object thrown from vehicle—injuries not arising out of use of vehicle—no coverage

The trial court did not err in determining as a matter of law that the injuries suffered by the defendant when hit by an object intentionally thrown from a moving vehicle did not arise out of the use of vehicle and thus were not covered by an automobile liability policy.

Am Jur 2d, Automobile Insurance §§ 85 et seq.

Automobile liability insurance: what are accidents or injuries "arising out of ownership, maintenance, or use" of insured vehicle. 15 ALR4th 10.

Appeal by defendant from order entered 26 January 1993 by Judge Giles R. Clark in Robeson County Superior Court. Heard in the Court of Appeals 2 February 1994.

Plaintiff brought this action seeking a declaratory judgment that an insurance policy issued by plaintiff did not provide coverage for injuries suffered by defendant Mario Locklear (Locklear) when he was hit by a beer can thrown from a moving vehicle by defendant Tarence Dale Hammonds (Hammonds). Defendants answered and asserted a counter-claim. Following a hearing on 19 January 1993, the trial court entered an order on 26 January 1993, finding that the policy did not cover the injuries because they did not arise out of the use of a vehicle. From this order, defendants appeal.

Baker & Jones, P.A., by H. Mitchell Baker, III, for defendant-appellants.

Teague, Campbell, Dennis & Gorham, by John Wishart Campbell, for plaintiff-appellee.

McCRODDEN, Judge.

The sole issue on this appeal is whether the trial court erred in determining as a matter of law that the injuries suffered by the minor

defendant Locklear, when hit by an object intentionally thrown from a moving vehicle, did not arise out of the use of a vehicle.

The parties stipulated to the following facts: On 8 April 1990, Hammonds was riding in the front passenger seat of an automobile being driven by Jamie Hunt (Hunt). Hammonds threw a beer can out of the car and struck Locklear, who was riding a bicycle on the shoulder of the highway, severely injuring him.

Hammonds was charged with felonious assault with a deadly weapon inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(b) (1993), and pleaded guilty to a misdemeanor violation of N.C. Gen. Stat. § 14-33 (1993), assault inflicting serious injury. Subsequently, Locklear and his father brought an action in Robeson County Superior Court against Hammonds. Judge J. Milton Read, Jr. found that Hammonds had injured Locklear by his willful and wanton negligence and entered judgment against Hammonds in the amounts of $48,000.00 for personal injuries to Locklear, $11,922.20 for medical expenses incurred by Locklear's father, and $2,000.00 as punitive damages.

When Locklear was injured, Hunt was using the automobile with the permission of Donna Jane Lester, who had leased it from U-Save Auto Rental d/b/a Crown Pointe Car Rentals. Plaintiff, Providence Washington Insurance Company (Providence), pursuant to a commercial auto liability policy issued to U-Save Auto Rental (the Policy), provided for the car liability coverage up to $25,000.00 per person.

The Policy provided coverage for injuries "arising from the ownership, maintenance or use of" the vehicle. This language is in harmony with the Financial Responsibility Act, N.C. Gen. Stat. §§ 20-279.1 to -279.39 (1993), which would control regardless. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). Our research has disclosed no other case in which a North Carolina Court has addressed the exact issue of whether injuries resulting from an object thrown from a moving vehicle arise out of the use of the vehicle. Courts of this state, however, have had ample opportunities to explore the limits of the "arising out of" language, and we believe that several are particularly instructive.

The test for determining whether an automobile liability policy provides coverage for injuries due to an accident is not whether the automobile was the proximate cause, but "whether there is a causal connection between the use of the automobile and the accident." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 539-40, 350 S.E.2d 66, 69 (1986). When we interpret policy provisions extending coverage, we must read them broadly so as to provide coverage whenever possible by reasonable construction. *Id.* at 538, 350 S.E.2d at 68. In this case, however, we do not believe it is reasonable to extend coverage to the assault by Hammonds.

In *State Capital*, our Supreme Court found that injuries resulting when a rifle discharged accidentally while it was being unloaded from a car arose out of the use of the auto. The Court reasoned that since the transportation of firearms is an ordinary and customary use of a motor vehicle and the use of an automobile includes its loading and unloading, the injuries were a "natural and reasonable incident or consequence of the use of that motor vehicle." 318 N.C. at 540, 350 S.E.2d at 70. On the ground that they involved injuries caused by "activities not ordinarily associated with the use of an automobile," *State Capital* distinguished several opinions of this Court in which the discharge of firearms in or about motor vehicles was found not to arise out of the use of the automobiles: *Wall v. Nationwide Mutual Insurance Co.*, 62 N.C. App. 127, 302 S.E.2d 302 (1983); *Insurance Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 363 (1977); and *Raines v. St. Paul Fire & Marine Insurance Co.*, 9 N.C. App. 27, 175 S.E.2d 299 (1970). *State Capital* at 540, 350 S.E.2d at 70. *Wall* was a case in which an occupant of a vehicle intentionally shot the plaintiff as he walked past the vehicle. In *Knight*, the insured, while an occupant of a vehicle, intentionally shot into another automobile, causing injury to an occupant. *Raines* involved the death of an occupant of a vehicle caused when the son of the named insured, while playing with a gun, accidentally discharged it. After careful review of these cases, we conclude that *Wall* and *Knight* control our decision today.

Hammonds assaulted Locklear by throwing a beer can, just as the passengers in *Knight* and *Wall* assaulted the plaintiffs with firearms. In each instance, the automobile was merely the situs of the assault. Throwing an object from a car at someone on the side of the road is no more an activity "ordinarily associated with the use of a automobile," *id.*, than is firing a gun from one car at another. Hammonds' assault upon Locklear was an "independent act disassociated from

the use of an automobile," *id.*, for which the insurance policy did not provide coverage. We, therefore, affirm the trial court's order finding no liability on the part of plaintiff.

Affirmed.

Judges WELLS and JOHN concur.

TAMMY P. MEDINA v. CECIL A. MEDINA

No. 9312DC1058

(Filed 5 July 1994)

Appeal and Error § 170 (NCI4th)— appellant in hiding—moot appeal—appeal dismissed

Plaintiff's appeal from the trial court's orders with regard to child custody, child support, and alimony is dismissed since plaintiff and the child in question are in hiding; if the court on appeal affirms the trial court's orders, plaintiff is not likely to present herself to the court and comply with the orders; if the court on appeal reversed the orders of the trial court, plaintiff will appear or not, as she may consider best for her own interests; and it is not after the manner of appellate courts to hear and decide what may prove to be only a moot case.

Am Jur 2d, Appeal and Error §§ 760 et seq.

Appeal by plaintiff from order entered 7 July 1993 and signed 14 July 1993 and from order entered 21 July 1993 and signed 19 August 1993 by Judge James Floyd Ammons, Jr. in Cumberland County District Court. Heard in the Court of Appeals 25 May 1994.

Reid, Lewis, Deese & Nance, by Renny W. Deese, for plaintiff-appellant.

Walen & McEniry, P.A., by K. Lee McEniry, for defendant-appellee.

LEWIS, Judge.

Because of our disposition of this appeal, a full recitation of the facts is not necessary. The pertinent facts are as follows: Plaintiff and defendant separated on or about 29 April 1992. By order dated 19

August 1992, the parties were granted joint custody of their minor child, with plaintiff having primary custody and defendant having secondary custody. On 5 May 1993, defendant, an employee of the United States Army, filed a motion for emergency visitation, due to his impending transfer for a three-year tour of duty in Germany. Defendant requested that he be awarded visitation of at least one week in July 1993. By order entered 25 May 1993, defendant's motion was granted. Plaintiff, who had since taken the child to Mississippi, was given three thirteen-day periods from which to select. Plaintiff notified defendant by mail of her selection. When defendant arrived on the specified date in Mississippi, he found that plaintiff and the child had disappeared, and even after an extensive search, he was unable to locate them.

Defendant returned to Cumberland County and filed motions for change of custody and for a show cause order regarding plaintiff's failure to abide by the order of visitation. In an order signed 14 July 1993, the court found plaintiff to be in willful contempt of the visitation order. In addition, the court awarded temporary custody of the child to defendant, suspended a previous order of child support, and ordered plaintiff to pay defendant's attorney's fees. The court then scheduled a hearing on defendant's motion for change of custody.

Also on 14 July, plaintiff, though still absent, filed a motion through her attorney to have the presiding judge, Judge James F. Ammons, Jr., recuse himself from any further hearings in the cause, and filed a motion to stay the proceedings in North Carolina and to transfer the case to Mississippi. By order signed 19 August 1993, Judge Ammons granted plaintiff's motion for recusal in part, denied it in part, and modified his 14 July order to allow defendant to appoint a guardian and custodian of the child until plaintiff surrendered herself to the jurisdiction of the court and complied with the 14 July order. In addition, the court terminated plaintiff's temporary alimony. Plaintiff has appealed the orders of Judge Ammons signed on 14 July and 19 August 1993. As of 25 May 1994, the date of oral argument of this appeal, the whereabouts of plaintiff and the child remained unknown.

In *Smith v. United States*, 94 U.S. 97, 24 L. Ed. 32 (1876), quoted in *State v. Williams*, 263 N.C. 800, 805, 140 S.E.2d 529, 533 (1965), the Supreme Court held in a unanimous opinion:

> It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is

> where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

Likewise, the courts of this state have held that a criminal defendant's appeal may be dismissed if he has escaped and is nowhere to be found. In *State v. Dixon*, 131 N.C. 808, 813, 42 S.E. 944, 945 (1902), our Supreme Court held that "[o]ne who thus dismisses himself abandons his appeal and has no ground to invoke a review of the trial by the appellate Court." In *State v. Keebler*, 145 N.C. 560, 562, 59 S.E. 872, 873 (1907), the Court stated, "We will not deal with a defendant who is in the woods." This Court, in *State v. Page*, 23 N.C. App. 539, 541, 209 S.E.2d 379, 380 (1974), dismissed the defendant's appeal and stated, "He is still a fugitive from justice and can no longer be made to comply with any judgment we may enter. At present, compliance with any decision of this court is in the discretion of the defendant."

We believe that the same principle which underlies the decisions in the above criminal cases, applies with equal force in the case at hand. Here, plaintiff was ordered to allow defendant thirteen days visitation before defendant's transfer to Germany. Plaintiff chose to disregard the order and, with the child, went into hiding. Plaintiff was held in willful contempt of court for violating the order, yet she refused to present herself and the child to the court. She now seeks, through her counsel, to challenge Judge Ammons' orders by appeal to this Court. As stated by the Supreme Court in *Smith*, if we affirm the orders of the trial court, plaintiff is not likely to present herself to the court and comply with the orders. *Smith*, 94 U.S. at 97, 24 L. Ed. at 32. If we reverse the orders of the trial court, plaintiff will appear or not, as she may consider most for her interest. Id. "It is not after the manner of appellate courts to hear and decide what may prove to be only a moot case . . . ." *In re Morris*, 225 N.C. 48, 50, 33 S.E.2d 243, 244 (1945). Accordingly, in our discretion, we dismiss plaintiff's appeal.

Appeal dismissed.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA, EX REL, ALFRED WEST, JR., PLAINTIFF v. LINDA G. WEST, DEFENDANT

No. 9330DC223

(Filed 5 July 1994)

Indians § 7 (NCI4th)— child support—jurisdiction of tribal court and state court

The state court had subject matter jurisdiction to consider an action by the State, which provided AFDC benefits, to establish and collect present and future child support in a case involving a father and child who were Cherokee Indians residing on the reservation even though the tribal court had held that defendant mother was not liable for child support.

Am Jur 2d, Indians § 63.

Appeal by the State from order entered 30 September 1992 by Judge Danny E. Davis in Swain County District Court. Heard in the Court of Appeals 8 December 1993.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith and Associate Attorney General Sybil Mann, for the State.

Graham Duls for defendant.

Haire, Bridgers & Spiro, P.A., by Ben Oshel Bridgers, for Eastern Band of Cherokee Indians, amicus curiae.

LEWIS, Judge.

As in the companion case of *Jackson County ex rel. Smoker v. Smoker*, No. 9330DC289 (N.C. App. July 5, 1994), this case concerns the issue of concurrent jurisdiction between our state courts and the Court of Indian Offenses of the Eastern Band of Cherokee Indians (hereinafter "the tribal court"). Alfred West, a member of the Eastern Band of Cherokee Indians, and Linda West, a non-Indian, both reside on the reservation. On 20 July 1990, Alfred West and Linda West entered into a separation agreement which gave custody of their minor child, who is also a member of the tribe, to Alfred. The Wests agreed to share child support. On 20 September 1990 Alfred West filed for Aid to Families with Dependent Children (hereinafter "AFDC"), and received AFDC benefits from October 1990 to June 1991, when he became eligible for Social Security Disability benefits for himself and the child. Alfred West received a total of $2,061.00 in AFDC benefits.

On 17 May 1991 Linda West filed an action in the tribal court seeking custody of her child. She later dismissed the custody action and proceeded only on the issue of visitation. On 17 June 1991 Alfred West answered the complaint and counterclaimed for reasonable child support.

On 26 August 1991 the state Child Support Enforcement Agency (hereinafter "the State") filed an action on behalf of Alfred West against Linda West in state district court seeking the establishment of a reasonable amount for child support and reimbursement for past public assistance paid to Alfred West. *See* N.C.G.S. § 110-135 (1991) (acceptance of benefits creates a debt to the State in the amount of public assistance paid); N.C.G.S. § 110-137 (1991) (by accepting benefits, recipient assigns to the State his or her right to child support, and the State becomes subrogated to the recipient's right to initiate an action for child support); N.C.G.S. § 110-138 (1991) (State has a duty to take appropriate action to ensure that child support is paid by a responsible parent). On 4 November 1991 Linda West answered the complaint and prayed for a dismissal of the State's action pending the outcome of the tribal court action. [r5] On 17 December 1991 the tribal court entered a judgment which granted an absolute divorce to the parties, awarded Alfred West custody, denied visitation to Linda West, and relieved Linda West of any obligation to support the child.

On 28 January 1992, Linda West again moved for dismissal of the state court action, or transfer of the action to the tribal court, or that full faith and credit be given to the judgment entered in the tribal court. The state court entered two separate orders, one addressing current support and one addressing reimbursement for past public assistance. On 5 March 1992, signed 9 April 1992, the court ordered Linda West to pay current child support in the amount of $127 per month and then suspended the order in light of the Social Security payments already being received by the child. On 23 March 1992 the court entered an order in open court, signed 1 April 1992, stating that the parties had agreed that Linda West would reimburse the State for $1,030 for past public assistance paid, at the rate of $45 per month. On 13 July 1992, signed 12 August 1992, the court granted a new trial on the issue of current child support.

On 19 August 1992 Linda West moved for dismissal of the State's action for current child support, or transfer of the action to the tribal court, or for full faith and credit to be granted to the order of the tribal court. On 30 September 1992, as corrected 10 December 1992,

the state court dismissed the action on the basis that the state and tribal courts had concurrent jurisdiction, that the tribal court had exercised jurisdiction first, and that the tribal court continued to exercise jurisdiction. The State now appeals from the dismissal of its state court action.

Although the State presents arguments regarding the issue of its action for reimbursement, we note at the outset that there is a valid order requiring Linda West to reimburse the State in the amount of $1,030. Nothing in the record indicates that that order has been vacated, appealed from, or otherwise disturbed. It is, therefore, res judicata on the issue of reimbursement for public assistance. The only issue before us is whether the state court had jurisdiction to consider an action to establish and collect present and future child support.

For the reasons stated in *Smoker*, we find that the state court has subject matter jurisdiction over the State's action for the establishment of child support. We note that in *Smoker*, both parents and the child are Cherokee. Here, although Mr. West and the child are Cherokee, Mrs. West is not. Even with this slight variation, the analysis in *Smoker* is applicable here. We therefore reverse and remand for further proceedings.

Reversed and remanded.

Judges ORR and JOHN concur.

STATE OF NORTH CAROLINA v. MARK A. MUSCIA, DEFENDANT

No. 931SC454

(Filed 5 July 1994)

Automobiles and Other Vehicles § 818.1 (NCI4th)— habitual impaired driving—no collateral attack on prior convictions

A defendant cannot collaterally attack the validity of his prior convictions in a prosection for habitual impaired driving.

Am Jur 2d, Automobiles and Highway Traffic § 310.

Appeal by defendant from judgment entered 3 February 1993 by Judge Gary E. Trawick in Dare County Superior Court. Heard in the Court of Appeals 4 January 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Aycock, Spence & Butler, by W. Mark Spence, for defendant appellant.

COZORT, Judge.

The only question before us is whether the trial court properly considered defendant's prior driving while impaired conviction to enhance the punishment imposed for this offense of driving while impaired. Defendant contends the trial court should not have considered his prior DWI conviction of May 1990 because it was based on a guilty plea which was obtained in violation of his constitutional rights. Specifically, defendant contends the prior guilty plea could not be considered because it was invalid under *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969). Defendant contends the plea was entered without defendant first being advised of his right against compulsory self-incrimination and his right to confront his witnesses against him. We affirm.

Defendant was arrested for driving while impaired on 3 January 1992. Defendant was convicted of driving while impaired in district court. Thereafter, defendant appealed to the superior court. Defendant entered a guilty plea and made a motion to suppress the prior 1990 conviction for purposes of sentencing. The motion was heard by the Honorable Gary E. Trawick on 1 February 1993. Judge Trawick denied defendant's motion, considered defendant's prior 1990 DWI conviction as a grossly aggravating factor, and imposed a level two punishment.

In *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846 (1994), this Court held that a defendant could not collaterally attack the validity of his prior convictions in a habitual impaired driving case. The defendant in *Stafford* moved to suppress the admission of his prior DWI convictions in his habitually impaired driving trial on grounds that they were invalid under *Boykin v. Alabama*. We find *Stafford* controlling here, where defendant seeks to suppress the use of his prior conviction to aggravate the sentence imposed for a subsequent DWI offense on grounds that the prior conviction was invalid under *Boykin*. Thus, following *Stafford*, we find the trial court did not err by

denying defendant's motion to suppress and by considering defendant's prior DWI conviction.

Affirmed.

Judges GREENE and WYNN concur.

ROBERT D. CLOUSE AND WIFE, BARBARA A. CLOUSE, PLAINTIFFS v. WALTER L. GORDON, WALTER L. GORDON & ASSOCIATES, CYNTHIA J. FRENCH, NEW WORLD REAL ESTATE SERVICE (A DOMESTIC CORPORATION), RAYMOND D. PETTY, SR., DEFENDANTS

No. 9320SC653

(Filed 19 July 1994)

1. Vendor and Purchaser § 67 (NCI4th)— house in flood plain—no fraudulent concealment by homeowner

In an action arising from the sale of real estate where plaintiffs contended that defendant homeowner fraudulently concealed the fact that the property was subject to flooding, the trial court did not err in granting defendant homeowner's motion for judgment n.o.v. where the parties negotiated the contract for the sale of the property at arms length; plaintiffs had full opportunity to view the topography of the land, including the fact that a mall and a four-lane thoroughfare were located upstream from the creek on the property; plaintiffs had knowledge that a creek ran through the property; plaintiff wife testified that she had grown up near houses located in flood plains; plaintiffs had full opportunity to inquire of other residents whether there was a flooding problem; there was no evidence that the homeowner resorted to any artifice that was calculated to induce plaintiffs to forego investigation of the property; plaintiffs had an independent survey done of the property and there was no evidence that defendant homeowner interfered in any way; and the fact that the property was located in a flood plain was of public record.

Am Jur 2d, Vendor and Purchaser § 554.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions. 90 ALR3d 568.

2. Brokers and Factors § 61 (NCI4th)— sale of real property—no duty of selling agent to determine land in flood plain—no duty to inform purchasers

Defendant who was the selling agent for real property purchased by plaintiffs did not owe plaintiffs the duty to check federal flood hazard maps to determine whether the property was located in a flood hazard zone and, upon finding out that the property was located in such a zone, to inform plaintiffs that the property was located in a flood plain and that it would probably be subject to flooding, since there was no evidence that defendant actually knew this information; plaintiff's action was not based on any actual representation made by defendant; plaintiffs employed an independent surveyor to conduct a survey of the property, but defendant would have no reason to question the surveyor's representation that the property was not located in a special flood hazard zone; N.C.G.S. § 93A-6(a)(1) did not impose upon defendant a duty to conduct an independent survey of the federal flood hazard maps; and plaintiffs were represented by an attorney at the closing who should have conducted a title search which would have uncovered the fact that the property was located in a flood plain.

Am Jur 2d, Brokers § 165.

Appeal by plaintiffs from orders entered 2 March 1993 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 9 March 1994.

This action arises out of a real estate transaction wherein Plaintiffs Robert and Barbara Clouse purchased realty located at 608 Sunnybrook Drive, Monroe, North Carolina, in December 1987. The seller of the property was Raymond D. Petty, Sr., and the selling agent was Cynthia J. French, an employee and agent of New World Real Estate Service. Further, Walter L. Gordon was a surveyor who prepared or caused to be prepared a survey of the property prior to plaintiffs purchasing the property.

Subsequently, in May or June, 1990, plaintiffs discovered that their property was located in a federally designated special flood hazard zone. Plaintiffs filed this action against Walter L. Gordon, Cynthia J. French and New World Real Estate alleging negligent conduct of Gordon and negligent or willful conduct of French and New World Real Estate in failing to disclose to plaintiffs a material fact concern-

ing the property. On 2 October 1991, plaintiffs filed an amended complaint to allege additional causes of action against Raymond Petty, Sr. for negligent and fraudulent conduct.

This action came on for trial, and on 19 January 1993, a jury returned a verdict finding that the plaintiffs were damaged by the negligence of Defendants Walter L. Gordon, Walter L. Gordon, Associates, and Cynthia J. French, and that plaintiffs were damaged by the fraud of Defendant Raymond D. Petty, Sr. Based on these findings, the jury found that plaintiffs were entitled to recover $25,000 in compensatory damages.

All defendants filed motions for judgments notwithstanding the verdict. Thereafter, Defendants Walter L. Gordon and Walter L. Gordon, Associates settled with plaintiffs out of court, and on 3 February 1993, plaintiffs voluntarily dismissed their claims against these two defendants. Subsequently, on 2 March 1993, Judge William H. Helms entered orders granting the motions for judgment notwithstanding the verdicts as to Defendants Petty, French, and New World Real Estate Service. From these orders, plaintiffs appeal.

Franklin S. Hancock and Michael G. Gibson for plaintiff-appellants.

W. David McSheehan for defendant-appellee Petty.

Cozen and O'Connor, by Michael L. Minsker and Eric J. Parham, for defendant-appellees French and New World Real Estate Service.

ORR, Judge.

The issues before this Court are whether the trial court erred in (1) granting Defendant Petty's motion for judgment notwithstanding the verdict as to plaintiffs' claim for fraud against him, and (2) granting Defendants French's and New World Real Estate Service's motion for judgment notwithstanding the verdict as to plaintiffs' negligence claims against them. At the outset we note that during oral argument it was conceded that Defendant French was acting as an agent of New World Real Estate Service, and for the purposes of this appeal, we shall treat Defendant French and Defendant New World Real Estate Service as one defendant.

The evidence viewed in the light most favorable to plaintiffs showed that during July, 1987, Barbara Clouse and her husband Robert Clouse wanted to move from New Jersey to North Carolina.

Subsequently, Mrs. Clouse contacted Defendant French, an agent of New World Real Estate Service, to help her find a house in North Carolina for the Clouses to purchase. Thereafter, while Mr. Clouse remained in New Jersey, Mrs. Clouse came to North Carolina, and French showed her the house and property owned by Defendant Petty located at 608 Sunnybrook Drive. While French was showing Mrs. Clouse this property, Mrs. Clouse had an opportunity to walk around the yard. Mrs. Clouse testified that as she was walking around the yard she noticed a creek located several hundred feet from the house. At this time, French did not inform Mrs. Clouse that the property was subject to flooding, and Mrs. Clouse did not inquire as to whether the property was subject to flooding.

The next day, French showed Mrs. Clouse the property again, and French helped Mrs. Clouse videotape the property to show Mr. Clouse. As they were videotaping the property, French testified that she answered some questions Mrs. Clouse had about the property, none of which concerned flooding. Further, French testified that she suggested to Mrs. Clouse at that time that she should have a survey and termite inspection done for the property and the house. The next day, Mrs. Clouse returned to New Jersey.

Thereafter, French and Mrs. Clouse were in contact over the phone about the property. After talking to the listing agent, French informed the Clouses that the property actually consisted of two lots instead of one and that the creek was on one of the lots. Eventually French and plaintiffs reached an agreement, and French prepared, and the Clouses signed, a contract for the sale of the property. French testified that she never did anything to prevent the Clouses from making a full and thorough investigation of the property.

Prior to the closing, French testified that she suggested to Mrs. Clouse again that she have a survey of the property done. Subsequently, French testified that Mrs. Clouse authorized her to have a survey done, and French contacted Walter Gordon, a registered land surveyor, to perform the survey of the property. Gordon performed such survey and prepared a map of the property on which he stated, "I have consulted the Federal Emergency Management Agency Flood map and determined the property shown is not in a special flood hazard zone." Additionally, the map prepared by Gordon did not show a creek on or near the property.

The closing was held on 11 December 1987. At the closing, French saw the survey map prepared by Gordon for the first time and noticed

that it did not show a creek. French informed Mr. Clouse that the survey was incorrect in that it did not show the creek and pointed out to Mr. Clouse where the creek should have been drawn. The Clouses were represented by an attorney at the closing. They concluded the purchase of the property for $74,400.

In June, 1990, Margaret Damon Desio, a real estate appraiser with Carolina Appraisal Company, was hired to do a mortgage appraisal on the property. In conducting such appraisal, Desio consulted federal flood maps and discovered that there was a flood plain on Sunnybrook. Desio testified that she determined that the lot containing the creek, Lot 51, was located in the flood plain but that it was unclear whether the lot containing the house, Lot 52, was in the flood plain. Thereafter, plaintiffs employed another surveyor to survey the property. The new survey showed that almost all of Lot 51 was contained in the flood plain and that a portion of Lot 52 was in the flood plain, including a part of plaintiffs' front and back yard.

Further, plaintiffs produced evidence tending to show that since they purchased the property, during heavy rain, the creek would overflow and flood their yard. Mrs. Clouse testified that during Hurricane Hugo, part of her house was flooded. A witness who lived near the property testified that between 1979 and 1982, when Petty owned the property, the creek flooded up and over the road approximately seven or eight times. Additionally, the evidence showed that the property is located downstream from a four-lane thoroughfare and the Monroe Mall, which mall has a large asphalt-covered parking lot, and that the drainage from this road and parking lot empties into this creek. The evidence also showed that Defendant French lived down the street from the property.

On the issue of damages, Mr. Clouse testified that the actual value of the property on the date of purchase, taking into consideration that it was located in a flood plain and subject to flooding, was thirty thousand dollars or less. Mrs. Clouse testified that the value of the property on the date of purchase, taking the flooding into account, was forty thousand dollars. Further, the Clouses testified that they would not have bought the property if they had known that it was located in a flood plain and subject to flooding.

I.

[1] On appeal, plaintiffs contend that the trial court erred in granting Defendant Petty's motion for judgment notwithstanding the verdict as to plaintiffs' claim for fraud against him. We disagree.

> When passing on a motion for judgment notwithstanding the verdict, the same standards applicable to a motion for directed verdict are to be applied. Thus, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict for plaintiff.

Brokers, Inc. v. High Point City Bd. of Educ., 33 N.C. App. 24, 28, 234 S.E.2d 56, 59, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 702 (1977) (citation omitted).

In the present case, Petty owned the property plaintiffs purchased, and plaintiffs alleged that Petty fraudulently concealed the fact from plaintiffs that the property was subject to flooding. On appeal, plaintiffs contend that sufficient evidence exists to support every element of their fraud claim and that the trial court erred in granting Petty's motion for judgment notwithstanding the verdict as to this claim. Because we find that *Goff v. Frank A. Ward Realty and Ins. Co., Inc.*, 21 N.C. App. 25, 203 S.E.2d 65, *cert. denied*, 285 N.C. 373, 205 S.E.2d 97 (1974) is controlling, we disagree.

In *Goff*, plaintiffs contracted to purchase a house from Charles J. Poche for $37,500. This house was located on a lot that was topographically lower than the lots located on its north and west, and was lower on the back than on the front. At the time of negotiating and executing the contract, Ward Realty and Insurance Company, Inc., through its agents, acted as sales agent for Poche. After plaintiffs closed on the transaction and moved into the house, they

> discovered that the property "had a long history of sewer and septic tank problems"; that in wet weather raw sewage from neighboring houses behind plaintiffs' property flows across plaintiffs' backyard and the resulting odor and slime rendered the backyard useless and constituted a serious health problem; that raw sewage sometimes bubbled up from plaintiffs' septic tank into their yard; and raw sewage from other houses flowed into a ditch in front of plaintiffs' house.

Id. at 26, 203 S.E.2d at 66. Subsequently, plaintiffs filed a complaint against Ward Realty and Insurance Company, Inc. and Poche alleging that these defendants fraudulently concealed the fact that this property had sewer problems and sought actual and punitive damages for this fraud. At the close of plaintiffs' evidence, defendants

moved for a directed verdict, which motion the trial court granted. Plaintiffs appealed to this Court.

This Court stated the applicable law:

> " * * * When the parties deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie.["] . . .
>
> * * *
>
> "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest."

Id. at 29, 203 S.E.2d at 68 (citations omitted).

Thereafter, this Court concluded:

> In the negotiation of the sale and purchase of the subject property, the parties were dealing at arms length. Plaintiffs had full opportunity to view the topography of the lot in question and to see that it was lower than the lots adjoining on the north and west. Plaintiffs had full opportunity to inquire of other residents of the area as to any septic tank problems in the area but they neglected to do so. Defendants resorted to no artifice which was calculated to induce plaintiffs to forego investigation. Hence, plaintiffs' action in deceit will not lie.

Id. at 29-30, 203 S.E.2d at 68. Based on these conclusions, this Court affirmed the trial court's granting of defendants' directed verdict motions.

In the present case, plaintiffs contend that Petty fraudulently concealed the fact that the property was subject to flooding and that this fraud injured plaintiffs. Like the parties in *Goff*, however, the parties in the present case negotiated the contract for the sale of the property at arms length. Plaintiffs had full opportunity to view the topography of the land, including the fact that a mall and a four-lane thoroughfare were located upstream from the creek on the property. Further, plaintiffs had knowledge that a creek ran through the prop-

erty, and Plaintiff Barbara Clouse testified that she grew up near houses located in flood plains in New Jersey. Further, plaintiffs had full opportunity to inquire of other residents whether there was a flooding problem.

The record contains no evidence that Petty resorted to any artifice that was calculated to induce plaintiffs to forego investigation of the property. In fact, plaintiffs had an independent survey done of the property, and the record is void of any evidence that Petty interfered in any way with this survey. In addition, the fact that the property was located in a flood plain was of public record, thus plaintiffs were not precluded from discovering this fact.

> Ordinarily, in the absence of inquiry by the vendors, the purchaser is not under a duty to disclose facts materially affecting the value of the property when no fiduciary relationship exists between them, certainly when such facts are a matter of public record, and the purchaser does not, by word or deed, divert a full investigation by the vendors.[] Thus, a purchaser of real estate cannot maintain an action for fraud for misrepresentations concerning the value of the property or its condition and adaptability to particular uses when the purchaser has an opportunity to make full investigation and is not induced to forego investigation by artifice or fraud on the part of the seller.[]

Strong's North Carolina Index 4th, vol. 29, Vendor and Purchaser § 65 (1994) (emphasis added) (footnotes omitted); *But see Brooks v. Ervin Construction Co.*, 253 N.C. 214, 116 S.E.2d 454 (1960) (where purchaser of lot and house could sue seller of the lot for fraud when the seller knew the house was constructed over a ditch filled with refuse and trash and this defect was not apparent to plaintiffs and not within the reach of their diligent attention and observation).

Thus, we conclude that under the facts of this case, plaintiffs cannot maintain an action for fraud against Petty. Accordingly, we find that the trial court did not err in granting Petty's motion for judgment notwithstanding the verdict.

II.

Plaintiffs also contend that the trial court erred in granting Defendant French's motion for judgment notwithstanding the verdict. We disagree.

[2] Plaintiffs' claim against French was for negligence. In order to withstand a motion for judgment notwithstanding a verdict as to this claim, the evidence, viewed in the light most favorable to plaintiffs, must be sufficient to support every element of the negligence claim. "To establish a *prima facie* case of negligence, plaintiff must put on evidence that defendant had a duty to conform to a certain standard of conduct, that defendant breached that duty, that plaintiff was injured, and that plaintiff's injury was proximately caused by the breach." *Simpson v. Cotton*, 98 N.C. App. 209, 211, 390 S.E.2d 345, 346 (1990).

In the case *sub judice*, French was the selling agent for the real property purchased by plaintiffs. Plaintiffs contend that under the facts of this case, French owed plaintiffs the duty of checking the federal flood hazard maps to determine whether the property was located in a flood hazard zone and that upon finding out that the property was located in such a zone, French had the duty to inform plaintiffs that the property was located in a flood plain and that it would probably be subject to flooding.

It is well-settled that

> "[a] broker who makes fraudulent misrepresentations or *who conceals a material fact* when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller."

Johnson v. Beverly-Hanks & Assoc., Inc., 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (emphasis in original) (quoting P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 132, at 165 (3d ed. 1988)). Further, "[a] broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Id.* This duty applies, however, to material facts known to the broker and to representations made by the broker.

In the present case, plaintiffs do not contend, and the record contains no evidence that, French actually knew the property was located in the flood hazard zone or that the property was subject to flooding. Further, during oral argument, plaintiffs conceded that their action against French is not based on any actual representation made by French. Instead, the alleged negligence of French is based on

French's failure to search the federal flood hazard maps to determine whether the property was located in a flood plain and to inform plaintiffs if she found that the property was located in such plain.

Plaintiffs have not cited, and we find no support for, the proposition that a selling agent for real estate owes a duty to the purchaser of that real estate to search flood hazard maps to determine whether the property she is selling is located in a flood plain. As we have already stated, it is the policy of the courts not to encourage negligence and inattention to one's own interest. *See Goff*, 21 N.C. App. at 29, 203 S.E.2d at 68. The purchaser is under some duty to insure that their interests are preserved.

Additionally, the plaintiffs employed Walter L. Gordon, an independent surveyor, to conduct a survey of the property. Gordon represented to plaintiffs that he had consulted the Federal Emergency Management Agency Flood map and determined that the property was not located in a special flood hazard zone. French, as a real estate agent, would have no reason to question Gordon's affirmative representation and make her own independent investigation when Gordon's expertise was specifically in the area of conducting surveys and when he was paid to specifically conduct such survey. Further, French would have no reason to believe she needed to conduct an independent search of the flood hazard maps in light of the fact that plaintiffs were represented by an attorney at the closing, and an attorney representing the buyer at a closing is normally expected to have conducted a title search of the property, which search would have presumably uncovered the fact that the property was located in a flood plain.

Plaintiffs contend, however, that N.C. Gen. Stat. § 93A-6(a)(1) imposed a duty on French to conduct an independent survey of the federal flood hazard maps. We disagree. N.C. Gen. Stat. § 93A-6(a)(1) states that the Real Estate Commission has the power to suspend or revoke a real estate license issued under Chapter 93A of the General Statutes if the Commission finds that the licensee is guilty of "[m]aking any willful or negligent misrepresentation or any willful or negligent omission of material fact . . . ." As already stated, plaintiffs do not allege that French made a willful or negligent misrepresentation or that she made a willful omission.

Additionally, the law is such that "mere inaction does not constitute negligence in the absence of a duty to act." 65 C.J.S. Negligence § 18 (footnote omitted). Thus, as we have held that French was under no duty to search the federal flood hazard maps, the fact that she did

not search these maps, discover that the property was located in a flood plain, and inform plaintiffs could not constitute a "negligent omission." Plaintiffs' argument is without merit.

Plaintiffs also contend, however, that French knew that the survey made by Gordon was wrong and thus a duty was imposed on French to conduct an independent investigation of the property as to whether it was located in a flood plain. Plaintiffs base their allegation that French knew the survey was wrong on the fact that the survey did not show that a creek ran through the property. We do not find that the fact that the survey did not include the creek created a duty in French to conduct an independent search of the federal flood hazard maps, especially in light of the facts that plaintiffs were represented by an attorney at the closing and French informed plaintiffs at the closing that the survey should have shown the creek running through the property. Plaintiffs' argument is without merit.

Accordingly, we conclude that under these facts, French was not under the duty to search the federal flood hazard maps to determine whether the property was located in a flood plain and affirm the trial court's granting of French's motion for judgment notwithstanding the verdict.

Affirmed.

Judge WELLS concurred prior to 30 June 1994.

Judge WYNN concurs in the result only.

MAIN STREET SHOPS, INC., PLAINTIFF v. ESQUIRE COLLECTIONS, LTD., DEFENDANT

No. 9330SC300

(Filed 19 July 1994)

1. Evidence and Witnesses § 672 (NCI4th)— failure to object when evidence first introduced—subsequent objection not timely

Defendant's objection to a particular exhibit, the contents of an envelope addressed to defendant corporation's secretary, was not timely where plaintiff had previously been permitted to testify with regard to the same evidence without objection.

Am Jur 2d, Trial §§ 405 et seq.

2. Landlord and Tenant § 38 (NCI4th)— default on lease—notice to lessee—admissibility of returned letter

In an action alleging default on a lease, the trial court did not err in admitting into evidence an unopened certified letter bearing the notation "unclaimed" and addressed to defendant corporation's secretary at the address set forth in the lease, since, by the very terms of the lease, notification is accomplished once an appropriate writing is addressed and deposited in the mail as specified; neither receipt nor proof of receipt is required; plaintiff's president's testimony without objection established that plaintiff gave notice of default to defendant in the manner designated in the lease; and the envelope and its contents were corroborative of that testimony.

Am Jur 2d, Landlord and Tenant §§ 1007 et seq.

3. Landlord and Tenant § 13 (NCI4th)— breach of covenant of quiet enjoyment—instruction not required

The trial court properly declined to instruct the jury with respect to an alleged breach by plaintiff of the covenant of quiet enjoyment, since that instruction was not relevant to those issues which were submitted to the jury, specifically, existence of the lease contract, defendant's breach thereof, and damages.

Am Jur 2d, Landlord and Tenant §§ 330 et seq.

Breach of covenant for quiet enjoyment in lease. 41 ALR2d 1414.

4. Attachment and Garnishment § 23 (NCI4th)— attachment of property—adequacy of sheriff's return—clear identification of property required

The adequacy of a sheriff's return upon attachment should be decided on a case by case basis, and all attendant circumstances should be considered with an eye toward whether the property has been identified clearly.

Am Jur 2d, Attachment and Garnishment §§ 330 et seq.

5. Attachment and Garnishment § 39 (NCI4th)— attachment of property—posting release bond—estoppel to challenge procedure defects

Posting a bond to release property from attachment estops a defendant from thereafter challenging any procedural defects in the process.

Am Jur 2d, Attachment and Garnishment §§ 419 et seq.

6. Attachment and Garnishment § 23 (NCI4th)— sheriff's return describing attached property—adequacy

Plaintiff substantially complied with the mandate of N.C.G.S. § 1-440.16(a) where the sheriff's returns described the property levied on as being "Esquire Collections, Shop + Contents" and "Close Esquire Collections Ltd a fforeign [sic] operation," since the returns adequately identified a particular unique commercial establishment in the small town of Highlands and indicated that the entire contents of the establishment were being seized, and a complete inventory of all goods in the retail store was not required.

Am Jur 2d, Attachment and Garnishment §§ 330 et seq.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee. 20 ALR5th 229.

Appeal by defendant from judgment entered 20 August 1992 by Judge C. Walter Allen in Macon County Superior Court. Heard in the Court of Appeals 12 January 1993.

Jones, Key, Melvin & Patton, P.A., by R. S. Jones, Jr. and Fred H. Jones, for plaintiff-appellee.

Creighton W. Sossomon for defendant-appellant.

JOHN, Judge.

Plaintiff-lessor instituted the actions *sub judice* against defendant-lessee alleging default of a written lease agreement, and seeking, *inter alia*, attachment of defendant's personal property located on and within the leased premises. Orders were entered by the clerk of court allowing attachment, and defendant twice posted bond to discharge the orders. The cases were consolidated for trial, and judgment was entered in favor of plaintiff on 20 August 1992 in the total amount of $44,620.02. The trial court contemporaneously denied defendant's motions to discharge the attachments and bonds.

Defendant contends the trial court erred by 1) allowing a certain exhibit into evidence; 2) failing to submit jury instructions requested by defendant; and 3) denying defendant's motions to discharge the attachments. We disagree.

I.

Defendant initially assigns error to the admission into evidence of plaintiff's Exhibit # 2 and its contents. The exhibit consisted of an unopened certified letter bearing the notation "unclaimed" and addressed as follows:

> Mr. John Roberts
> Suite B-202
> 5455 Buford Highway, Atlanta, Georgia 30340

Enclosed in the envelope were a four-page letter dated 24 January 1990 from O. E. Young (Young), plaintiff's president, to John Roberts (Roberts), defendant's secretary, and a bill for propane gas usage. Plaintiff was permitted to introduce the envelope and contents for purposes of showing notification of default in rent and utility payments in satisfaction of lease provisions requiring notice of, and a 30-day period to cure, default.

Defendant maintains "[t]he presumption that a letter properly addressed and mailed has been received" is inapplicable to the circumstances herein since the letter in question was neither received nor properly "mailed" due to an incorrect address and failure to designate agency capacity of the addressee. Consequently, plaintiff insists, notice of default and opportunity to cure, preconditions to suit under the lease, were not properly in evidence.

We first review the manner in which the envelope itself was introduced at trial. The following exchange took place between Young and plaintiff's counsel on direct examination:

> Q. Was that [October 1989] the last payment that [defendant] made under the lease?
>
> A. Yes sir.
>
> Q. Did you thereafter demand that [defendant] pay [its] rent?
>
> A. Yes sir.
>
> Q. In January of 1990, did you give notice to the defendant that it had breached the lease or that it was in default?
>
> A. By notice, what—a letter, yes. I sent [it] a registered [sic] letter. I sent it to [defendant's] Secretary-Treasurer as it appeared on the lease—as the lease called for.
>
> Q. I will hand you a document designated as Plaintiff's Exhibit 2 and ask if you recognize that?

. . . .

A. It's a registered [sic] letter addressed in my handwriting containing—

. . . .

A. Return receipt requested. It's a certified letter dated the 20th of February, 1990 to Mr. John Roberts . . . Suite B-202, 5455 Buford Highway, Atlanta, Georgia 30340. That's the address that was in the lease . . . .

Q. Did the contents of that certified letter . . . notify the defendant that it was in default?

A. Yes sir.

MR. MORRIS: We would offer into evidence, Your Honor, the document identified as Plaintiff's Exhibit 2.

No objection was interposed by defendant.

On cross-examination, defendant's counsel asked Young: "But it's your testimony that inside that envelope is a notice of default directed to the defendant corporation, Esquire Collections, is that correct?," to which the witness replied, "[T]hat's part of what's in it, the gas bill and so forth."

During the second day of trial, plaintiff requested the court's permission to share the contents of the unopened envelope with the jury. In overruling defense counsel's general objection thereto, the court stated: "The other one contains some matters that were covered in direct and cross, and we'll put Mr. Young back on the stand once this is passed to the jury and you may cross examine about this letter."

[1] Thus, defendant's objection was first raised only after Exhibit # 2 had been received into evidence. Moreover, there was no objection when Young was asked on direct whether by sending the certified letter he had "notif[ied] defendant that it was in default," prompting his affirmative response, or when Young similarly stated on cross-examination that the envelope contained notice of default and the gas bill. Therefore, at the time of defendant's objection to the admission of the envelope's contents, plaintiff had previously been permitted to testify about them without objection. Accordingly, defendant's objection was not raised in a timely manner, *see* N.C.R. App. P. 10(b)(1); N.C.R. Evid. 103(a)(1) (1992), and was thereby waived. *See State v. Hunt*,

223 N.C. 173, 176, 25 S.E.2d 598, 600 (1943) ("An objection to testimony not taken in apt time is waived.") (citation omitted). *See also* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 19, at 79 (4th ed. 1993) ("An objection is timely only when made as soon as the potential objector has the opportunity to learn that the evidence is objectionable . . . . Unless prompt objection is made, the opponent will be held to have waived it."); *State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989) (defendant not entitled to complain on appeal about evidence elicited by his own counsel on cross-examination), *vacated and remanded for further consideration in light of McKoy v. North Carolina*, 494 U.S. 1022, 108 L. Ed.2d 603 (1990). As defendant's objection has not been properly preserved for our review, we need not address directly the merits of its contention the court erred in admitting the contents of the certified letter.

[2] Were defendant's assignment of error properly before us, we briefly note the lease itself states that the obligatory notice is provided if given "in writing addressed to the respective party to this lease at the address set forth herein and deposited in the mail with postage prepaid . . . ." By the very terms of the lease, therefore, notification is accomplished once an appropriate writing is addressed and deposited in the mail as specified; neither receipt nor proof of receipt are required. Young's testimony without objection established that plaintiff gave notice of default to defendant in the manner designated in the lease; the exhibit and its contents were corroborative of that testimony.

Moreover, defendant's general objection to the introduction of Exhibit # 2 and its contents failed to alert either the trial court or this Court to the specific grounds contended for exclusion of the evidence. *See* N.C.R. App. P. 10(b)(1); *see also* Broun, *supra*, at 83. A general objection, if overruled, typically does not entitle a party to appellate review thereof unless there is no possible purpose for which the proffered evidence could have been admissible. *State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980). As the exhibit and contents corroborated the testimony of plaintiff's president, defendant's general objection was ineffectual for purposes of our review.

II.

[3] Defendant next assigns as error the court's failure to instruct the jury on breach of the covenant of quiet enjoyment. Defendant's argument on this issue is unfounded.

In charging the jury in a civil case, the duty of the trial court is to "declare and explain the law arising in the evidence." *In re Cooley*, 66 N.C. App. 411, 416, 311 S.E.2d 613, 616 (1984). Concerning requested instructions:

> If a party contends that certain acts or omissions constitute a claim for relief or a defense against the other party, the trial court must submit the issue if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted.

Watson v. White, 60 N.C. App. 106, 109, 298 S.E.2d 174, 176 (1982) (citation omitted), *rev'd on other grounds*, 309 N.C. 498, 308 S.E.2d 268 (1983).

In answers to both complaints, defendant denied breach of the lease in question and alleged several counterclaims upon theories of, *inter alia*, trespass by plaintiff upon defendant's right to possession of the premises, improper attachment of the premises leading to wrongful eviction of defendant, and unfair and deceptive trade practices. However, defendant asserted no claim based upon breach of the lease agreement. Each of defendant's counterclaims was dismissed at trial pursuant to plaintiff's motion for directed verdict. As plaintiff correctly points out, defendant has not assigned as error the dismissal of its counterclaims.

While the requested instruction may have been appropriate had defendant presented a claim for breach of lease or for constructive eviction, *see Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 89, 92-93, 394 S.E.2d 824, 828-29, 830-31, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990), or had its counterclaims survived plaintiff's motion for directed verdict, the instruction was not relevant to those issues which were submitted to the jury—specifically, existence of the lease contract, defendant's breach thereof, and damages. Accordingly, the trial court properly declined to instruct the jury with respect to an alleged breach by plaintiff of the covenant of quiet enjoyment.

III.

[4] By its third and final assignment of error, defendant argues the attachments procured by plaintiff were improperly executed and consequently should have been discharged upon his motion and the bonds posted thereon dissolved. This contention fails.

Defendant insists improper or insufficient returns were made by the sheriff upon execution of the orders of attachment. Specifically, defendant maintains there was not adequate compliance with N.C. Gen. Stat. § 1-440.16 (1983), which provides:

> (a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. *In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly.*

(Emphasis added). According to defendant, the italicized portion of the statute obligates the sheriff to create an "inventory" of all property upon which he levies. Defendant misapprehends the purport of the statute.

In the case *sub judice*, the sheriff's first return described the property levied on as being "Esquire Collections, Shop + Contents"; the second return listed the property levied on as "Close Esquire Collections Ltd a fforeign [sic] operation." Defendant asserts these returns fail to describe the property with adequate specificity—"neither return even locates the property seized or where held, much less lists the actual items, even by broad category." This failure, the argument continues, rendered the levies void. However, defendant is unable to offer any authority in support of its suggestion a more detailed inventory must be provided; instead, it asks us to analogize the requirements for a levy on personal property (as here) to levies on corporate stock, goods in a warehouse and real property, and to the issuance of search warrants. In the absence of any case law supporting such a position, we decline to adopt defendant's interpretation of the amount of detail required in a return upon attachment.

First, although "descri[ptions] [of] the property levied" set out by the sheriff in the returns herein were arguably minimal, they nonetheless complied with the statutory obligation to provide "sufficient detail to identify the property clearly." We agree with plaintiff's characterization of the returns as "adequately identif[ying] the name of a particular, unique, commercial establishment in the small mountain town of Highlands, and indicat[ing] that the entire contents of the establishment were being seized."

Second, extending defendant's analysis to its logical conclusion of mandating a *complete* inventory of all goods in a retail store would result in a process so time-consuming as to defeat the purpose under-

lying the statutory remedy of attachment. Rather than undertake to draw a red line delineating where between two extremes (one being no description of the property seized, the other being a complete inventory) the desired amount of detail falls, we hold the adequacy of a sheriff's return upon attachment should be decided on a case-by-case basis. All attendant circumstances should be considered, with an eye towards whether the property has been identified clearly.

Moreover, with respect to both attachment orders, defendant promptly posted bond, enabling it to re-enter and repossess the premises. Each bond signed by defendant's president contained the following language:

> The sheriff . . . pursuant to an order of attachment directed to him in this case, *has seized and levied on certain property of the defendant the value of which is indicated below*; and, an order has been entered by the court ordering the discharge of the attachment upon the defendant giving bond in accordance with the order;
>
> The defendant as principal and the surety named below, acknowledge themselves bound to the plaintiff in the amount set out below. *The condition of this bond is that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment* and all costs that the defendant may be ordered to pay.

(Emphasis added).

[5] While our courts have not spoken to the issue in many years, we have traditionally adhered to the principle that posting a bond to release property from attachment estops a defendant from thereafter challenging any *procedural* defects in the process. As our Supreme Court reasoned nearly one hundred years ago:

> [We must now reach a decision] as to the validity of the levy and seizure by the sheriff of the goods of the defendant Folb under the warrants of attachment. The defendant Taylor, the assignee, with sureties, executed to the sheriff a bond for the delivery of the goods, should the plaintiffs recover judgment in the action against Taylor, the assignee of Folb, *and in that paper-writing they recited the fact that the sheriff had made seizure and levy of the goods. The defendants are estopped to deny the sufficiency and validity of the seizure of the goods and levy of the attachments.*

Pearre v. Folb, 123 N.C. 239, 243, 31 S.E. 475, 476 (1898) (emphasis added) (citation omitted); *see also Martin v. McBryde*, 182 N.C. 175, 184-86, 108 S.E. 739, 743-44 (1921). Stated otherwise:

> Where a bond to release or dissolve an attachment is given under a statute requiring an unconditional promise to perform the final judgment of the court [as here], it is generally held that the defendant is estopped to raise any question as to the regularity of the attachment proceedings.

6 Am. Jur. 2d *Attachment and Garnishment* § 329, at 793 (1964). Defendant is therefore estopped from challenging any *procedural* irregularity which it claims occurred during execution, including any alleged insufficiency of the sheriff's returns. Although this rule is inapplicable to challenges questioning the validity of attachment orders (for example, because of improper grounds alleged in support of issuance), *see Bizzell v. Mitchell*, 195 N.C. 484, 488-91, 142 S.E. 706, 709-10 (1928), defendant has made no such argument before us.

[6] Finally, we note with approval the following language from our Supreme Court: "Where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved." *Page v. McDonald*, 159 N.C. 38, 41, 74 S.E. 642, 643 (1912) (citations omitted); *see also Connolly v. Sharpe*, 49 N.C. App. 152, 154, 270 S.E.2d 564, 566 (1980) ("substantial compliance with the statutory requirements will suffice") (citation omitted). Plaintiff herein has substantially complied with the mandate of G.S. § 1-440.16(a).

Based on the foregoing, we find no error in the proceedings below.

No error.

Judges WELLS and McCRODDEN concur.

Judge Wells concurred prior to 30 June 1994.

STATE OF NORTH CAROLINA v. RANDALL EUGENE JENKINS

No. 9314SC68

(Filed 19 July 1994)

1. **Rape and Allied Sexual Offenses § 82 (NCI4th)— sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first-degree rape and second-degree kidnapping.

Am Jur 2d, Rape §§ 88 et seq.

2. **Criminal Law § 375 (NCI4th)— judge's turning back on defendant—improper expression of opinion**

The trial court improperly expressed an opinion in the presence of the jury in a rape and kidnapping trial when he turned his back to the jury for forty-five minutes during defendant's testimony on direct examination, and because defendant asserted consent as a defense, and his testimony and credibility were crucial to that defense, the trial court's action was sufficiently prejudicial to require a new trial.

Am Jur 2d, Trial §§ 91 et seq.

Gestures or facial expressions of trial judge in criminal case, indicating approval or disapproval, belief or disbelief, as ground for relief. 49 ALR3d 1186.

3. **Criminal Law § 362 (NCI4th)— rape case—judge's clearing of courtroom—failure to make required findings**

In a prosecution for first-degree rape and second-degree kidnapping of a college student, the trial court erred in granting the State's motion to clear the courtroom during the student's testimony without making the required findings that the party seeking closure had advanced an overriding interest that was likely to be prejudiced, the degree of closure required to protect that interest, and whether alternatives to closing the procedure existed.

Am Jur 2d, Trial §§ 87 et seq.

4. **Evidence and Witnesses § 124 (NCI4th)— evidence of prior sexual acts between complainant and defendant—admissibility**

In a prosecution for first-degree rape and second-degree kidnapping, the trial court did not err in admitting evidence of prior

sexual acts between the complainant and defendant which was pertinent to the defense that complainant consented to the sexual act in question, nor did the court err in excluding evidence of sexual acts which was irrelevant and cumulative.

Am Jur 2d, Evidence §§ 496 et seq.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 ALR3d 257.

5. Evidence and Witnesses § 386 (NCI4th)— evidence of other offenses—admissibility

The trial court in a first-degree rape and second-degree kidnapping case did not err in admitting evidence that one month prior to the alleged rape, defendant failed to return the victim's car, stole some money, broke into her home, and was arrested, since the evidence was admissible to show the chain of events and the termination of the relationship.

Am Jur 2d, Evidence §§ 404 et seq.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed 497.

Appeal by defendant from judgments entered 24 July 1992 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 7 October 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. White, for the State.

Public Defender Robert Brown, Jr., by Assistant Public Defender Brian Michael Aus; and Daniel Shatz, for defendant appellant.

COZORT, Judge.

On 24 July 1992, defendant was convicted of one count of first degree rape and one count of second degree kidnapping. Judge Orlando F. Hudson sentenced defendant to life in prison for the first degree rape and thirty years in prison for the second degree kidnapping to run at the expiration of the first sentence. Defendant appeals. We find the trial court committed two errors of sufficient prejudice to require a new trial for defendant.

The State presented the following evidence: A female student at North Carolina Central University, began dating defendant, a temporary employee for Western Temporary Services, in November or December of 1990. The student and defendant lived together periodically from March 1991 to September 1991. In September 1991, defendant took the student's car, her pocketbook, and $200.00. The student refused to allow defendant to return to live in her apartment. During the month of October, defendant called the student and attempted to reconcile with her. On 7 October 1991, the student had defendant arrested when he attempted to enter her apartment and damaged her front door.

On 1 November 1991, defendant stopped by the student's apartment to borrow $50.00. Defendant entered the apartment carrying a laundry basket. Defendant became angry, grabbed the student by the neck, and told her they were "all going to die." Defendant then grabbed neckties from the laundry basket and dragged the student into the bedroom. He threw her on the bed and began choking her. The student fought defendant as he ripped her robe and pulled off her underwear. Defendant straddled the student and tied a necktie to her foot. At that time, Michael Kennealy, a delivery man for a florist, knocked on the door and heard someone crying repeatedly "Oh, God, help me." Defendant answered the door and told Mr. Kennealy that everything was all right. Mr. Kennealy went to the apartment complex office, and the office manager called the police.

When defendant answered the door for the delivery man, the student ran into the bathroom. Defendant brought the flowers and a butcher knife into the bathroom. He grabbed the student's hair and pulled her back into the bedroom, where he raped her while holding the knife to her throat. Defendant got up, and the student grabbed her clothes. Defendant took a necktie and tied her legs to the bed. The student grabbed the knife that defendant had laid on the bed and attempted to cut the necktie off her left foot. Defendant grabbed the knife, tied her hands to the bed, and tied a necktie around her head so she could not scream.

Durham police officers arrived on the scene, knocked on the door, and forcibly entered the apartment. Defendant ran towards the officers yelling "shoot me, shoot me." Defendant struggled and the officers subdued him.

Medical testimony was offered that the student had a bruise on her right temple and an abrasion on her left hand. After notification

of his *Miranda* rights, defendant gave a statement that he dated the student, he had gone to her apartment to get a check, and he did not remember anything else.

Defendant presented testimony that when he entered the apartment the student hugged and kissed him and led him to the bedroom where she had two neckties attached to the head of the bed. They engaged in consensual intercourse. When defendant went to the door and saw flowers being delivered, he became angry, and the student began to cry. When defendant attempted to discard the flowers, the student grabbed the butcher knife and cut him. The student ran into the bathroom where she vomited. The student attacked defendant. Defendant placed her in a bear hug and threw her on the bed. The student kicked defendant as he attempted to dress, and he slapped her. Defendant took the knife away from the student and apologized for hitting her. The couple then reconciled and the student requested that defendant tie her up before engaging in sexual intercourse. At that point defendant heard a knock, saw the police, and attempted to put on his clothes. When police entered the room, he said "Oh, you're going to shoot me. Shoot me, kill me, come on." Defendant further testified that he and the student had engaged in bondage twice before. He gave the initial statement to police because he wanted to cooperate, but he changed his mind when he realized he was going to be arrested and prosecuted.

[1] Defendant argues twelve assignments of error on appeal. We find two have merit and entitle defendant to a new trial. Before addressing those two issues, we first consider defendant's argument that the evidence was insufficient to uphold a guilty verdict. We disagree.

> It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980).

State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Applying the *Brown* standards to the State's evidence below, we find sufficient evidence of each element of each offense. The trial court did not err in denying defendant's motion to dismiss.

[2] We now turn to defendant's meritorious arguments. First, defendant argues that the trial court improperly expressed an opinion in the presence of the jury when he turned his back to the jury for forty-five minutes during defendant's testimony on direct examination. We agree. In the case below, the following exchange occurred between defense counsel and the trial court:

> MR. AUS: Your Honor, I would also like to have it put on the record that during about forty-five minutes of Mr. Jenkins' testimony that you were staring at the wall and you had your back turned to the jury.
>
> THE COURT: Yes, I sure did. Do you want to move for a mistrial based on that?
>
> MR. AUS: No, Judge.
>
> THE COURT: And I may do it again during the cross examination. I mean, I can look anywhere I want to look but if you want to tell me something different, we can discuss that now. Where would you like for me to look? Mr. Aus, where would you like me to look during anybody's examination.
>
> MR. AUS: Judge, I would like for you, Judge, you have looked at the jury, or at least was looking in the direction of the jury the entire time.
>
> THE COURT: I haven't done anything the entire time.
>
> MR. AUS: Well, Judge, you didn't have your back—Let me put it this way, your back was to the wall.
>
> THE COURT: You may note that it was forty-five minutes, I believe it was. So how many minutes did I look at other witnesses when they were testifying? Did you keep a record of that?

N.C. Gen. Stat. § 15A-1222 (1988) provides: "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Trial judges "must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed

to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury." *State v. Sidbury*, 64 N.C. App. 177, 178-79, 306 S.E.2d 844, 845 (1983). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *Id.*

Considering the trial court's action in light of the factors and circumstances disclosed in the record, we find that the jury could reasonably infer from the trial court's action in turning his back to defendant and the jury during defendant's testimony that the trial judge did not believe defendant's testimony to be credible. Although the trial court may not have intended to convey such a message, we must find error where the trial court's actions may speak directly to the guilt or innocence of the defendant. *See State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96, 97 (1979). Here, defendant asserted consent as a defense. Defendant's testimony and his credibility were crucial to that defense. Therefore, we believe the trial court's action was sufficiently prejudicial to require a new trial.

[3] We also find merit to defendant's argument that the trial court erred in granting the State's motion to clear the courtroom during the student's testimony. The trial court permitted counsel, defendant, court personnel, and members of the press to remain in the courtroom during the testimony. N.C. Gen. Stat. § 15-166 (1983) provides that the trial court may exclude from the courtroom all persons except officers of the court, the defendant, and those engaged in the trial during the testimony of the prosecutrix. In clearing the courtroom, the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 48, 81 L.Ed.2d 31, 39 (1984). In the case below, the trial court made no findings of fact to support the closure during the student's testimony. *See State v. Burney*, 302 N.C. 529, 276 S.E.2d 693 (1981). Accordingly, we

find the trial court erred. On re-trial, the trial court must follow the above mandates if the State moves to close the trial during the student's testimony.

We now turn our attention to three matters which may arise upon retrial.

[4] First, defendant argues that the trial court erred in excluding evidence of all the prior sexual acts between defendant and the student. We disagree. N.C. Gen. Stat. § 8C-1, Rule 412(b) (1992) provides in part:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> * * * *
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> * * * *
>
> Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. . . . In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence.

Although evidence of prior sexual activity may be admissible pursuant to the exception set forth in Rule 412(b)(1), the defendant must show the basis of admissibility, and the trial court must determine the relevance of the proffered evidence. *State v. Black*, 111 N.C. App. 284, 289, 432 S.E.2d 710, 714 (1993). In the case below, the trial court ruled that defendant could present evidence of previous acts of bondage between the complainant and defendant, sexual acts on a leather couch, complainant experiencing pain during previous acts of intercourse, a sexual act on a piano stool, and watching pornographic

movies. The trial court ruled that defendant could not present evidence of masturbation, sexual aids, a sexual encounter in a hotel room while another couple slept, and certain sexual acts prior to complainant and defendant watching the pornographic movie. The trial court excluded the evidence as irrelevant or highly prejudicial. We agree with the trial court that every sexual act between the complainant and defendant was not relevant. The trial court permitted evidence of sexual acts pertinent to the defense that the complainant consented to the sexual act on 1 November 1991. We find that defendant failed to prove the basis of admissibility for the excluded evidence which was irrelevant and cumulative. We find no error.

[5] Defendant next argues that the trial court erred in admitting evidence that one month prior to the alleged rape, defendant failed to return the student's car, stole some money, broke into her home, and was arrested. Defendant contends that the evidence was inadmissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992), which prohibits use of prior bad acts to show a defendant's bad character and that he acted in conformity therewith. We disagree. The State argues that the evidence was admissible to show the chain of events and the termination of the relationship. We find the evidence admissible as "a part of the history of the event [which] serve[d] to enhance the natural development of the facts.'" *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990) (quoting *Commonwealth v. Evans*, 343 Pa. Super. 118, 132, 494 A.2d 383, 390 (1985)). We find no error.

Next, defendant contends that the trial court erred in failing to instruct the jury on the lesser included offense of false imprisonment because defendant's testimony raised the possibility that defendant tied the student to the bed in order to avoid being struck by her. We find no merit to defendant's argument. Defendant testified that he bound the student to the bed at her request after they had reconciled and she had relinquished the knife. Defendant's argument is overruled.

We have reviewed defendant's remaining assignments of error and find them either unlikely to recur on retrial or to be unpersuasive.

New trial.

Judges JOHNSON and McCRODDEN concur.

McARDLE CORP., PLAINTIFF v. S. ALLEN PATTERSON, AND WIFE, KRISTIN L. PATTERSON, DEFENDANTS

No. 9310SC1068

(Filed 19 July 1994)

1. **Trial § 113 (NCI4th)— summary judgment order—undisputed facts listed—no erroneous finding of facts**

There was no merit to defendants' contention that the first trial court judge erred in making findings of fact and conclusions of law in his order denying their motion for summary judgment, since the judge merely listed the undisputed facts, and his recitation of those facts was not error.

Am Jur 2d, Summary Judgment § 26.

2. **Trial § 105 (NCI4th)— partial summary judgment order—binding effect on another judge**

The first trial judge's order which was, in effect, both a denial of defendants' motion for summary judgment and a grant of partial summary judgment in favor of plaintiff finally determined the issue of notice, and that order was binding on the trial court judge before whom the case was scheduled after dismissal of defendants' appeal from the first judge's partial summary judgment order.

Am Jur 2d, Summary Judgment §§ 41 et seq.

3. **Mortgages and Deeds of Trust § 91 (NCI4th)— posted foreclosure notice—time and contents of posting**

A posted notice of a foreclosure hearing may run concurrently with any other effort to effect service, and there is no requirement that the posted notice contain the names of the parties entitled to notice. N.C.G.S. § 34-21.16(a).

Am Jur 2d, Mortgages §§ 720 et seq.

Judge EAGLES dissenting.

Appeal by defendants from order and judgment filed 26 July 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 May 1994.

Brown & Bunch, by M. LeAnn Nease and Scott D. Zimmerman, for plaintiff-appellee.

S. Allen Patterson, II, pro se, for defendants-appellants S. Allen Patterson, II and Kristin L. Patterson.

LEWIS, Judge.

Plaintiff commenced this action to recover a deficiency judgment against defendants resulting from the foreclosure sale of property, which had been security for a promissory note guaranteed by defendants. After a bench trial, judgment was for the plaintiff, and defendants appeal.

The action was originally begun by plaintiff's predecessor in interest, First Federal Savings and Loan Association of Raleigh (hereinafter "First Federal"), in September 1990 before Judge George Greene. The action arose from defendants' guaranty of payment of a promissory note given by G.A.D. Development Company, Inc. (hereinafter "G.A.D.") to First Federal. The principal amount of the note was $161,000.00, and the note was secured by a deed of trust on property owned by G.A.D. in Wake County (hereinafter "the property"). G.A.D. defaulted on the note, leaving a balance owed of $161,444.61. At the foreclosure sale the property brought $110,400.00, with $108,995.00 being applied to G.A.D.'s obligation. As of 11 September 1990, the amount owing on the note after application of the proceeds of the foreclosure sale was $62,889.22.

Defendants answered the complaint and alleged as a defense that they did not receive proper notice of the foreclosure hearing, as required under N.C.G.S. § 45-21.16 (Cum. Supp. 1993), and that therefore, pursuant to section 45-21.16(b)(2), they were not liable for the deficiency. Thereafter, defendants moved for summary judgment. On 4 February 1991, Judge Greene denied defendants' motion for summary judgment. In the order denying summary judgment, Judge Greene made "findings of fact" and "conclusions of law." Among the findings of fact were findings that there were no genuine issues of material fact; that plaintiff attempted to mail legal notice of the foreclosure hearing to defendants by certified mail, return receipt requested, at their then-known address; that defendants did not receive the attempted mailing; that plaintiff's attempt to serve defendants by certified mail was a reasonable and diligent effort to serve defendants; and that plaintiff achieved proper service of notice by posting a notice on the property. Judge Greene concluded that defendants were properly notified of the foreclosure hearing as

required by section 45-21.16(b)(2) and that plaintiff was entitled to proceed against defendants for the deficiency.

Defendants appealed Judge Greene's order, and this Court dismissed the appeal as interlocutory in an unpublished opinion, reported as *First Federal Savings & Loan Ass'n v. Patterson*, 104 N.C. App. 138, 408 S.E.2d 764 (1991). The case was then scheduled for trial before Judge Donald Stephens. Before trial, Judge Stephens determined, as a matter of law, that by virtue of Judge Greene's order, he was precluded from considering the issue of whether defendants received adequate notice of the foreclosure hearing. Judge Stephens then proceeded to trial without a jury on plaintiff's claim, and judgment was subsequently entered against defendants. Defendants gave notice of appeal from the judgment entered by Judge Stephens.

On appeal, defendants contend that (1) Judge Greene erred in denying defendants' motion for summary judgment and in granting partial summary judgment in favor of plaintiff, (2) Judge Greene erred in making findings of fact and conclusions of law in addressing a motion for summary judgment, and (3) Judge Stephens erred in determining that he was precluded from considering the issue decided by Judge Greene in the order denying defendants' motion for summary judgment.

I.

The order of Judge Greene purports to be nothing more than a denial of defendants' motion for summary judgment. However, in light of Judge Greene's conclusion that defendants received adequate notice and that plaintiff was therefore entitled to proceed against defendants for the deficiency, the order became, in effect, a grant of partial summary judgment in favor of plaintiff on the issue of defendants' defense of inadequate notice.

Plaintiff contends that defendants have not properly appealed Judge Greene's order, as defendants only gave notice of appeal from the judgment of Judge Stephens. However, Judge Greene's order stated that it was a denial of defendants' motion for summary judgment, and the general rule is that where there has been a trial on the merits, it is not proper to appeal the denial of a motion for summary judgment. *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 340, 427 S.E.2d 149, 151 (1993). Thus, it is understandable that defendants did not give notice of appeal from the order of Judge Greene. However, because we conclude that Judge Greene's order was in actuality both

a denial of defendants' motion and a grant of partial summary judgment for plaintiff, in our discretion we will review Judge Greene's order.

II.

[1] Defendants' first contention is that Judge Greene erred in making findings of fact and conclusions of law in his order denying their motion for summary judgment. Defendants are correct that it is not the function of the trial court to make findings of fact and conclusions of law on a motion for summary judgment. *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 528 (1978). However, in some instances, it can be helpful for the trial court to set out the undisputed facts which form the basis of its judgment. *Id.* at 292, 241 S.E.2d at 529. When that appears helpful or necessary, the court should state that the facts set out are the undisputed facts. Id. In the case at hand, Judge Greene merely listed the undisputed facts, stating that there were no genuine issues of material fact. We do note that the label "findings of fact," as used by Judge Greene, could be misleading in that it tends to imply that the facts were disputed. *See A-S-P Assocs. v. City of Raleigh*, 38 N.C. App. 271, 275, 247 S.E.2d 800, 803 (1978), *rev'd on other grounds*, 298 N.C. 207, 258 S.E.2d 244 (1979). However, the facts were not in dispute, and we conclude that Judge Greene's recitation of the facts was not error.

III.

[2] Defendants next argue that Judge Greene's order was not binding on Judge Stephens. As stated above, Judge Greene's order was, in effect, both a denial of defendants' motion for summary judgment and a grant of partial summary judgment in favor of plaintiff. We note that summary judgment can be entered in favor of the non-movant in appropriate cases. N.C.G.S. § 1A-1, Rule 56(c); *Federal Land Bank v. Lackey*, 94 N.C. App. 553, 554, 380 S.E.2d 538, 539 (1989), *aff'd per curiam*, 326 N.C. 478, 390 S.E.2d 138 (1990).

As to the effect of one judge's order on another judge, our Supreme Court has stated:

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Whitley's Elec. Serv., Inc. v. Walston, 105 N.C. App. 609, 610, 414 S.E.2d 47 (1992) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). Furthermore, where a judge rules as a matter of law, as on a motion for summary judgment, the rights of the parties are finally determined, subject only to reversal on appeal. *Id.* at 611, 414 S.E.2d at 48. Accordingly, Judge Greene's order was binding on Judge Stephens, and Judge Stephens did not err in not re-examining the issue of notice.

IV.

[3] Defendants' final contention is that they did not receive adequate notice of the foreclosure hearing and that they therefore cannot be held liable for any deficiency. Section 45-21.16(b)(2) provides that notice of the hearing must be served upon "[a]ny person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale."

Section 45-21.16(a) provides for the proper manner of service:

> The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized [under the Rules of Civil Procedure], service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing . . . .

§ 45-21.16(a). Rule 4(j1) of the North Carolina Rules of Civil Procedure provides that "[a] party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication." N.C.G.S. § 1A-1, Rule 4(j1) (1990). Therefore, if a party cannot with due diligence be served by personal delivery or registered or certified mail, service of the notice of hearing may be made by posting the notice on the property. In the case at hand, the parties stipulated that two attempts to serve defendants with the notice of hearing were made by certified mail, and defendants agree that the attempted service by mail was made with due diligence. Defendants' only contention is that the posted notice was not sufficient in that (1) the notice was posted before it was determined that defendants could not be served with actual notice, and (2) the posted notice did not contain the names of defendants.

As to defendants' first argument, we note that section 45-21.16(a) provides that service by posting "may run concurrently with any other effort to effect service." The first attempted service by mail was postmarked 11 July 1989, and the notice was posted on the property on 12 July. Thus, the posting was concurrent with the attempt to serve defendants by mail, and defendants' argument is without merit.

Defendants' second argument is that section 45-21.16 requires that the posted notice contain the names of the parties entitled to notice of the hearing. However, section 45-21.16(c) specifically lists the information the notice of hearing must contain and does not include a requirement that the notice contain the names of the parties entitled to notice. Furthermore, we do not believe that such a requirement is implied by the statute as a whole. The posted notice is, in effect, notice to the world. Accordingly, we hold that defendants received adequate notice of the foreclosure hearing, and that Judge Greene did not err in denying defendants' motion for summary judgment and in granting partial summary judgment for plaintiff on this issue.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

Judge COZORT concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. The majority states that "section 45-21.16(c) specifically lists the information the notice of hearing must contain and does not include a requirement that the notice contain the names of the parties entitled to notice" and holds that "[w]e do not believe that such a requirement is implied by the statute as a whole." G.S. 45-21.16(c) provides that "[n]otice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following: . . . ." A posted document cannot be "reasonably calculated" to give notice without listing at least the name of the person entitled to receive that notice. *Cf.* G.S. 1A-1, Rule 4(ji)(ii) ("The notice of service of process by publication shall . . . (ii) be directed to the defendant sought to be served"). Unlike the majority, I would imply that requirement from the "reasonably calcu-

lated" language of G.S. 45-21.16(c). Furthermore, it is quite understandable that our General Assembly omitted this requirement from the list of enumerated items because with its inclusion the statute would be needlessly nonsensical: i.e., the statute would read, "[n]otice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice *aware* of the following: . . . his or her own name." (Emphasis added.) Given that "foreclosure under a power of sale is not favored in the law, and its exercise [is to] be watched with jealousy," *In Re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (internal quotations omitted), I would reverse the judgment of the trial court.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. ROBERT WILLIS ABERNETHY, JEAN ABERNETHY, AND WILLIAM D. LOWERY, JR., DEFENDANTS

No. 9329SC407

(Filed 19 July 1994)

Insurance § 725 (NCI4th)— sexual abuse of child—"expected" injuries—no personal liability coverage under homeowner's policy

Defendant homeowner's deeds and subsequent admission that he willfully sexually abused a music student in his home established that, at the very least, the child's injuries were "expected" by the homeowner as that term was used in his homeowner's insurance policy which excluded personal liability coverage for bodily injury "which is expected or intended by the insured."

Am Jur 2d, Insurance §§ 475 et seq., 1504 et seq.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

Appeal by plaintiff from partial summary judgment entered 17 February 1993 by Judge Zoro J. Guice, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 2 February 1994.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan and Sharon D. Jumper, for plaintiff-appellant.

Edwards & Kirby, by David F. Kirby, for defendant-appellee.

JOHN, Judge.

Plaintiff Nationwide contends the trial court erred by granting partial summary judgment in favor of defendant Lowery (Lowery). By means of its order, the trial court determined that Lowery's alleged injuries, resulting from acts of defendant Robert Abernethy (Abernethy) committed prior to October 1988, were covered under a homeowner's policy issued by plaintiff to defendants Abernethy. We determine the policy did not provide coverage, and therefore reverse the order of partial summary judgment and remand with instruction that full summary judgment be entered in favor of plaintiff.

The evidence indicates Abernethy was a music teacher. In 1980, he began giving voice lessons to Lowery who was seven (7) years old. Between approximately 1984 and 1991, Abernethy sexually abused Lowery by committing such acts as: touching and fondling Lowery's genitals, masturbating Lowery, and engaging in oral sex. After his actions were discovered, Abernethy was indicted and subsequently pled guilty to Taking Indecent Liberties with Children in violation of N.C.G.S. § 14-202.1 (1986).

On 17 February 1992, Lowery filed suit against Abernethy (the underlying tort action), seeking compensatory and punitive damages based upon Abernethy's acts of sexual molestation. Abernethy thereafter demanded that plaintiff, which insured Abernethy under a homeowner's policy, provide liability coverage for his unlawful acts.

The record indicates plaintiff issued three homeowner's policies to defendants Abernethy during the relevant years of 1984 through 1990. Each carried the same policy number (61MP366-327) and provided standard personal liability coverage for damages "because of **bodily injury** or **property damage**." Each policy also contained the following relevant exclusion from coverage:

> 1. **Coverage E - Personal Liability** . . . [does] not apply to **bodily injury** or **property damage**:
>
> a. which is expected or intended by the **insured**

The policy issued in April 1989 contained an additional exclusion for injuries "arising out of sexual molestation . . . ."

On 13 July 1992, Nationwide filed the present declaratory judgment action to determine issues of coverage and defenses prior to trial of the underlying tort action. Defendants Abernethy failed to file an answer. Defendant Lowery answered and requested a declaration that coverage existed for all acts and injuries alleged in his tort complaint.

Both Nationwide and Lowery moved for summary judgment. On 2 February 1993, the trial court entered an order granting partial summary judgment for plaintiff; by means of this order, the trial court determined no coverage existed *after* the "sexual molestation" exclusion was added to the homeowner's policy. On 17 February 1993, the trial court entered a second order which granted partial summary judgment for Lowery; by means of this order, the trial court ruled that coverage existed for those claims arising *before* the "sexual molestation" language was added to the policy. In April 1993, a jury found in favor of Lowery in the underlying tort action and awarded both actual and punitive damages.

The sole issue is whether the trial court erred in concluding the Abernethy policy provided insurance coverage for Lowery's injuries. In resolving this question, we need focus only upon the policy as it existed *prior* to the addition of terminology excluding from coverage injuries "arising out of sexual molestation"—no appeal having been taken from the trial court's adjudication of no coverage following insertion of this language. Both parties argue, and we agree, that coverage prior to the "sexual molestation" provision depends upon the *exclusion* for "bodily injury . . . which is expected or intended by the insured." (Emphasis omitted).

We focus first upon "bodily injury." The policy provided liability coverage "because of bodily injury or property damage." (Emphasis omitted). Our review indicates that Lowery's alleged injuries consisted of mental, emotional and psychological harm occasioned by the sexual abuse and his medical expenses incurred in treating this trauma. Because there has been no argument to the contrary, we assume for purposes of our decision that these alleged injuries constitute "bodily injury" within the meaning of the policy.

We therefore examine the remaining phraseology contained in the exclusionary clause, *i.e.*, were Lowery's injuries "*expected or intended by the insured*"? (Emphasis omitted). Lowery correctly argues that the test required by the policy language is generally a sub-

jective one, focusing upon whether the insured intended the resulting injury. *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 703-04, 412 S.E.2d 318, 322 (1992). In that regard, the parties have stipulated that Abernethy would testify he did not intend or expect to cause injury to Lowery when committing the acts of sexual abuse. Lowery contends that under *Stox* this stipulation mandates a conclusion that his injuries are covered under the policy. We disagree with Lowery's interpretation of that decision.

Stox concerned an "intended or expected" exclusion identical to the exclusion at issue in the case *sub judice*. *Stox*, 330 N.C. at 700, 412 S.E.2d at 321. In *Stox*, the insured intentionally pushed the victim causing her to fall and break her arm. *Id.* at 699-700, 412 S.E.2d at 320. The insured testified that he did not intend to injure the victim when he pushed her. Focusing on the word "intended" in the exclusionary clause, the Supreme Court held that the insured's testimony, supported by the testimony of the victim, provided competent evidence to support the trial court's factual finding that the insured did not *intend* to cause bodily injury. *Id.* at 704, 412 S.E.2d at 322-23. In reaching its conclusion, the Court drew a distinction between *Stox* and the situation encountered in *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983).

Commercial Union also involved the question of whether an exclusion for "expected or intended" injury had application. In *Commercial Union*, the insured was arguing with his wife while she and a female friend were seated in an automobile. The insured became violent, drew a pistol, and fired several shots into the vehicle killing the friend. *Commercial Union*, 62 N.C. App. at 461, 303 S.E.2d at 215. The insured pled guilty to second-degree murder of the friend, yet stipulated that he intended to injure only his wife, *i.e.*, he did not intend to injure the friend. *Id.* at 461, 303 S.E.2d at 215. The victim's estate sought insurance proceeds under the insured's homeowner's policy. The trial court granted summary judgment for the insurance company and this Court affirmed, holding that the victim's death was both "expected" and "intended" within the meaning of the homeowner's policy. *Id.* at 464, 303 S.E.2d at 217.

In *Stox*, the Supreme Court concluded that this Court reached the correct result in *Commercial Union* since the insured in that case:

> pled guilty to the second-degree murder of [the friend]. Thus, *he obviously knew it was probable that he would injure* [the friend] when he fired four or five shots into her moving car. . . . Stated

> otherwise, through the insured's actions and admissions, the injury to [the friend] was established to have been "intended" within the meaning of that term as used in the insurance policy.

Stox, 330 N.C. at 704, 412 S.E.2d at 322 (emphasis added) (citations omitted). We determine that *Commercial Union*, as explained by our Supreme Court in *Stox*, governs the case *sub judice*.

A jury has found that Abernethy's actions caused Lowery to suffer severe mental and emotional trauma. Like the policyholder in *Commercial Union*, Abernethy has asserted he did not "intend or expect" to cause any such injury. However, Abernethy *pled guilty* to the offense of Taking Indecent Liberties with Children in violation of G.S. § 14-202.1. The statute prescribes as an element of the offense that the defendant's acts be "willful." "Willful" has been defined *inter alia* as "done deliberately: not accidental or without purpose: intentional, self-determined." Webster's Third New International Dictionary 2617 (1968). In summary, defendant has admitted he *intentionally* committed acts of *sexual abuse*. *See State v. Thompson*, 314 N.C. 618, 624, 336 S.E.2d 78, 81 (1985) (a guilty plea is an admission that defendant committed each element of the crime). In light of this acknowledgment, we conclude he "knew it was probable" that Lowery's injuries would ensue and thus "expected or intended" those injuries.

One purpose of our criminal statutes is to protect the public from the harm caused by those acts defined as crimes. *See* 22 C.J.S. *Criminal Law* § 8 (1989). G.S. § 14-202.1 was enacted to protect "children from the sexual advances of adults." *State v. Elam*, 302 N.C. 157, 162, 273 S.E.2d 661, 665 (1981). Legislative recognition of the nexus between an act of child sexual abuse and the harm produced thereby is further demonstrated by the original classification of a violation of the statute as a Class H felony carrying a maximum sentence of ten years, as well as the recent increase in the maximum punishment level to twenty years. *See* G.S. § 14-202.1; N.C.G.S. § 14-1.1 (1993).

In addition, the severe emotional scarring resulting to children from such encounters with sexual predators is apparent both as a matter of common sense and as a matter of law. *See* David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 538-39 (1981). For example, even when Abernethy first began sexually abusing his young music student, it was well documented in popular literature that sexual abuse causes victims far-reaching mental and emotional problems. *See, e.g.*,

Cheryl McCall, *The Cruelest Crime*, LIFE, Dec. 1984, at 35-42; Russell Watson, *The Hidden Epidemic*, NEWSWEEK, 14 May 1984, at 30-36; John Leo, *Someday, I'll Cry My Eyes Out*, TIME, 23 April 1984, at 72-73. Further, numerous jurisdictions have concluded that a policy exclusion for "expected or intended" injuries applies as a matter of law in instances of child sexual abuse even in face of an asserted denial of any intent to cause harm or injury. *See, e.g., Allstate Ins. Co. v. Mugavero*, 589 N.E.2d 365, 369 (N.Y. 1992). (To accept the "semantic argument" that insured who sodomized, raped and otherwise sexually assaulted two minor children over a five year period did not intend to injure the children "would be abhorrent to the legislative policy reflecting the heightened awareness of the serious consequences of child sexual abuse, the need for preventive measures, and the public perception that molesting a child without causing harm is a virtual impossibility."); *Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415, 419 (Colo. 1990) (Most jurisdictions, by inferring an intent to injure as a matter of law when an insured has engaged in sexual misconduct with a minor, have in effect "taken judicial notice that some harm inevitably results from sexual assaults on children."); *Perreault v. Maine Bonding and Casualty Co.*, 568 A.2d 1100, 1101 (Me. 1990) (No "factfinder could rationally give any credit" to insured's assertion he neither expected nor intended any injury to the young child as a result of the act which formed the basis for his guilty plea to criminal sexual contact; "[o]n any objective basis, anyone intentionally committing [this offense] is bound to expect that psychological and emotional harm will result," and "[h]arm from the sexual abuse of a child is so highly likely to occur that the intent to commit the act inherently carries with it the intent to cause the resulting injury."); *Whitt v. DeLeu*, 707 F.Supp. 1011, 1016 (W.D. Wis. 1989) ("[S]exual misconduct with a minor is objectively so substantially certain to result in harm to the minor victim" that a molester cannot claim ignorance of such effects; therefore, an insured "who sexually manipulates a minor cannot expect his insurer to cover his misconduct and cannot obtain such coverage simply by saying that he did not mean any harm."); *Vermont Mutual Insurance Company v. Malcolm*, 517 A.2d 800, 802-803 (N.H. 1986) (Despite denial of insured that he neither "expected" nor "intended" any harm to the young boy, "the assaults were inherently injurious in the most obvious sense," and "[t]his common understanding of the nature of such acts is beyond reasonable dispute and consistent with the legislative classifications of the acts within the . . . serious category of sex offenses.").

Because of the close relationship between an act of child sex abuse and resulting harm to the child, therefore, we conclude as a matter of law that Abernethy "knew it was probable," *Stox*, 330 N.C. at 704, 412 S.E.2d at 322, that his actions would cause Lowery to suffer mental and emotional injury. Stated otherwise, Abernethy's deeds and subsequent admission that he wilfully sexually abused Lowery establish that, at the very least, Lowery's injuries were "expected" by Abernethy as that term is used in the policy. *See Stox*, 330 N.C. at 704, 412 S.E.2d at 322. Thus, as in *Commercial Union*, any testimony by Abernethy to the effect that he did not "expect or intend" to cause such injury is ineffectual—Abernethy cannot by denial circumvent the undeniable.

Although our decision denies Abernethy liability coverage under his homeowner's policy, we are aware it is Lowery who likely will suffer the effects thereof. Indeed, it was his counsel rather than Abernethy's who argued in favor of coverage before this Court. We are most sympathetic to Lowery's plight as an innocent victim of Abernethy's deplorable conduct. Nonetheless, we are constrained to conclude the policy's exclusionary clause is unambiguous under the facts of the case *sub judice* and is effective as to Lowery's claims against Abernethy.

Because the insurance policy issued by plaintiff did not provide liability coverage, we reverse the trial court's grant of partial summary judgment in favor of Lowery and remand with instruction that summary judgment be entered for plaintiff. We observe that plaintiff has also argued it should not be liable for punitive damages. As we have decided there was no liability coverage, it is unnecessary to reach the punitive damages question.

Reversed and remanded.

Judges WELLS and MARTIN concur.

Judge Wells concurred prior to 30 June 1994.

WILLIAM C. LEEUWENBURG, PLAINTIFF/APPELLANT v. WATERWAY INVESTMENT LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, AND FREDRICK N. ESHELMAN AND WIFE, DONNA G. ESHELMAN, ROGER N. SCHECTER, DIRECTOR, DIVISION OF COASTAL MANAGEMENT, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, AND ANN S. HINES, LOCAL PERMIT OFFICER FOR COASTAL AREA MANAGEMENT ACT AND ZONING ENFORCEMENT OFFICER, NEW HANOVER COUNTY, NORTH CAROLINA, DEFENDANTS/APPELLEES

No. 935SC524

(Filed 19 July 1994)

Environmental Protection, Regulation, and Conservation § 40 (NCI4th)— permit to construct pier—failure to contest through administrative procedures—declaratory judgment action precluded

Plaintiff's action seeking a declaratory judgment that defendants had no right to construct a pier across certain submerged lands belonging to plaintiff and that other defendants had no right to issue a permit pursuant to the Coastal Area Management Act authorizing such construction was precluded by plaintiff's failure to exhaust the administrative remedies provided by CAMA to seek review of the permit decision.

Am Jur 2d, Administrative Law §§ 505 et seq.

Appeal by plaintiff from order entered 11 March 1993 by Judge Franklin R. Brown in New Hanover County Superior Court. Heard in the Court of Appeals 1 March 1994.

Plaintiff filed this action seeking a declaratory judgment that defendants Waterway Investment Limited Partnership and Eshelman have no right to construct a pier across certain submerged lands belonging to plaintiff and that defendants Schecter and Hines have no right to issue a permit authorizing such construction. Accordingly, plaintiff also seeks injunctive relief to prevent construction of the pier. The facts may be briefly summarized as follows: Plaintiff is the owner of lot 31 in the residential subdivision of Shandy Point in New Hanover County. Pursuant to G.S. § 113-205, on 31 August 1992, the N.C. Division of Marine Fisheries recorded a "Declaration of Final Resolution of Claim to Submerged Lands" which recognized plaintiff's claim of ownership to certain regularly flooded estuarine marshlands described in his deed to lot 31, subject to all public trust rights in the land.

Defendant Eshelman owns a tract of land in a subdivision adjacent to plaintiff's property which he purchased from defendant Waterway Investment Limited Partnership. On 29 June 1992 the North Carolina Division of Coastal Management issued a general permit to Eshelman pursuant to G.S. § 113A-118.1 of the Coastal Area Management Act, G.S. § 113A-100, et seq., ("CAMA") authorizing construction of a 275 foot long pier, terminating in a gazebo, a floating dock to the west of the gazebo and a boat lift to the east. The structure was to extend across plaintiff's property so that Eshelman would be able to reach navigable portions of Shandy Point Channel which provides access to the Atlantic Intracoastal Waterway. The permit was issued over plaintiff's objections that the pier would cross the intertidal marshland previously recognized to be owned by plaintiff, and his contention that the pier would thereby interfere with plaintiff's use, as well as the public's right to use, the submerged lands. Plaintiff did not file a petition with the Coastal Resources Commission seeking a contested case hearing as to the appropriateness of the permit.

After a hearing the trial court denied plaintiff's motion for a preliminary injunction and granted defendants' motions to dismiss plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(6), concluding that "plaintiff has failed to exhaust the administrative remedies provided by CAMA to seek review of the permit decision and may not collaterally attack the permit decision by an action for declaratory judgment." Plaintiff appealed.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy J. Allen Jernigan and Assistant Attorney General Jill B. Hickey, for defendant-appellee Schecter.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Michael Murchison, for defendant-appellees Eshelman.

Assistant County Attorney Kemp P. Burpeau for defendant-appellee Hines.

MARTIN, Judge.

Plaintiff's sole assignment of error is to the trial court's dismissal of his complaint pursuant to G.S. § 1A-1, Rule 12(b)(6). We agree with the trial court that the present action is precluded by plaintiff's failure to exhaust the administrative remedies provided by CAMA to seek review of the permit decision. Accordingly, we affirm the order dismissing this action.

When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under G.S. § 1A-1, Rule 12(b)(6) will be granted. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984). The Eshelmans' permit was granted pursuant to G.S. § 113A-118.1 entitled "General permits" which provides in part:

> (d) The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

G.S. § 113A-121.1 entitled "Administrative review of permit decisions" states:

> (b) A person other than a permit applicant . . . who is dissatisfied with a decision to deny or grant a minor or major development permit may file a petition for a contested case hearing only if the [Coastal Resources] Commission determines that a hearing is appropriate. A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made. A determination of the appropriateness of a contested case shall be made within 15 days after a request for a determination is received and shall be based on whether the person seeking to commence a contested case:
>
> (1) Has alleged that the decision is contrary to a statute or rule;
>
> (2) Is directly affected by the decision; and
>
> (3) Has a substantial likelihood of prevailing in a contested case.
>
> If the Commission determines a contested case is appropriate, the petition for a contested case shall be filed within 20 days after the Commission makes its determination. A determination that a person may not commence a contested case is a final agency decision and is subject to judicial review under Article 4 of Chapter 150B of the General Statutes.

G.S. § 113A-121.1(c) provides that the permit is suspended until the Commission makes a final decision in a contested case or determines that the review cannot commence. Additionally, G.S. § 113A-123 provides for "Judicial review" as follows:

> (a) Any person directly affected by any **final** decision or order of the Commission under this Part may appeal such decision or

> order to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of Chapter 150B of the General Statutes . . . . (Emphasis added.)

G.S. § 150B-43 provides a "Right to judicial review" as follows:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision . . . Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

The foregoing provisions operate as statutory limitations on the ability of affected parties to seek judicial review. Based upon a plain reading of the statute, because no **final** order was entered by the Coastal Resources Commission, plaintiff is not entitled to judicial review. *See High Rock Lake Assoc. v. Envt'l Management Comm.*, 39 N.C. App. 699, 252 S.E.2d 109 (1979). We have recognized that:

> The Coastal Area Management ACT (CAMA), N.C. Gen. Stat. 113A-100, *et seq.*, was enacted to provide for the protection and continued productivity of the coastal resources, to manage competing uses of those resources, and to protect public trust rights in the lands and waters of the coastal area. CAMA directs and empowers the Coastal Resource Commission (CRC) to enforce the Act's provisions. Under the authority vested in it by CAMA, the CRC has designated all public trust waters as subject to its management under coastal management development standards. Any development in public trust waters requires a CAMA permit. N.C. Gen. Stat. 113A-118.

Ballance v. N.C. Coastal Resources Comm., 108 N.C. App. 288, 289, 423 S.E.2d 815, 816 (1992), *disc. review denied*, 333 N.C. 536, 429 S.E.2d 553, *reconsideration dismissed*, 333 N.C. 789, 431 S.E.2d 21 (1993). Our Supreme Court has stated:

> As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has

> expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies." (Citations omitted.)

Presnell v. Pell, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979). The policy of judicial restraint acquires the status of a jurisdictional prerequisite when the legislature has explicitly provided the means for a party to seek effective judicial review of a particular administrative action. *Id.* at 722, 260 S.E.2d at 615. This procedure is particularly efficient when the subject of inquiry is of a very technical nature or involves the analysis of many records. *Elmore v. Lanier*, 270 N.C. 674, 155 S.E.2d 114 (1967). Accordingly, a statute under which an administrative board has acted, which provides an orderly procedure for appeal to the superior court is the exclusive means for obtaining such judicial review. *Presnell* at 722, 260 S.E.2d 615. Furthermore, the policy of requiring exhaustion of administrative remedies does not require merely the initiation of the prescribed procedures, but that they should be pursued to their appropriate conclusion and final outcome before judicial review is sought. *Huang v. N.C. State University*, 107 N.C. App. 710, 421 S.E.2d 812 (1992). We read G.S. § 113A-121.1 to require that a party entitled to its provisions must first challenge a decision to deny or grant a permit by way of a petition to the Coastal Resources Commission. After a final decision by the Coastal Resources Commission, then a party may invoke the jurisdiction of the superior court.

We recognize that the Administrative Procedure Act does not entirely preclude the possibility of judicial review by use of a declaratory judgment action. G.S. § 150B-43 specifically provides: "[n]othing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article." However, had plaintiff followed the appropriate administrative procedures prescribed by G.S. § 113A-121.1, the propriety of the challenged permit would clearly have been subject to judicial review. Thus, it is clear that G.S. § 150B-43 provides no authority for permitting plaintiff

to bypass the requirements of G.S. § 113A-121.1. *See Porter v. Dept. of Insurance*, 40 N.C. App. 376, 253 S.E.2d 44, *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). "By enacting the provisions for administrative review of rules, the legislature wisely determined that the agency itself should have the first opportunity to review the propriety and applicability of its own rules. So long as the statutory procedures provide an effective means of review of the agency action, the courts will require parties to exhaust their administrative remedies." *Id.* at 380-81, 253 S.E.2d at 47.

In the present case there was no final order of the Coastal Resources Commission subject to review by the superior court. *See State ex rel. Envir. Mgmt. v. Raeford Farms*, 101 N.C. App. 433, 400 S.E.2d 107, *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991), *appeal after remand*, 112 N.C. App. 228, 435 S.E.2d 106 (1993), *review allowed*, 335 N.C. 555, 441 S.E.2d 115 (1994). Thus, the trial court did not have the complete administrative record before it, as required by G.S. § 150B-47. The correct procedure for seeking review of an administrative decision is to file a petition in court "explicitly stat[ing] what exceptions are taken to the [administrative] decision." N.C. Gen. Stat. § 150B-46. G.S. § 113A-118 requires that permits for development in public trust waters be issued by the Coastal Resources Commission or its duly authorized agent. G.S. § 113A-121.1 provides the means for administrative review of such decisions, and G.S. § 113A-123 provides an exclusive means by which to obtain judicial review of the Commission's decision. Since plaintiff chose not to pursue the statutory scheme, the determination granting the Eshelmans' permit is final.

The trial court's order dismissing plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(6) is affirmed.

Affirmed.

Judges EAGLES and McCRODDEN concur.

STATE OF NORTH CAROLINA v. PATRICIA DIANE BAKER LANGSTON PRIDDY

No. 933SC744

(Filed 19 July 1994)

1. **Automobiles and Other Vehicles § 818.1 (NCI4th)— habitual impaired driving—substantive felony offense—original exclusive jurisdiction in superior court**

The offense of habitual impaired driving as defined by N.C.G.S. § 20-138.5 constitutes a separate substantive felony offense which is properly within the original exclusive jurisdiction of the superior court.

Am Jur 2d, Automobiles and Highway Traffic §§ 296-310.

2. **Constitutional Law § 169 (NCI4th)— midtrial dismissal on jurisdictional grounds—no attachment of double jeopardy**

The midtrial dismissal of the habitual driving while impaired charge on jurisdictional grounds did not amount to an "acquittal" of that offense so as to bar a second trial, since the dismissal was not based upon grounds of factual guilt or innocence.

Am Jur 2d, Criminal Law §§ 258 et seq.

Appeal by the State from judgment entered 17 March 1993 by Judge Napoleon B. Barefoot in Craven County Superior Court. Heard in the Court of Appeals 8 March 1994.

On 4 April 1992, defendant Patricia Diane Baker Langston Priddy was arrested and charged with driving while impaired and driving while her license was permanently revoked. On 8 September 1992, the grand jury returned a true bill of indictment charging defendant with habitual impaired driving in violation of G.S. § 20-138.5, based upon an allegation that she drove while impaired on 4 April 1992 after having been convicted of three previous offenses of impaired driving within seven years before 4 April 1992.

The case was initially called for trial in the superior court. Defendant announced her intention to plead guilty to driving while her license was revoked and the matter proceeded on the habitual impaired driving charge. The trial was bifurcated, with the parties presenting evidence on the issue of defendant's impaired driving

before proceeding with evidence as to the allegations of the three previous convictions.

At the close of all of the evidence on the issue of impaired driving, defendant moved to dismiss on the ground that the State had presented insufficient evidence of impaired driving and on the ground that the superior court lacked jurisdiction because the impaired driving charge had not been first tried in the district court. The trial court allowed the motion to dismiss. Although the court did not set out, in the written order of dismissal, the basis for its ruling, the court stated on the record that the motion was granted on jurisdictional grounds because the district court had original exclusive jurisdiction of the impaired driving offense. Defendant pled guilty to driving while her license was revoked and received a probationary sentence. The State appealed from the dismissal of the habitual driving while impaired charge.

Attorney General Michael F. Easley, by Associate Attorney General Robert T. Hargett, for the State.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, for defendant-appellee.

MARTIN, Judge.

[1] The primary issue which we must decide is whether the trial court erred in dismissing the charge of felonious habitual impaired driving for lack of jurisdiction. The State contends that the superior court had original jurisdiction to try the underlying issue of driving while impaired as an element of felonious habitual impaired driving because habitual impaired driving constitutes a substantive felony offense. Defendant argues that the habitual impaired driving does not constitute a separate felony offense; rather, it is a mere punishment enhancement statute like G.S. § 14-7.1, the habitual felon statute. Defendant reasons that, because habitual impaired driving is solely a punishment enhancement statute, there is no underlying felony to make original jurisdiction in superior court proper. We agree with the State's position and hold that the offense of habitual impaired driving as defined by G.S. § 20-138.5 constitutes a separate substantive felony offense which is properly within the original exclusive jurisdiction of the superior court.

G.S. § 20-138.5, entitled "Habitual impaired driving," explicitly provides that "[a] person commits the **offense** of habitual impaired driving if . . . ." and contains two elements which the State must prove

beyond a reasonable doubt: (1) that the defendant drives while impaired as defined by G.S. § 20-138.1 and (2) that the defendant has been convicted of three or more offenses involving impaired driving as defined in G.S. § 20-4.01(24a) within seven years of the date of the present offense. The offense is punishable as a Class J felony. N.C. Gen. Stat. § 20-138.5(b) (effective until 1 January 1995). By comparison, the habitual felon statute, which is solely a penalty enhancement statute, states, in relevant part: "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C. Gen. Stat. § 14-7.1. Because G.S. § 14-7.1 simply defines certain persons to be habitual felons, who, as such, are subject to greater punishment for criminal offenses, our Supreme Court has held that being an habitual felon is not a crime and cannot support, standing alone, a criminal sentence. Rather, being an habitual felon is a status justifying an increased punishment for the principal felony. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

By contrast, the legislature chose the specific language to define the crime of habitual impaired driving as a separate felony offense, capable of supporting a criminal sentence. Thus, the legislature must not have intended to make habitual impaired driving solely a punishment enhancement status. As stated in *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 770 (1961):

> The Legislature, unless it is limited by constitutional provisions imposed by the State and Federal Constitutions, has the inherent power to define and punish any act as a crime, because it is indisputedly [sic] a part of the police power of the State. The expediency of making any such enactment is a matter of which the Legislature is the proper judge.

It is for the legislature to define a crime and prescribe its punishment, not the courts or the district attorney. *State v. Small*, 301 N.C. 407, 417, 272 S.E.2d 128, 135 (1980); *see* N.C. Const. Art. I, § 6.

> [W]hile a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). (Citations omitted.)

We conclude that the legislature clearly intended felonious habitual impaired driving to constitute a separate felony offense. Exclusive original jurisdiction of all felony offenses is in superior court. N.C. Gen. Stat. § 7A-271. Consequently, the trial court erred by dismissing the charge of habitual impaired driving for lack of jurisdiction.

[2] Our inquiry cannot end here, however. Defendant asserts that even if the superior court erred by dismissing the charge of habitual impaired driving for lack of jurisdiction, her prosecution for that offense is barred because another trial would violate the constitutional prohibition against former jeopardy. While the State contends that double jeopardy is an issue for the superior court on remand, G.S. § 15A-1445(a) clearly provides that the State may appeal the dismissal of criminal charges only when further prosecution would not be barred by the rule against double jeopardy. Thus, the State's appeal is subject to dismissal if further prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution or the "law of the land" clause of Article I, § 19 of the North Carolina Constitution.

Had defendant been granted a dismissal of the charge on jurisdictional grounds prior to trial, she clearly could have been tried for the offense upon the State's successful appeal of the order of dismissal. *See State v. Oakes*, 113 N.C. App. 332, 438 S.E.2d 477 (1994). However, defendant correctly argues that jeopardy has attached in this case because the jury was empaneled, sworn and heard evidence with respect to her impaired driving. Jeopardy attaches in a criminal case when a competent jury has been empaneled and sworn. *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), *cert. denied and appeal dismissed*, 287 N.C. 261, 214 S.E.2d 434 (1975), *cert. denied*, 423 U.S. 1080, 47 L.Ed.2d 91 (1976). However, in a case like this where a dismissal of charges occurs prior to the verdict, the attachment of jeopardy only begins the inquiry as to whether the prohibition against double jeopardy bars retrial.

It is well established that "[t]he Double Jeopardy Clause of the North Carolina and United States Constitutions protect against (1) a second prosecution after acquittal for the same offense, (2) a second prosecution after conviction for the same offense, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444,

340 S.E.2d 701 (1986); *State v. Strohauer*, 84 N.C. App. 68, 72, 351 S.E.2d 823, 826 (1987), *citing North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656 (1969). The question before us involves the first category, i.e., whether the midtrial dismissal of the habitual driving while impaired charge on jurisdictional grounds amounts to an "acquittal" of that offense so as to bar a second trial. In our opinion, it does not because the dismissal was not based upon grounds of factual guilt or innocence.

In *United States v. Scott*, 437 U.S. 82, 57 L.E.2d 65 (1978), the trial court, after jeopardy had attached and before the jury had returned a verdict, dismissed charges pursuant to defendant's motion upon grounds which were not based upon the legal insufficiency of the prosecution's evidence to sustain a conviction. The Supreme Court held that the prosecution's appeal of the dismissal was not barred by the provisions of 18 U.S.C. § 3731, which contains provisions restricting the government's right to appeal similar to the provisions of our own G.S. § 15A-1445(a) with respect to the right of the State to appeal.

> [T]he defendant by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant . . . . No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant.

Id. at 99-100, 57 L.Ed.2d at 79-80.

The dismissal of the habitual driving while impaired charge in the present case was not the equivalent of an acquittal. The dismissal, upon defendant's motion, was based solely upon the trial court's ruling that it had no jurisdiction and was entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant's guilt or innocence. Since there was no acquittal or conviction in this case a retrial would not offend the constitutional protections afforded by the prohibitions against double jeopardy, and neither the State's appeal nor a retrial of the charge against defendant are barred.

Reversed and Remanded.

Judges EAGLES and McCRODDEN concur.

WADELL NICHOLSON, PETITIONER/APPELLEE v. ALEXANDER KILLENS, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT/APPELLANT

No. 937SC969

(Filed 19 July 1994)

Automobiles and Other Vehicles § 93 (NCI4th)— breathalyzer test—petitioner not advised of rights—revocation of license properly rescinded

The trial court did not err in rescinding the revocation of petitioner's driver's license for willful refusal to submit to chemical analysis because petitioner was not properly advised of his rights pertaining to a breathalyzer test under N.C.G.S. § 20-16.2(a) where the charging officer, after designating that a breathalyzer test was to be performed, failed to take defendant before another officer to inform defendant both orally and in writing of the rights enumerated in that statute.

Am Jur 2d, Automobiles and Highway Traffic §§ 122 et seq.

Appeal by respondent from order entered 28 June 1993 by Judge Richard B. Allsbrook in Nash County Superior Court. Heard in the Court of Appeals 12 May 1993.

Here, the parties stipulated in writing to the following facts:

1. Petitioner was arrested on January 8, 1993, at 11:30 P.M. by Trooper R. C. Wilder for an implied consent offense.

2. Trooper Wilder had reasonable grounds to believe that petitioner had committed an implied consent offense.

3. Trooper Wilder transported petitioner to a breathalyzer room for the purpose of requesting him to submit to a chemical analysis of his breath.

4. Trooper Wilder advised petitioner of his rights enumerated in G.S. 20-16.2(a).

5. Trooper Wilder is a certified chemical analyst in accordance with G.S. 20-139.1.

6. At 12:22 A.M., Trooper Wilder requested petitioner to submit to a chemical analysis of his breath.

7. Trooper Wilder used an Intoxilyzer 5000 instrument.

8. Petitioner told Trooper Wilder that he was not going to submit to the chemical analysis of his breath and did not submit to the test.

9. Trooper Wilder reported petitioner as having willfully refused to submit to a chemical analysis of his breath at 12:53 A.M.

On 2 June 1993, the trial court entered an order rescinding the revocation of petitioner's license because "petitioner was not notified of his rights as required by subsection (a) of G.S. 20-16.2 and therefore condition (4) as set out in [G.S. 20-16.2(d)] was not met." Respondent appeals.

Moore, Diedrick, Carlisle & Hester, by Lawrence G. Diedrick, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for respondent-appellant.

EAGLES, Judge.

In its sole assignment of error, respondent argues that the trial court erred in ordering a rescission of the revocation of petitioner's license because petitioner was properly advised of his rights under G.S. 20-16.2(a). After careful review, we disagree and affirm.

G.S. 20-16.2 provides:

(a) Basis for Charging Officer to Require Chemical Analysis; Notification of Rights.—. . . .

Except as provided in this subsection or subsection (b), before any type of chemical analysis is administered the person charged must be taken before a chemical analyst authorized to administer a test of a person's breath, who must inform the person orally and also give the person a notice in writing that:

(1) He has a right to refuse to be tested.

(2) Refusal to take any required test or tests will result in an immediate revocation of his driving privilege for at least 10 days and an additional 12-month revocation by the Division of Motor Vehicles.

(3) The test results, or the fact of his refusal, will be admissible in evidence at trial on the offense charged.

(4) His driving privilege will be revoked immediately for at least 10 days if:

a. The test reveals an alcohol concentration of 0.08 or more; or

b. He was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more.

(5) He may have a qualified person of his own choosing administer a chemical test or tests in addition to any test administered at the direction of the charging officer.

(6) He has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights.

If the charging officer or an arresting officer is authorized to administer a chemical analysis of a person's breath and the charging officer designates a chemical analysis of the blood of the person charged, the charging officer or the arresting officer may give the person charged the oral and written notice of rights required by this subsection.

. . . .

(c) Request to Submit to Chemical Analysis; Procedure upon Refusal.—The charging officer, in the presence of the chemical analyst who has notified the person of his rights under subsection (a), must request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law. Then the charging officer and the chemical analyst must without unnecessary delay go before an official authorized to administer oaths and execute an affidavit stating that the person charged, after being advised of his rights under subsection (a), willfully refused to submit to a chemical analysis at the request of the charging officer. . . .

(d) Consequences of Refusal; Right to Hearing before Division; Issues.—. . . . If the person properly requests a hearing, he retains his license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws his

request, or he fails to appear at a scheduled hearing. . . . The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (4), or (5) is not met, it must rescind the revocation.

G.S. 20-16.2 (Emphasis added.)

Regarding the interpretation of statutes, our Supreme Court has stated that:

> The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978) (citations omitted). *See Carter v. Wilson Construction Co.*, 83 N.C. App. 61, 68, 348 S.E.2d 830, 834 (1986)("Statutes imposing a penalty are to be strictly construed"). We conclude that the language of the statute at issue here is clear and unambiguous. It is uncontradicted that after designating that a breathalyzer test was to be performed, Trooper Wilder failed to take defendant before another officer to inform defendant both orally and in writing of the rights enumerated in G.S. 20-16.2(a). Given the strict construction required in dealing with statutes that impose a penalty, we conclude that Trooper Wilder's failure to comply with G.S. 20-16.2(a) must result in the recision of the

revocation of petitioner's license in this case. G.S. 20-16.2(d). We have reviewed respondent's in pari materia argument regarding G.S. 20-139.1 and conclude that it is not persuasive. "If and when the law-making body wishes to amend the statute, a few words will suffice. This Court must forego the opportunity to amend here." *Insurance Co. v. Bynum*, 267 N.C. 289, 292, 148 S.E.2d 114, 117 (1966). Accordingly, this assignment of error fails.

Affirmed.

Judges LEWIS and WYNN concur.

ED FORD D/B/A EDCO AMUSEMENT CO., PLAINTIFF/APPELLANT v. STATE OF NORTH CAROLINA, DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, DIVISION OF ALCOHOL LAW ENFORCEMENT, DEFENDANT/APPELLEE

No. 9330SC989

(Filed 19 July 1994)

Intoxicating Liquor § 31 (NCI4th)— video machines on ABC licensed premises—violation of gambling laws—ALE memorandum not a rule—APA rulemaking procedures inapplicable

A memorandum distributed by the Division of Alcohol Law Enforcement to its supervisors that "video poker" and similar video machines were in violation of state gambling laws, specifically N.C.G.S. § 14-306, and that possession or operation of those video machines on ABC licensed premises was unlawful, did not constitute a "rule" which required compliance with the Administrative Procedure Act's rule promulgation requirements, but instead constituted nothing more than a setting forth of guidelines to be followed when investigating and prosecuting violations of state law, and a nonbinding interpretive statement that possession or operation of certain video machines on ABC licensed premises transgressed that law.

Am Jur 2d, Intoxicating Liquors §§ 34 et seq.

Appeal by plaintiff from order entered 25 June 1993 by Judge Forrest A. Ferrell in Haywood County Superior Court. Heard in the Court of Appeals 9 May 1994.

Russell L. McLean, III for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for defendant-appellees.

JOHN, Judge.

Plaintiff, a video game distributor, instituted this action seeking injunctive and compensatory relief based upon defendant's declaration that certain types of video machines violated North Carolina's criminal gambling laws. Plaintiff contends the trial court erred by granting defendant's motion for summary judgment—thereby dismissing plaintiff's action. We are not persuaded by plaintiff's argument and thus affirm the decision of the trial court.

On 1 November 1991, the Alcoholic Beverage Control Commission ("ABC Commission") issued a memorandum indicating that in the ABC Commission's opinion certain video machines were in violation of state gambling laws, specifically N.C.G.S. § 14-306. On 4 November 1991, defendant Division of Alcohol Law Enforcement ("ALE" - a division of the Department of Crime Control and Public Safety) distributed a similar memorandum to its supervisors. ALE specified those video machines considered violative of G.S. § 14-306 and advised all ALE supervisors that, on or after 1 December 1991, criminal and administrative charges would be brought if such machines were possessed or operated on licensed ABC premises. ALE agents were directed to notify affected businesses of the policy and to allow an opportunity for compliance therewith.

Plaintiff, the owner of approximately 30 "Lucky Eight" video machines, had distributed them to various businesses throughout Buncombe, Haywood and Transylvania Counties. After learning of the ABC Commission and ALE position, plaintiff filed the present lawsuit alleging defendant ALE "attempted to promulgate certain rules and regulations in violation of the North Carolina Administrative Procedures Act."

Defendant answered by denying all material allegations and moving to dismiss the complaint. It also counterclaimed, seeking a declaration that plaintiff's video machines were illegal slot machines. On 30 March 1993, defendant moved for (1) summary judgment on plaintiff's claim and (2) partial summary judgment on its counterclaim. On 25 June 1993, the trial court entered summary judgment dismissing plaintiff's claim, but denied defendant's motion as regards its counterclaim.

The sole assignment of error presented is directed at the trial court's allowance of defendant's motion for summary judgment. Plaintiff argues the memoranda issued by ALE and the ABC Commis-

sion constituted a "rule" within the meaning of the North Carolina Administrative Procedures Act. N.C.G.S. § 150B-1 to -64 (1991) ("APA"). *See* G.S. § 150B-2(8a). He further claims this attempted "rule" was invalid because neither agency complied with APA's rule promulgation requirements. *See* G.S. § 150B-18 to -21.7. We find plaintiff's assertions unfounded.

Initially we note the ABC Commission is not a party to this action and thus the propriety of its 1 November 1991 memorandum is not before us. Consequently, we need consider only whether the 4 November 1991 memorandum issued by ALE to its supervisors constituted a "rule" under the APA. The APA defines this term as follows:

> "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term *does not include the following*:
>
> * * * *
>
> c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
>
> * * * *
>
> g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

G.S. § 150B-2(8a) (emphasis added).

The proper interpretation of APA statutory provisions, as with any statute, presents a question of law. *See Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988). Where a particular claim can be decided by examination of an issue of law, summary judgment is proper. *See Gray v. Hagar*, 69 N.C. App. 331, 333, 317 S.E.2d 59, 60-61 (1984).

In the case *sub judice*, the alleged "rule" consisted of a memorandum written by Donald M. Murray, Director of ALE, and addressed

to ALE supervisors. Murray set forth ALE's interpretation that "video poker" and similar video machines were in violation of G.S. § 14-306. Further, Murray directed ALE supervisors to instruct agents to visit ABC licensed businesses known to possess such machines and to inform proprietors of the agency's position. On these facts, the APA simply has no application.

ALE is a law enforcement agency. *See* N.C.G.S. § 18B-500 (1989). Although ALE agents may investigate any criminal offense, their primary duty is enforcement of state ABC laws and the Controlled Substances Act. *Id.* In performing this duty, agents possess specific statutory authority to inspect ABC licensed premises and to gather evidence concerning violation of ABC laws, *see* G.S. § 18B-502, including prohibition of gambling devices on ABC licensed premises. N.C. Admin. Code tit. 4, 2s .0207 (August 1992).

The memorandum at issue *sub judice* constituted nothing more than a "setting forth" of "guidelines" to be followed when investigating and prosecuting violations of state law, and a "nonbinding interpretative statement" that possession or operation of certain video machines on ABC licensed premises transgressed that law. As such, the memorandum fell squarely within the meaning of G.S. §§ 150B-2(8a)(c) and (8a)(g), and therefore did not constitute a "rule."

While the ALE memorandum establishes a "notification" and "compliance" procedure, the record contains no suggestion of a requirement that ALE notify ABC permittees prior to charging a violation of state gambling laws. Under the circumstances of the case *sub judice*, such advance warning to licensees is to be commended as it furthers amicable relations between business and government. However, the mere fact of "advance warning" does not constitute a "rule" under the APA. ALE is a law enforcement agency, and its internal guidelines (whether distributed to the public or not) for enforcement of the criminal law do not come within the purview of the APA.

Accordingly, we conclude that the trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges WELLS and JOHNSON concur.

Judge WELLS concurred prior to 30 June 1994.

STATE OF NORTH CAROLINA v. WILLIE LEE HARRIS, DEFENDANT

No. 9310SC998

(Filed 19 July 1994)

1. Evidence and Witnesses § 1469 (NCI4th)— attempted robbery with dangerous weapon—bottleneck found at crime scene—admissibility

In a prosecution of defendant for attempted robbery with a dangerous weapon, the trial court did not err in admitting into evidence a broken bottleneck where defendant pushed a rock-like object into the face and lip of his victim and told her he would cut her bad; the victim believed she had been cut and was extremely scared; defendant's movements were limited to a very small area through which no one else walked between the time defendant grabbed the victim and the policeman arrived; the policeman watched defendant continuously; the policeman saw defendant drop something that was dark and no larger than a baseball that made a "glassy sound" when it hit the ground; the bottleneck was the only big object found in the area and no other bottle parts were found in the area; and the policeman frisked defendant for weapons, without finding anything, even though defendant did have some implement in his hand when he attacked the victim.

Am Jur 2d, Evidence §§ 936 et seq.

2. Robbery § 84 (NCI4th)— attempted robbery with dangerous weapon—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for attempted robbery with a dangerous weapon where it tended to show that defendant grabbed his victim around the neck from behind, held a broken bottleneck against her face and lip, and threatened to cut her bad.

Am Jur 2d, Robbery § 89.

Appeal by defendant from judgment entered 10 June 1993 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 7 June 1994.

Attorney General Michael F. Easley, by Assistant Attorney General E. Clementine Peterson, for the State.

John T. Hall for defendant appellant.

COZORT, Judge.

Defendant was convicted of attempted robbery with a dangerous weapon and sentenced to fourteen years in prison. On appeal defendant contends the trial court erred in overruling his objection to the introduction of a broken bottleneck. Defendant also contends the trial court erred by denying defendant's motion to dismiss the charges on the grounds of insufficiency of the evidence. We find no error.

The State offered evidence tending to show that on 13 February 1993, sixteen-year-old Joan Marie Pittman left work and walked to her car in the Raleigh Civic Center parking lot. As she opened her car door, the defendant, Willie Lee Harris, grabbed her around the neck from behind. He ordered Ms. Pittman to get in the car or he would "cut her bad." Ms. Pittman felt a sharp, rock-like object pushing against her face and lip. She thought defendant had cut her face. Ms. Pittman was extremely scared and struggled with defendant and screamed for help.

Raleigh Police Detective R.F. Holsclaw observed defendant grab Ms. Pittman, and he drove quickly to the area where Ms. Pittman continued to struggle with defendant. When defendant saw Detective Holsclaw approaching, he released Ms. Pittman and started to walk away. Detective Holsclaw blocked defendant's path, approximately seven or eight feet from Ms. Pittman's car. Detective Holsclaw watched defendant continuously, and as he exited his car, he saw defendant's hand drop and something leave defendant's hand. Detective Holsclaw stated that he heard a "cling" which he described as a "glassy" sound. The object that dropped from defendant's hand was dark in color and no larger than a baseball. After defendant dropped the object, he moved two or three feet in front of the left front tire of Holsclaw's car. Detective Holsclaw patted defendant down for weapons, handcuffed him, and called for help from another officer.

Officer D.L. Williams arrived, and Detective Holsclaw directed him to the area about five feet away where the Detective saw defendant drop the object. Officer Williams testified it was a "pretty small area" between Ms. Pittman's car and the detective's car. Detective Holsclaw testified that no one else had walked through that area in the interim. The top of a broken bottle was the only big object on the ground in that area. There were no other bottle parts in the area.

[1] Defendant's first contention on appeal is that the trial court erred by overruling his objection to the State's Exhibit No. 1, the broken

bottleneck. Defendant argues there was insufficient evidence to prove that he was ever in possession of the bottle top or that it was used in the attempted robbery. Defendant contends that, since Ms. Pittman never saw the object, and Detective Holsclaw stated only that the object was dark, smaller than a baseball, and made a "glassy sound," there was insufficient evidence to link the bottleneck to the attempted robbery. Citing *State v. Baker*, 320 N.C. 104, 108, 357 S.E.2d 340, 343 (1987), defendant argues that the bottleneck should have been excluded because the speculation and conjecture required to establish a connection between this object and the crime divested this evidence of any probative value. We disagree.

We find it was within the trial court's discretion to admit this exhibit because there was sufficient evidence from which the jury could infer that the bottleneck was the dangerous implement defendant used or threatened to use in the attempted robbery. The following evidentiary facts clearly link the broken bottleneck to the defendant and his attempted robbery of Ms. Pittman: (1) defendant pushed a rock-like object into the face and lip of Ms. Pittman, and said, "I'll cut you . . . I'll cut you bad"; (2) Ms. Pittman believed she had been cut, and she was extremely scared; (3) defendant's movements were limited to a very small area, and no one else walked through the area in between the time defendant grabbed Ms. Pittman and when Detective Holsclaw arrived; (4) Detective Holsclaw watched defendant continuously; (5) Detective Holsclaw saw defendant drop something that was dark-looking and no larger than a baseball, that made a "glassy sound" when it hit the ground; (6) the bottleneck was the only big object found in the area, and no other bottle parts were found in the area; and (7) Detective Holsclaw frisked defendant for weapons, without finding anything, even though defendant did have some implement in his hand when he attacked Ms. Pittman.

Defendant's argument that this evidence requires the trier of fact to speculate in order to conclude that the bottleneck was the dangerous implement used by the defendant is unpersuasive. Essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved. *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E.2d 284, 286, *cert. denied*, 293 N.C. 254, 237 S.E.2d 536 (1977). The evidentiary facts recited above establish a logical inference that the dangerous weapon or implement used by defendant in the attempted robbery was the exhibit introduced by the State.

[2] Defendant's second contention is that the trial court erred in denying defendant's motion to dismiss the charges on the grounds of insufficient evidence. The burden was on the State to prove the following elements of N.C. Gen. Stat. § 14-87 (1993): (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of a dangerous weapon, implement, or means; and (3) danger or threat to the life of the victim. This court's standard of review, as established in *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984), is to determine the sufficiency of the evidence in the light most favorable to the State.

Defendant argues that there was insufficient evidence to support either intent or the possession, use, or threatened use of a dangerous weapon, implement, or means. Defendant argues there was no evidence to establish that the object Ms. Pittman felt against her face was dangerous because it did not cut her, and because there was no evidence regarding defendant's intent to use the implement. Defendant further argues that Ms. Pittman's fear of injury was not sufficient, and also argues the fact that Ms. Pittman was not cut shows that defendant did not intend to cut her.

The statute itself does not require the State to prove that defendant intended to cut Ms. Pittman. *State v. Richardson*, 279 N.C. 621, 628, 185 S.E.2d 102, 108 (1971), stands for the proposition that there is no need for serious injury or intent to inflict harm under N.C. Gen. Stat. § 14-87. The statute requires only a showing that defendant used or threatened to use a dangerous weapon or implement and posed a danger or threat to the life of the victim. A dangerous weapon "is generally defined as any article, instrument, or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which the defendant used it or threatened to use it, and in some cases, the victim's perception of it. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979).

The implement in this case is a green glass bottleneck large enough to be held in the hand, about two and a half inches long. The broken edges of the bottleneck curve into two sharp, jagged points.

Defendant held this broken bottleneck to Ms. Pittman's face and lip. While Ms. Pittman did not see the bottleneck, she heard defendant threaten to "cut her bad." This evidence satisfies our requirement that the defendant use or threaten to use a dangerous weapon or

implement. Courts of other jurisdictions have found a broken beer bottle to be a dangerous weapon. *Compton v. State of Texas*, 759 S.W.2d 503, 504 (Tex. App.-Dallas 1988); *People of the State of Illinois v. Ptak*, 193 Ill. App. 3d 782, 785, 550 N.E.2d 711, 713, 140 Ill. Dec. 826, 829, *appeal denied*, 132 Ill. 2d 552, 555 N.E.2d 383, 144 Ill. Dec. 264 (1990); and *Wright v. The State*, 175 Ga. App. 788, 788, 334 S.E.2d 382, 382 (1985). When defendant held the broken bottleneck to Ms. Pittman's face and lip and threatened to "cut her bad," the defendant's use of the broken bottleneck constituted a dangerous weapon.

We find that the trial court properly admitted State's Exhibit No. 1 into evidence and properly denied defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon.

No error.

Judges EAGLES and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JULY 1994

BROADWAY v. PPG IND. No. 9310IC408	Ind. Comm. (033648)	Affirmed
BURNS v. GREENE COUNTY BD. OF EDUC. No. 938SC992	Greene (92CVS193)	Affirmed
CLAMPETT v. CAROLINA POWER & LIGHT CO. No. 9328SC937	Buncombe (92CVS3994)	Affirmed
CLINKSCALES v. BAHLSEN OF AMERICA No. 9310SC1109	Wake (93CVS02696)	Reversed
DEANS v. DEANS No. 937DC128	Wilson (92CVD688)	Affirmed
DEERE & CO. v. GREENE No. 9310SC966	Wake (92CVS12106)	Affirmed
FIRST UNION v. HINRICHS No. 9223DC1327	Ashe (91CVD181)	Affirmed
FREEMAN v. FREEMAN No. 9321DC734	Forsyth (87CVD3820) (WBTS 12634)	Affirmed
GRANTHAM v. MOTELS OF AMERICA No. 938SC485	Wayne (90CVS2302)	Affirmed
HENDREN v. HENDREN No. 9320SC996	Moore (92CVS711)	Affirmed
KING v. DOODY No. 935DC1304	New Hanover (92CVD500)	No Error
KING v. PITTS No. 9326DC846	Mecklenburg (92CVD13356)	Reversed & Remanded
MOYE v. MOYE No. 9320DC1272	Moore (92CVD561)	Vacated
RATLIFF v. SUN STATE DRYWALL No. 9310IC698	Ind. Comm. (747042)	Vacated & Remanded
SMITH v. CITY OF KANNAPOLIS No. 9419SC33	Cabarrus (91CVS1339)	Affirmed

STATE v. BAILEY No. 9310SC906	Wake (92CRS67566)	No Error
STATE v. HOARD No. 9312SC919	Cumberland (91CRS25169)	No Error
STATE v. MURCHISON No. 9326SC1243	Mecklenburg (93CRS26459)	Affirmed
STATE v. REDFERN No. 9320SC841	Union (92CRS11204)	No Error
STATE v. STREETER No. 9314SC1160	Durham (91CRS13195)	No Error
STATE v. TAYLOR No. 9310SC1235	Wake (91CRS86589) (91CRS86591) (91CRS86593) (91CRS86594) (91CRS86596) (91CRS86597) (91CRS86601)	No Error; Remanded for resentencing as to Count Two of 91CRS86596
STATE v. THOMPSON No. 9318SC1265	Guilford (93CRS20528) (93CRS20530) (93CRS20531) (93CRS20532) (93CRS32550) (93CRS32552)	No Error
STATE v. WILLIAMS No. 9312SC1259	Cumberland (92CRS19643)	No Error
STATE v. YOUNG No. 936SC522	Halifax (91CRS3425)	No Prejudicial Error
THOMPSON CADILLAC-OLDSMOBILE v. OLDSMOBILE DIV. OF GEN. MOTORS No. 9310SC1043	Wake (93CVS05904)	Reversed & Remanded
WESLAKE v. SEXTON No. 9329DC483	Henderson (90CVD316)	Affirmed
WORLEY v. AMP ENTERPRISES, INC. No. 9324SC445	Watauga (92CVS615)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 19 JULY 1994

COX v. HOZELOCK, LTD. No. 9321SC739	Forsyth (90CVS706)	No Error
DENTON v. CONVALESCENT CENTER OF SANFORD No. 9311SC1152	Lee (92CVS397)	Affirmed
FRALEY v. CHEROKEE SANFORD GROUP No. 9310IC138	Ind. Comm. (823010)	Affirmed
FREEMAN v. FREEMAN No. 9311DC899	Lee (89CVD912)	Affirmed
GAVIN v. GAVIN No. 9312DC957	Cumberland (92CVD657)	Affirmed
GOINGS v. HERRON No. 9319SC238	Randolph (92CVS785)	Affirmed
HELLER v. SINGLETON No. 933DC741	Carteret (92CVD436)	Affirmed
HONEYCUTT v. TRAVELERS INDEMNITY W.E.S. CO. OF RHODE ISLAND No. 9325SC328	Caldwell (91CVS1109)	Reversed & Remanded
J. H. CARTER BUILDER v. PHELPS No. 9310SC438	Wake (90CVS03227)	Affirmed
JONES v. KILLENS No. 937SC1019	Nash (93CVS766)	Affirmed
KING v. TOWN OF SURF CITY No. 935SC1006	Pender (92CVS500)	Dismissed
LEWIS v. ALBERGHINI No. 9324DC1194	Watauga (92CVD366)	Affirmed
LINTHICUM v. OLSON No. 9318SC984	Guilford (92CVS5907)	Affirmed
MAYO v. DUKE UNIVERSITY No. 9315SC793	Orange (92CVS627)	Affirmed
MILLER v. PETERS No. 9319SC922	Rowan (91CVS707)	No Error

MOOSE v. J. COBURN, INC. No. 9322SC821	Iredell (91CVS1892)	Affirmed in part; Reversed & remanded for a new trial in part
PENDERGAST v. WOODALL No. 9324SC997	Watauga (92CVS454)	Reversed & Remanded
SAUNDERS v. SAUNDERS No. 9313DC929	Brunswick (91CVD283)	Affirmed
SMITH v. COOKE TRUCKING No. 9310IC1110	Ind. Comm. (060910)	Affirmed
SNYDERGENERAL CORP. v. RALEIGH MECHANICAL & METALS No. 9310SC614	Wake (90CVS03057)	Affirmed
STATE v. BLANTON No. 935SC667	Pender (92CRS4976) (92CRS4977)	92CRS4976—Judgment for voluntary manslaughter—Affirmed. 92CRS4977—Judgment for felonious hit and run—Remanded for resentencing.
STATE v. CONNOR No. 9315SC1102	Orange (92CRS5509) (92CRS5510)	No Error
STATE v. ELMORE No. 9327SC820	Lincoln (92CRS5603)	New Trial
STATE v. HARRIS No. 9326SC1104	Mecklenburg (91CRS83072)	Affirmed
STATE v. JOHNSON No. 9321SC1078	Forsyth (93CRS11741) (93CRS11742) (93CRS11743) (93CRS11744) (93CRS11745) (93CRS11746) (93CRS11747) (93CRS11748)	No Error
STATE v. McCLEASE No. 931SC1178	Pasquotank (93CRS631)	No Error

STATE v. McCLEASE No. 931SC1178	Pasquotank (93CRS631)	No Error
STATE v. McEACHERN No. 9316SC973	Robeson (91CRS3019) (91CRS3021)	No Error
STATE v. MILLS No. 938SC1168	Lenoir (89CRS8851)	No Error
STATE v. THOMPSON No. 934SC1052	Onslow (90CRS22774)	No Error
STATE v. YOUNG No. 9326SC1059	Mecklenburg (92CRS52288)	No Error
TAYLOR v. PEMBROKE STATE UNIVERSITY No. 9210SC1241	Wake (90CVS10030)	Reversed & Remanded
TOWN OF POLLOCKSVILLE v. HEIRS OF JORDAN No. 934SC13	Jones (91CVS191)	Dismissed
WGC PROPERTIES v. HUEY No. 9215SC1079	Alamance (91CVS2310)	Reversed & Remanded
WILLIS v. RAGGEDY ANN CHILD CARE CENTER No. 9326SC1122	Mecklenburg (90CVS6373)	Dismised
WOODARD v. TRIPP No. 933DC280	Pitt (91CVS819)	Affirmed

CHRISTINE CRAVER, EMPLOYEE/PLAINTIFF v. DIXIE FURNITURE COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9310IC815

(Filed 19 July 1994)

1. **Workers' Compensation § 357 (NCI4th)— time for filing claim—estoppel**

The Industrial Commission erred as a matter of law in concluding that defendants were not estopped from asserting N.C.G.S. § 97-24's time bar in opposition to plaintiff's claim where, through its system of dealing with employee injuries, Dixie Furniture conveyed to plaintiff the understanding that she would be compensated for her work-related accidents and consequent disability but Dixie Furniture's carrier ultimately denied coverage and plaintiff was informed after the expiration of the two-year time period for filing claims. Although Dixie Furniture may genuinely have thought plaintiff's injuries would be covered, plaintiff was misled to her detriment. Neither bad faith, fraud, nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied.

Am Jur 2d, Workers' Compensation §§ 542, 543.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action. 15 ALR2d 500.

2. **Workers' Compensation § 45 2 (NCI4th)— appeal—conclusions—jurisdiction**

A deputy commissioner's award was upheld where defendants argued that certain findings were supported by insufficient evidence and that the full Commission did not address the validity or correctness of the deputy commissioner's award, but the contentions as to the findings were unfounded and the full Commission reached its decision solely on the jurisdictional issue and want of jurisdiction was defendants' only asserted grounds for contesting the deputy commissioner's conclusions.

Am Jur 2d, Workers' Compensation § 708.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 13 April 1993. Heard in the Court of Appeals 18 April 1994.

Michael A. Swann for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Stephen W. Coles for defendant-appellee.

JOHN, Judge.

Plaintiff appeals an opinion and award of the North Carolina Industrial Commission (the Commission) dismissing her claim on grounds it was not filed within the two-year period set forth in N.C. Gen. Stat. § 97-24(a) (1991). In so ruling, a majority of the full Commission specifically rejected the Deputy Commissioner's determination that defendants were estopped by their conduct from asserting the statutory time bar, and that the Commission had jurisdiction of plaintiff's claim for compensation.

By six assignments of error, plaintiff contends the Commission erred by failing to adopt the Deputy Commissioner's award in its entirety. Against the contingency that we decide the estoppel issue in plaintiff's favor, defendants also bring forth six cross-assignments of error to the 10 July 1990 and 15 April 1991 opinions of Deputy Commissioner Garner. Under the circumstances of this case, we find only plaintiff's contentions persuasive.

The following factual and procedural information is undisputed: Plaintiff began employment with defendant Dixie Furniture Company (Dixie Furniture) in 1977. In 1985, her position was lead person in the "rough-in" room, a supervisory job which also required her to set up machinery and saws, "keep the wood pushed out," and handle certain billing matters. On 4 March 1985, plaintiff struck her right elbow on a "set-up bar." On 26 August 1985, she suffered a similar injury to her right wrist after hitting it on a "guide bar." Immediately following both incidents, plaintiff informed plant nurse Ann Barnes (Ms. Barnes). In each instance, Ms. Barnes applied ice to the affected area and made a notation regarding plaintiff's condition in the company's employee health record.

Plaintiff first sought outside medical attention for increasing pain and stiffness in her right arm and shoulder on 11 November 1986. After consultation with a series of physicians, her condition was eventually diagnosed in September 1987 as reflex sympathetic

dystrophy of her right arm. While allegedly conducting an investigation into the compensability of plaintiff's injuries, defendant Liberty Mutual Insurance Company (Liberty Mutual), Dixie Furniture's carrier, made several initial payments covering her medical expenses. Meanwhile, on 22 May 1987, another Dixie Furniture plant nurse named Janet Osborne (Ms. Osborne) submitted a Form 19 to the Industrial Commission describing the 4 March 1985 accident. Liberty Mutual ultimately denied coverage for plaintiff's injuries some time after expiration of the two-year statutory period, and plaintiff subsequently filed a request for hearing with the Commission on 24 February 1989.

The hearing was conducted on 30 March 1990 and 6 April 1990. Per the parties' request, Deputy Commissioner Edward Garner, Jr. thereafter issued an opinion and order limited to the issue of the Commission's jurisdiction to hear plaintiff's claim. Pertinent findings of fact contained therein are as follows:

> 1. On March 4, 1985, the plaintiff sustained an injury by accident arising out of and in the course of her employment when she struck her right elbow on a set-up bar. The accident was reported to the company nurse who made an entry in the employee health record. At that time the nurse noted a small reddened area, but no bruising or swelling. She applied ice to the injury, then saw the plaintiff again on March 6, 1985, at which time she checked the right elbow and found fading discoloration, but no lump.
>
> 2. On August 26, 1985, the plaintiff sustained another injury by accident arising out of and in the course of her employment when she hit her right wrist on a guide bar. This was reported to the plant nurse who applied ice and an ace wrap. The nurse noted no discoloration, but noted that the wrist was slightly puffy.
>
> 3. The plaintiff did not seek medical treatment until November 11, 1986, when she saw Dr. Karl Bolstad, who also saw her on November 25, 1986; December 2, 1986; and April 3, 1987. Thereafter, the plaintiff was treated by Dr. Joseph Nicastro on June 18, 1987; July 16, 1987; and August 11, 1987. She was eventually referred to Dr. Gary Poehling and saw him on September 15, 1987. Dr. Poehling diagnosed a reflex sympathetic dystrophy of her right arm.
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> 4. On November 11, 1986, Dr. Bolstad treated plaintiff and filled out a standard registration form in which he indicated that

plaintiff got hurt on the job. Plaintiff gave this form to the plant nurse when she returned to work. Plaintiff also paid Dr. Bolstad for the treatment rendered and submitted the bills to the plant nurse according to company policy. The plant nurse was fully aware that plaintiff was receiving medical treatment from Dr. Bolstad for the job-related injury.

5. Plaintiff discussed her injury with Mr. Bob Wood, Director of Health Safety, and he told her to have it covered by workers' compensation. Mr. Wood also told the company's personnel manager that it should be a compensable claim.

6. On June 4, 1987, Dr. Bolstad received a check from Liberty Mutual Insurance Company in the amount of $105.50 to cover plaintiff's medical expenses.

7. The plant nurse knew the procedure for filing workers' compensation claims, and the employees, including the plaintiff, relied on her for such services.

8. When plaintiff was out of work, the defendant-employer carried her on the company records as if she was on workers' compensation leave.

9. Although the defendant-employer was aware of plaintiff's medical condition, it did not file a Form 19 with the Industrial Commission until May 22, 1987.

10. Although the defendant-carrier was paying medical expenses and had advised Dr. Bolstad that the claim was being investigated, it first contacted the plaintiff in January of 1988, when Steve Cowherd, an adjuster, took a recorded interview from the plaintiff.

11. Although the defendant-employer and the defendant-carrier had knowledge of plaintiff's claim, compensation was not officially denied until after the statute of limitation had run.

12. The plaintiff did not file a claim for compensation with the Industrial Commission until she filed a request that the claim be assigned for hearing through her attorney on or after February 24, 1989, which was more than two years after the two accidents.

13. The conduct of both the plant nurse whom the plaintiff relied on for workers' compensation advice, and the defendant-carrier misled the plaintiff and lured her into a false sense of

security about her claim until after the statute of limitation had run.

Based upon the foregoing, Deputy Commissioner Garner reached the following conclusions of law:

1. The plaintiff sustained an injury by accident arising out of and in the course of her employment on March 4, 1985 and on August 26, 1985.

2. The plaintiff did not file a claim within two years of either accident as required by G.S. § 97-24(a).

3. The employer and carrier did lure the plaintiff into a false sense of security and caused her not to file a claim with the North Carolina Industrial Commission and are estopped from pleading the statutory bar of G.S. § 97-24(a).

4. The North Carolina Industrial Commission has jurisdiction to hear this case.

The parties were allowed sixty (60) days in which to submit additional evidence by way of medical records and/or medical depositions. At the conclusion of that time, Deputy Commissioner Garner entered a second opinion and award on 15 April 1991, which incorporated by reference the 10 July 1990 opinion and order. Included in this second opinion were the following additional findings of fact:

2. The plant nurse of defendant-employer was responsible for assisting employees in filing workers' compensation claims. The nurse had a workers' compensation information bulletin, and this bulletin was never given to the employees. Specifically the plaintiff was never given a copy of this bulletin.

3. Mr. Robert Craven, personnel manager, stated at the hearing that the plant nurse would take care of filing workers' compensation claims for the employees. He also thought this claim was compensable.

4. Ms. Ann Barnes, plant nurse, stated at the hearing that the employees relied on the plant nurse as to what course of action to take in workers' compensation matters.

. . . .

6. On November 7, 1989, plaintiff was rated by Dr. Gary G. Poehling as having a 75 percent permanent partial impairment to

the right arm. Prior to rating plaintiff, Dr. Poehling administered two objective tests. . . . Dr. Poehling also found that plaintiff had loss of strength and endurance in her right arm and also loss of sensation in her index finger and thumb which essentially causes her to have what he described as a "blind hand". Plaintiff cannot feel what she is picking up with the thumb and index finger . . . .

7. On February 26, 1990, plaintiff was rated by Dr. Vincent E. Paul. . . . [A]fter Dr. Paul looked over what the tests done by Dr. Poehling have shown, he amended his decision and increased his permanent partial impairment rating to 50 percent. Both doctors agree that plaintiff is not totally disabled and she can do some sort of work . . . .

8. As a result of plaintiff's injury by accident, she has suffered a 75 percent permanent partial impairment of the right arm.

Deputy Commissioner Garner then concluded as a matter of law:

2. Plaintiff is entitled to compensation at the rate of $180.00 per week for 180 weeks for the 75 percent permanent partial impairment she sustained to her right arm as a result of her injury by accident. G.S. 97-31(13).

3. Plaintiff is entitled to temporary total disability benefits for all time missed from work from the date of injury by accident up to and including February 29, 1988. Plaintiff is not entitled to temporary disability benefits after February 29, 1988, because [defendant] offered her a job and she refused to even attempt to do said job.

Defendants thereafter appealed to the full Commission pursuant to N.C. Gen. Stat. § 97-85 (1991), contending *inter alia* that certain findings of fact contained within the two opinions were unsupported by evidence, that the conclusions of law with respect to estoppel were erroneous, and that the Commission lacked jurisdiction to enter an award because plaintiff's claim was not brought within the two-year time bar established in G.S. § 97-24(a).

On 13 April 1993, a majority of the full Commission entered an opinion and award providing:

WHEREFORE, the hearing Commissioner's Opinion and Award is affirmed and adopted, excluding Finding of Fact #13, Conclusions of Law #3 and #4, and the Order, which are replaced as follows:

CONCLUSIONS OF LAW

3. The employer is not estopped from raising G.S. § 97-24(a) as a bar to plaintiff's claim, and the Commission is without jurisdiction to award compensation for her injury.

ORDER

Plaintiff's claim must be, and hereby is, DISMISSED.

Deputy Commissioner J. Harold Davis dissented therefrom, writing separately:

> The Workers' Compensation Act is to be liberally construed to effectuate the broad intent of the Act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose.
>
> The plant nurse testified at the hearing that the employee relied on her to handle all workers' compensation claims. Therefore, when plaintiff reported the injury by accident to the plant nurse, she thought that was all [that was] required of her. The plant nurse had in her possession a workers' compensation manual, but never provided workers' compensation information to the employees. The personnel manager also testified that the plant nurse would "*take care of*" filing workers' compensation claims for employees. This was a company policy and all employees relied on this policy, and in the case of the plaintiff, she relied on it to her detriment.
>
> It is also well established that "**the law of estoppel applies in worker's compensation proceedings as in all other cases**", and an employer, by his conduct, may waive[] the time for filing a claim. . . . .
>
> In this case, plaintiff did not have the means to understand any written material on the Workers' Compensation Act; the company provided none. She was injured on the job, verbally responded to it, and sought and obtained treatment. The company took care of all her needs in reference to her claim until after the two year statute [expired], then they "*pulled the rug out from under her.*"

I.

[1] Each of plaintiff's six assignments of error (subsumed into three arguments in her appellate brief) concerns itself with the single issue of whether or not defendants are equitably estopped from asserting G.S. § 97-24(a) as a defense to her claim. Specifically, plaintiff contends the majority of the full Commission erred by rejecting Deputy Commissioner Garner's finding of fact #13 and conclusions of law #3 and #4 and replacing them with its own conclusion # 3. She further alleges the majority's determinations contained within conclusion #3—that defendants were *not* estopped to raise G.S. § 97-24(a) as a bar to her claim, and that the Commission was without jurisdiction to compensate plaintiff for her injuries, represent errors of law because the Deputy Commissioner's findings expressly adopted by the Commission compel a contrary conclusion.

As defendants correctly observe, upon review of a Deputy Commissioner's award, the full Commission's powers are plenary. *See* G.S. § 97-85; *see also, e.g., Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 785, 316 S.E.2d 86, 87 (1984). The full Commission is not bound by the Deputy Commissioner's findings of fact, *Robinson v. J.P. Stevens*, 57 N.C. App. 619, 627, 292 S.E.2d 144, 149 (1982); upon consideration of the evidence, it may "adopt, modify, or reject" his findings, and is free to make its own determinations regarding the weight and credibility of the evidence. *Hollar v. Furniture Co.*, 48 N.C. App. 489, 497, 269 S.E.2d 667, 672 (1980) (citations omitted).

Furthermore, upon subsequent appeal to this Court, the findings of fact reached by the full Commission are "conclusive and binding," so long as supported by any competent evidence. N.C. Gen. Stat. § 97-86 (1991); *see also, e.g., Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 314, 309 S.E.2d 273, 276 (1983), *disc. review denied*, 311 N.C. 407, 319 S.E.2d 281 (1984); our review is limited to the discovery and correction of errors of law. *See, e.g., Godley v. County of Pitt*, 306 N.C. 357, 359-60, 293 S.E.2d 167, 169 (1982).

However, findings of *jurisdictional* facts are not conclusive on appeal, even when supported by competent evidence, and upon challenge to the Commission's jurisdiction, we may consider all evidence in the record and reach an independent determination. *See Patterson v. Parker & Co.*, 2 N.C. App. 43, 45, 162 S.E.2d 571, 572 (1968); *Weston*, 65 N.C. App. at 314, 309 S.E.2d at 276 (citations omitted).

We begin by noting that should the doctrine of estoppel not be applicable to the circumstances of this case, plaintiff's claim (con-

cededly filed more than two years after the incidents giving rise thereto) must fail. The relevant statute provides:

> (a) The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident.

G.S. § 97-24(a). Our cases have consistently held this two-year period to be a condition precedent (as opposed to a statute of limitation) to an injured worker's right to compensation. *See, e.g., Parker v. Thompson-Arthur Paving Co*, 100 N.C. App. 367, 369, 396 S.E.2d 626, 628 (1990) (citations omitted). Plaintiff's failure to file her claim in a timely fashion, therefore, raises a jurisdictional obstacle to that claim. *Id.* Moreover, the general rule is that such a jurisdictional bar cannot be overcome by consent, waiver, or estoppel. *Id.*

However, our decisions have also acknowledged that the Workers' Compensation Act "requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees." *See, e.g., Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335, 335 S.E.2d 44, 46 (1985) (citation omitted). In addition, we have enunciated a rule to the effect that, in an attempt to achieve the overriding legislative purpose, "equitable estoppel may [be used to] prevent a party from raising the time limitation of G.S. 97-24 to bar a claim." *Id.* at 337, 335 S.E.2d at 47; *see also Parker*, 100 N.C. App. at 369-72, 396 S.E.2d at 628-30. In *Belfield*, we quoted with approval the following language from a respected treatise:

> The commonest type of case is that in which a claimant, typically not highly educated, contends that he was lulled into a sense of security by statements of employer or carrier representatives that "he will be taken care of" or that his claim has been filed for him or that a claim will not be necessary because he would be paid compensation benefits in any event. When such facts are established by the evidence, the lateness of the claim has ordinarily been excused.

Belfield, 77 N.C. App. at 336, 335 S.E.2d at 47 (quoting 3 A. Larson, *The Law of Workmen's Compensation*, § 78.45, at 15-302 through 15-305 (1983)).

Upon review of all the evidence, we conclude that the case *sub judice* comes within the purview of those circumstances in which application of the doctrine of equitable estoppel is appropriate. Findings adopted by a majority of the full Commission, for example, indi-

cate that after being injured in the performance of her job, plaintiff reported directly to the plant nurse, Ms. Barnes. Dixie Furniture employed several plant nurses, whose job duties included keeping employee health records and examining employees injured at work. These nurses had access to an explanatory bulletin concerning workers' compensation procedures, and they were "responsible for assisting employees in filing workers' compensation claims." Employees (including plaintiff) relied on the plant nurses to decide as a preliminary matter which course of action to take when an injury was sustained (*i.e.*—whether to pursue workers' compensation or insurance/health benefits); as Ms. Barnes stated at the hearing, she served as "kind of . . . a go-between [between] the insurance company and the [employees]." Testimony from various other supervisory personnel indicated that they also not only felt that plant nurses routinely "took care of" filing workers' compensation claims for employees, but that plaintiff's injury was compensable.

Substantial evidence presented at the hearing (reflected in large part in the Commission's adopted findings of fact) supports plaintiff's avowal that she believed coverage for her injuries was assured by Dixie Furniture, and that Dixie Furniture itself was operating under the assumption plaintiff's injuries were compensable. To illustrate, when plaintiff's medical care necessitated absence from work, she was carried on Dixie Furniture's records as if she were on workers' compensation leave (as opposed to "sick leave"). Additionally, after receiving treatment for pain and stiffness in her right arm in November 1986, plaintiff returned the physician's standard registration form to Ms. Barnes; she also submitted all of her medical bills to the plant nurse. Moreover, during the time Liberty Mutual was investigating the compensability of plaintiff's claim, it made several medical payments on her behalf (between 4 June 1987 and September 1988). While payment of medical benefits alone does not constitute estoppel for purposes of G.S. § 97-24(a), *Barham v. Hosiery Co.*, 15 N.C. App. 519, 521, 190 S.E.2d 306, 308 (1972), this action by Liberty Mutual constitutes neither the sole nor even the primary basis for plaintiff's assertion of estoppel in the case *sub judice*.

In light of all the circumstances, we hold plaintiff was indeed "lulled into a [false] sense of security" by the plant nurses of defendant Dixie Furniture, whose actions and statements would reasonably have led plaintiff to believe her claim was compensable. *See Parker*, 100 N.C. App. at 371, 396 S.E.2d at 629-30. Through its system of dealing with employee injuries, Dixie Furniture conveyed to plaintiff the

understanding she would be compensated for her work-related accidents and consequent disability. However, Dixie Furniture's carrier ultimately, in the words of Commissioner Davis, "pulled the rug out from under her," and denied coverage of plaintiff's claim. Significantly, she was informed of this substantially after expiration of the two-year time period.

Although Dixie Furniture may genuinely have thought plaintiff's injuries would be covered by Liberty Mutual, "neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied." *Hamilton v. Hamilton*, 296 N.C. 574, 576, 251 S.E.2d 441, 443 (1979) (citation omitted). The basis for effecting estoppel is "the inconsistent position subsequently taken, rather than in the original conduct." *Id.* Plaintiff was misled to her detriment, and it is precisely under such circumstances that this Court has determined application of the doctrine of equitable estoppel to be appropriate.

We therefore hold the majority of the full Commission erred as a matter of law in concluding, based upon the findings it adopted as its own from Deputy Commissioner Garner's opinion, that defendants were not estopped from asserting G.S. § 97-24's time bar in opposition to her claim. Accordingly, although plaintiff's claim was not timely filed, the Commission had jurisdiction to hear it and enter an award thereon.

II.

[2] In the event we were to rule, as we have, in plaintiff's favor on the estoppel issue, defendants have brought forth six cross-assignments of error to the 10 July 1990 and 15 April 1991 opinions rendered by Deputy Commissioner Garner. Specifically, defendants argue insufficient evidence supports certain findings of fact contained within those opinions. We have reviewed each of these contentions carefully and find they are unfounded.

Defendants further observe accurately that because the full Commission reached its decision solely on the jurisdictional issue (which was the subject of the 10 July 1990 opinion), it did not address the validity or correctness of Deputy Commissioner Garner's 15 April 1991 opinion and award. Defendants also therefore broadly cross-assign as error the conclusions of law contained in the 15 April 1991 award. However, before the full Commission and again before this Court, the only basis offered for assigning these conclusions of law as

error is that the Commission lacked jurisdiction over the case. As we have determined the Commission indeed had jurisdiction to consider plaintiff's claim, and want of jurisdiction was defendants' only asserted grounds for contesting the Deputy Commissioner's conclusions with respect to plaintiff's injury or right to compensation, we uphold in all respects Deputy Commissioner Garner's award entered 15 April 1991.

For the foregoing reasons, we reverse the Opinion and Award of the full Commission, and remand this case for entry of an opinion and award upholding the Opinion and Award of Deputy Commissioner Garner filed 15 April 1991.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

Judge WELLS concurred prior to 30 June 1994.

KATHERINE C. KENNEDY, PLAINTIFF v. GUILFORD TECHNICAL COMMUNITY COLLEGE, DEFENDANT

No. 9318SC444

(Filed 19 July 1994)

Public Officers and Employees § 58 (NCI4th)— "whistleblower" action—job transfer—prima facie case—legitimate reason shown by defendant—no discrediting evidence by plaintiff—summary judgment for defendant

Assuming that plaintiff's transfer to a secretarial position she considered less attractive than her former secretarial position following her protected activity of reporting employee misuse or misappropriation of state property established a *prima facie* showing of discrimination in her employment in violation of the "whistleblower" statutes, N.C.G.S. §§ 126-84 and 126-85, the trial court properly entered summary judgment for defendant technical college where defendant presented evidence that plaintiff's transfer had no effect on her hours, wages, seniority, or benefits, the job descriptions for the two positions were almost identical, plaintiff's transfer was an integral part of a larger reorganization

plan, and plaintiff's former position was permanently eliminated, and plaintiff presented no specific facts tending to discredit defendant's reorganization claim or to show that the legitimate reason offered by defendant was not its true reason but was a pretext for discrimination.

Am Jur 2d, Wrongful Discharge §§ 55 et seq.

Liability for discharging at-will employee for refusing to participate in, or for disclosing, unlawful or unethical acts of employer or coemployees. 9 ALR4th 329.

Appeal by plaintiff from summary judgment entered 12 March 1993 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 7 February 1994.

Smith, Follin & James, by Norman B. Smith and Margaret Rowlett, for plaintiff-appellant.

Hendrick, Zotian, Bennett & Blancato, by William A. Blancato, for defendant-appellee.

JOHN, Judge.

Plaintiff-employee filed an amended complaint in this action on 16 April 1992, claiming retaliation in violation of N.C. Gen. Stat. § 126-85 by defendant-employer following her reports of fellow-employee misuse and misappropriation of audio-visual (AV) equipment. In sum, plaintiff's complaint stated that after she informed supervisory and investigatory personnel at defendant Guilford Technical Community College (GTCC) of employee personal use of State equipment and of State property missing from inventory, she was transferred from her position as "Audio-Visual Secretary" (AV secretary) to the position of "Library Public and Technical Services Secretary." Plaintiff initiated her suit after unsuccessfully seeking reinstatement as AV secretary by means of an internal grievance procedure pursued with GTCC in the fall of 1991. From entry of summary judgment in favor of defendant on 12 March 1993, plaintiff appeals. We affirm the trial court.

This action was brought under North Carolina's "whistleblower" statutes, N.C. Gen. Stat. § 126-84 (1993), and N.C. Gen. Stat. § 126-85 (1993), which provide in pertinent part as follows:

§ 126-84. Statement of policy.

It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

(1) A violation of State or federal law, rule or regulation;

(2) Fraud;

(3) Misappropriation of State resources; or

(4) Substantial and specific danger to the public health and safety.

§ 126-85. Protection from retaliation.

(a) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten *or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment* because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

(Emphasis added).

A court ruling upon a motion for summary judgment must view all the evidence in the light most favorable to the nonmovant (here, plaintiff), *see, e.g., Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 318-19 (1979), *overruled in part on other grounds, Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992), accepting all her asserted facts as true, *Railway Co. v. Werner Industries*, 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974) (citation omitted), and drawing all reasonable inferences in her favor. *Whitley v. Cubberly*, 24 N.C. App. 204, 207, 210 S.E.2d 289, 291 (1974) (citations omitted). However, once the moving party presents an adequately supported motion, the opposing party must come forward with specific facts (not mere allegations or speculation) that controvert the facts set forth in the movant's evidentiary forecast. *Roumillat*, 331 N.C. at 63-64, 414 S.E.2d at 342; *Moore v. Fieldcrest Mills*, 36 N.C. App. 350, 353, 244 S.E.2d 208, 210 (1978), *aff'd*, 296 N.C. 467, 251 S.E.2d 419 (1979); *see also* N.C.R. Civ. P. 56(e) (1990), which provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial. *If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

(Emphasis added).

Both parties correctly point out that our courts have issued no published decisions interpreting or applying G.S. §§ 126-84 and 126-85. Thus the question of whether the general principles just enunciated are applicable to actions commenced under these statutes has not been definitively answered. However, the parties direct our attention to related cases involving discrimination and retaliation claims brought under 42 U.S.C. §§ 2000e *et seq.* (Title VII) and 42 U.S.C. § 1983 (Section 1983) and suggest our analysis of the case *sub judice* should follow that utilized by courts in considering Title VII and Section 1983 claims. Noting that the procedures adopted by courts in these cases closely parallel the customary summary judgment analysis set out above, we elect for purposes of this appeal to adopt the parties' recommended reasoning.

Plaintiff relies upon a decision from the federal court for the principle that a *prima facie* case of retaliation (based upon a violation of first amendment rights) in "whistle-blowing" circumstances is properly considered composed of the following elements: "(1) [plaintiff] engaged in protected activity, (2) followed by an adverse employment action, and (3) the protected conduct was a substantial or motivating factor in the adverse action." *McCauley v. Greensboro City Bd. of Educ.*, 714 F. Supp. 146, 151 (M.D.N.C. 1987) (citations omitted) (plaintiff claimed she was retaliated against, in violation of Title VII and 42 U.S.C. § 1981 and § 1983, for filing race and sex discrimination charges with the E.E.O.C.). The *McCauley* court then observed that although "[t]he analysis for retaliatory acts which violate . . . Title VII is similar, . . . the Plaintiff must prove 'but for' instead of 'motivating factor' causation in her *prima facie* case." *Id.* (citation omitted).

The case cited by plaintiff continues by stating that upon presentation of a *prima facie* case of retaliation based upon first amendment rights, "the burden shifts to the defendant to show that it would have taken the same action even in the absence of the protected conduct." *Id.* at 153. Stated otherwise, "the burden of production shifts to

the defendant to articulate a legitimate, non-discriminatory reason for the adverse [employment] action." *Melchi v. Burns Int'l Sec. Servs. Inc.*, 597 F. Supp. 575, 582 (E.D. Mich. 1984) (construing Michigan's "Whistleblowers' Protection Act"); *see also Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1260 (7th Cir. 1990), *cert. denied*, 501 U.S. 1217, 115 L.Ed.2d 996 (1991). An articulated reason is not "legitimate," and so does not overcome the presumption of discrimination arising from plaintiff's *prima facie* showing, unless it has "a rational connection with the business goal of securing a competent and trustworthy work force." *Harris v. Marsh*, 679 F. Supp. 1204, 1285 (E.D.N.C. 1987), *aff'd in part, rev'd in part on other grounds by Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th. Cir. 1990).

Finally, if the defendant-employer meets its burden, the plaintiff must then come forward with evidence to show "that the legitimate reason was a mere pretext for the retaliatory action." *Melchi*, 597 F. Supp. at 582 (relying on language from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 36 L.Ed.2d 668, 679 (1973)); thus, "a plaintiff retains the ultimate burden of proving that the [adverse employment action] would not have occurred had there been no protected activity" engaged in by the plaintiff. *Id.* at 583. Courts have referred to this as requiring a showing by plaintiff of "but-for" causation, *id.*, creating an affirmative obligation on plaintiff's part to produce evidence countering that produced by the employer on its motion for summary judgment. Furthermore, if at that point "plaintiff has no evidence whatsoever of pretext, the continued litigation of plaintiff's case can be frivolous despite the existence of a *prima facie* case." *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 536 (4th Cir. 1990) (citation omitted).

We begin our analysis of the case *sub judice* by assuming *arguendo* (but explicitly not deciding) that when viewed in the light most favorable to plaintiff, the evidence before the trial court established a *prima facie* case of discrimination with respect to conditions of plaintiff's employment in retaliation for having engaged in the protected activity of reporting employee misuse or misappropriation of State property. In this context, however, we note parenthetically defendant's strong arguments against consideration of plaintiff's transfer to a secretarial position in the Learning Resources Center's library as "discrimination" with respect to her compensation, terms, conditions, location or privileges of employment. *See* G.S. § 126-85. GTCC emphasizes uncontested evidence demonstrating that plaintiff's transfer had no effect on her hours, her wages, her seniority, or her privileges and benefits, and only minimal impact on her location

(requiring a move from third to first floor), and that the written job description for her new secretarial position was virtually identical to the description for her former one.

Defendant further counters plaintiff's suggestion that the transfer interrupted a "reclassification" of her former job which had been in progress for some time by pointing out she was unable to offer any evidence supporting that assertion. For instance, defendant continues, she presented no factual information establishing that her desired reclassification had been approved by the appropriate personnel, that funding for it was or would ever be available, or that being transferred would necessarily have an adverse effect upon any decision made about the reclassification.

Furthermore, plaintiff stated she was primarily dissatisfied with her new job because she perceived it manifested less responsibility and she felt "isolated" and "bored." However, GTCC observes that she had worked fewer than three weeks when she requested a transfer to another department, and during that time she was in the process of being trained. Moreover, she began her work in the library during the "slow" period when school was not in session.

Finally, defendant argues it is uncontroverted that secretarial help was greatly needed in the library, and that within time and after training plaintiff would have been given a broader range of responsibilities there. On the other hand, the duties she had performed as the part-time AV secretary had been divided among student workers and another employee, and the job itself eliminated following her departure therefrom.

Nonetheless, assuming *arguendo* plaintiff's transfer to a position she considered less attractive following reports to college authorities of employee misconduct constituted a *prima facie* showing of "discrimination," we proceed to an examination of defendant's evidence presented to the trial court.

Defendant moved for summary judgment pursuant to Rule 56 on 12 February 1993, and supported its motion with numerous affidavits as well as various attached memoranda. Included was the affidavit of Beverley Gass (Gass), current Dean and former Director of the Learning Resources Center (the LRC), which houses the AV department as well as the library and the Office of the Director of Education and Faculty/Staff Development. Other affidavits presented were those of Scott Burnette (Burnette), lead technician of the AV department, and

Dr. Delores Parker (Dr. Parker), Vice-President for Academic Affairs and Student Development at GTCC, as well as Randy Candelaria (Candelaria) and Martha Davis (Davis), GTCC librarians. Defendant's materials established that plaintiff's transfer to the library was part of a campus-wide reorganization, which directly affected the LRC in numerous respects.

Considered cumulatively, defendant's affidavits show the following: In the beginning of 1991, Lundee Amos (Amos) was the Director of Education and Faculty/Staff Development; in the summer of 1991, she was appointed to the position of Dean of GTCC's Greensboro campus. On 1 August 1991, Robin Brewington (Brewington) became the Director of Educational Development (part of the LRC staff); in that role, Brewington assumed many of Amos' earlier duties. Marlene Matthews (Matthews) had been Amos' secretary before the latter became Dean, and since Amos' former responsibilities had been given to a person working within the LRC, Matthews was also transferred to the LRC. Matthews is a full-time secretary with a ten-month contract of employment.

With the transfer of Matthews, the LRC had three secretaries on staff—Betty Jones (Jones, Gass' personal secretary), plaintiff, and Matthews. Plaintiff and Jones both worked on the third floor, where Brewington's office was also located. Because Matthews was familiar with much of the work that had been assigned to Brewington upon Amos' promotion, Brewington strongly desired that Matthews function as her secretary. Accommodating that wish meant that Matthews would also be situated on the third floor of the LRC.

At that time, Gass began discussing the most efficient allocation of secretarial resources with various department heads of the LRC—in particular, Brewington and the LRC's two librarians, Candelaria and Davis. Candelaria and Davis had been in need of secretarial assistance for several months, and occasionally asked Jones for help. However, as even plaintiff conceded in her deposition, because Gass herself had recently been promoted to Dean of the LRC, Jones was "swamped" with work, making reliance on her impractical. Gass first suggested the creation of a "secretarial pool" for the entire LRC building, but as Brewington wanted closer personal assistance from Matthews, this idea was not acceptable.

Ultimately, Gass decided that Matthews would be situated on the third floor and assigned to Brewington; in addition, she would be available to perform secretarial tasks for the AV department should

the need arise. Jones was to continue as Gass' personal secretary, also remaining on the third floor. Plaintiff was transferred to the first-floor library to provide secretarial services for the librarians. The job of AV secretary was thereafter eliminated and not re-established, plaintiff's former duties having been parcelled out and assigned to others. However, the job description for the newly created secretarial position (Library Public and Technical Services Secretary) was virtually identical to that of the AV secretary.

Included with Dr. Parker's affidavit was a copy of GTCC's policy regarding reorganization, which provides:

> The President reserves the right to make changes in job status through reorganization or reassignment of personnel (includes promotion and transfers . . . as defined in procedures). All other promotions or transfers of employees will be considered upon request initiated by the employee or appropriate supervisory personnel.

Dr. Parker elaborated by noting that each department's dean has the right to "reassign or reorganize" clerical personnel (such as secretaries) within his or her department. Thus, it was Gass' discretionary duty to decide where to place each secretary within the LRC. Dr. Parker approved plaintiff's transfer after "full investigat[ion]," because "in [her] opinion it was the most efficient allocation of resources within the LRC." Furthermore, Dr. Parker found there to be "no need to reestablish the position [of AV secretary] and it would be inefficient to do so."

Candelaria and Davis both indicated that because no classes were held in August, it was a "slow" month in the library. Nonetheless, secretarial help was greatly needed, and they were in the process of training plaintiff for further duties when she sought a transfer to the Guided Studies department. During the few weeks plaintiff was in the library, she occupied the same office space Jones had when serving as Gass' secretary before they both relocated to the third floor in 1988. This area was connected to Candelaria's (plaintiff's new supervisor's) office.

We hold defendant met its burden of countering any *prima facie* showing of plaintiff by establishing a "legitimate explanation for the challenged action," *Carr v. F.W. Woolworth Co.*, No. 91-541-CIV-5-BO, slip op. at 9 (E.D.N.C. Sept. 23, 1992)—specifically, that plaintiff's transfer to the LRC library was an integral part of a larger reorgani-

zation plan, well within the realm of Gass' discretionary power to make assignments for the secretarial personnel working at the LRC.

In response to defendant's well-supported motion, plaintiff offered nothing more than speculation regarding her supervisors' motives. She presented no specific facts tending to discredit defendant's reorganization claim or to show "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Melchi*, 597 F. Supp. at 582 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L.Ed.2d 207, 215 (1981)). Indeed, in her deposition testimony, she acknowledged the verity of all the factual information presented in the affidavits submitted by defendant regarding the appointments, relocations, and resultant work loads of various staff and faculty members.

Plaintiff produced no factual information tending to refute defendant's contention that her transfer was simply a sensible managerial decision, or to show that it was instead the result of retaliation for her "whistleblowing" activities in the AV department. The only evidence offered by plaintiff arguably supporting her assertion of retaliation was deposition testimony of Brewington to the effect that Gass and Burnette had said they wanted plaintiff out of the AV department. Upon further inquiry therein, however, Brewington's responses indicated those comments were reflective of personality conflicts between plaintiff and her co-workers; Brewington did not believe the statements were connected in any way with a desire to retaliate against plaintiff for reporting misuse or misappropriation of AV equipment.

Accordingly, we hold that defendant's motion for summary judgment was amply supported by evidence establishing a legitimate reason for plaintiff's transfer to a substantially similar job in the LRC. Plaintiff then failed to meet her burden of coming forward with a showing that defendant's stated reasons were simply a pretext for discrimination. *Blaine v. Whirlpool Corp.*, 891 F.2d 203, 204-05 (8th Cir. 1989). The trial court thus properly granted summary judgment in favor of defendant in the circumstances of this case. *See* Rule 56(e).

Affirmed.

Judges WELLS and McCRODDEN concur.

Judge Wells concurred prior to 30 June 1994.

CRAIG STAN EURY, JR. AND KENNETH WHITE, PETITIONERS/APPELLEES v. NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION, RESPONDENT/APPELLANT

No. 9310SC935

(Filed 2 August 1994)

1. Administrative Law and Procedure § 72 (NCI4th)— errors of law—scope of review

Because some of respondent's assignments of error in an appeal from a superior court order reversing a decision of the State Personnel Commission presented errors of law, the Court of Appeals conducted a *de novo* review of those issues.

Am Jur 2d, Administrative Law §§ 769-774.

2. Discovery and Depositions § 52 (NCI4th)— formal offer of proof—interpretation of admission—error by trial court

In an action arising out of the dismissal of petitioners who were employees of respondent, the trial court erred by improperly construing respondent Employment Security Commission's admissions and by concluding that respondent had failed to make a formal offer of proof of testimony excluded by those admissions, since respondent was not permitted to make a showing in the record of what it proposed to prove, and the trial court interpreted the admissions in an unduly broad manner to include material not contained in the language of the admission request.

Am Jur 2d, Depositions and Discovery §§ 353 et seq.

3. Public Officers and Employees § 65 (NCI4th)— suspension of state employees—reasons—sufficiency of notice to employees

The superior court erred in concluding that respondent state agency had not given petitioners sufficient notice of the reasons for their investigatory suspension pursuant to 25 N.C.A.C. 01J .0610(6), since petitioners were apprehended and arrested on 12 July 1989 for the manufacture of marijuana and possession of drug paraphernalia; on the next day petitioners admitted to their superior that they had been arrested for growing marijuana; and petitioners were placed on investigatory suspension on 14 July 1989 by letter informing them that the reason for suspension was

the "need to investigate allegations concerning your personal conduct which could affect your work status."

Am Jur 2d, Civil Service §§ 52 et seq.

4. Public Officers and Employees § 67 (NCI4th)— off-duty criminal conduct by state employees—just cause for dismissal

Where a state employee has engaged in off-duty criminal conduct, the agency need not show actual harm to its interests to demonstrate just cause for an employee's dismissal; rather, the agency must demonstrate that the dismissal is supported by the existence of a rational nexus between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency.

Am Jur 2d, Civil Service § 63.

Appeal by respondent from order filed 29 June 1993 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 10 May 1994.

The North Carolina Employment Security Commission (hereinafter "Respondent-ESC") appeals from the Superior Court's order reversing the decision of the State Personnel Commission to dismiss petitioners from employment. Petitioners Craig Stan Eury, Jr., and Kenneth W. White were employed by respondent-ESC on 25 January 1977 and 1 May 1979 respectively. Petitioners were permanent state employees employed in Rural Manpower Representative I positions. Respondent's Exhibit 19 is a job description which describes the "nature of work" of a Rural Manpower Representative I position as follows:

> This is specialized employment service work in the recruitment and placement of farm labor.
>
> Employees are responsible for determining farm labor needs and availability in a specific area or county and for formulating plans to secure workers to meet these needs. Work includes registering all principal farm employers, recording crop acreages and anticipated labor requirements, taking orders for all agricultural work, referring workers to growers, and recruiting workers from outside areas to meet labor needs. Employees are expected to use initiative and to make decisions independently since a majority of their duties are performed alone and outside the

> office. General supervision is received from an employment office manager or higher-level rural manpower representative through periodic conference, and work is reviewed and evaluated by them through written reports and records.

Regarding petitioners' positions with respondent-ESC, an administrative law judge made the following findings of fact which were thereafter adopted by the State Personnel Commission:

> 5. ESC is an agency of the State charged with the administration of Chapter 96 of the General Statutes of North Carolina, the Employment Security Law. Further, ESC is charged with enforcing federal and state law with regard to migrant and seasonal workers' housing and certification to work.
>
> 6. One of the goals of ESC is to match farm labor with farm jobs and to provide protection of migrant farm labor through proper administration of the federal and state law and reporting of violations of any other state and federal law to appropriate regulatory agencies.
>
> 7. In order to administer the Rural Manpower Services Program, it is necessary for ESC employees to accurately collect and report certain information concerning employers and employees in the State, meet with and educate the agricultural community of the services available to it, and coordinate the employment needs and employment placement.
>
> 8. As RMR I's, the petitioners' job duties included the following activities: engage in the specialized employment service work in the recruitment and placement of farm labor; determine farm labor needs and availability in a specific area or county, and formulate plans to secure workers to meet these needs; report to appropriate state and federal agencies any violations of wage and hour laws, violations of migrant and seasonal labor laws, etc.
>
> 9. The work of RMR I's includes: registering all principal farm employers, recording crop acreage and anticipated labor requirements, taking orders for all agricultural work, referring workers to growers, and recruiting workers from outside areas to meet labor needs.
>
> 10. Although their job duties and responsibilities could necessitate working additional hours, the petitioners' established work hours were from 8:00 a.m. to 5:00 p.m., Monday through Friday.

11. The ESC's RMRs are given a tremendous amount of freedom to circulate among the target population in order to collect the necessary information and coordinate the employment and placement activities. [The State Personnel Commission supplemented this finding as follows: "Petitioners admitted that they could not perform their job well without the tremendous flexibility and independence afforded them by ESC. Petitioners admitted that their outstanding performance was due in part to the flexibility afforded them by ESC."]

12. Employees who are RMRs are expected to use initiative and to make decisions independently because a majority of their duties are performed alone and outside the office.

13. The RMRs are given telephone credit cards belonging to the State of North Carolina; freedom to complete time and overtime compensation records; freedom to complete mileage reports for travel expense reimbursement; freedom to write up job orders from the agricultural community; and independently arrange meetings of migrant farm labor crews and farmers in need of their services.

14. The telephone credit cards belonging to the State are to be used to charge calls that are made solely in connection with carrying out State business.

15. Mileage reports are to accurately reflect miles traveled in the performance of their duties for which employees would be reimbursed.

16. Time records and overtime compensation records are to accurately reflect the time that employees spend performing their jobs and compensatory time due them for overtime hours worked.

On Wednesday 12 July 1989 at approximately 4 p.m., law enforcement officers spotted petitioners watering marijuana plants at a remote, rural field. Petitioners were arrested for the manufacture of marijuana and possession of drug paraphernalia. After they were arrested and read their rights, petitioners admitted that they had planted the marijuana. (Petitioners later testified that the marijuana was grown for their personal use.) Petitioners did not know who owned the land. Petitioner White's vehicle was impounded. Respondent-ESC's records indicate that at the time of their arrest both petitioners had previously signed out, signifying the end of their work on that

date. From their written indications on the sign-out sheets, petitioners were on compensatory time at the time they were arrested in the marijuana field. During the evening of 13 July 1989, petitioners admitted to their superiors that they had been arrested for growing marijuana but refused requests to disclose any other pertinent details. Petitioners were placed on investigatory suspension by letter dated 14 July 1989 informing them that "[t]he specific reason for your investigatory suspension without pay is the need to investigate allegations concerning your personal conduct which could affect your work status."

In the criminal action, on 14 September 1989 the felony charges of manufacturing marijuana and possession of drug paraphernalia were dismissed and petitioners pleaded no contest to the misdemeanor charge of maintaining a vehicle for the transportation of a controlled substance. G.S. 90-108(a)(7). Petitioner White forfeited his truck to the Moore County Sheriff's Department, and petitioner Eury paid an equivalent amount in cash. In addition, each petitioner was required to perform 200 hours of community service work. Upon completion of the conditions, the remaining criminal charges were dismissed in 1990 and petitioners' criminal records were expunged. *See* G.S. 15A-146; G.S. 90-96(b).

On 29 September 1989, respondent-ESC's management officials conducted a pre-dismissal conference pursuant to 25 N.C.A.C. 01J .0606 at which both petitioners admitted that they had illegally grown marijuana for their personal use and had possessed paraphernalia for growing marijuana. Respondent-ESC's management officials recommended petitioners' dismissal. Petitioners were dismissed from state employment effective 5 October 1989 based upon the growing of marijuana, on property not owned by them, while on paid leave status.

Petitioners filed a request for contested case hearing challenging their dismissal. Prior to the hearing, petitioners served a request for admissions on respondent-ESC. Respondent-ESC did not file a timely response and those requests for admissions, *infra*, were deemed admitted per G.S. 1A-1, Rule 36. The administrative law judge denied respondent-ESC's motion to amend or withdraw the admissions, denied a subsequent motion to amend, and granted petitioners' motion in limine to exclude any testimony or evidence on matters deemed admitted. Because of these admissions, respondent-ESC could not offer evidence regarding the opinions of respondent-ESC's higher level management and administrators regarding *inter alia* the impact of petitioners' conduct on the agency or on management's

trust in petitioners to perform their duties. During the proceedings, respondent-ESC argued that the admissions should not be interpreted in an unduly broad manner to include material not contained in the language of the admission request. In a recommended decision filed 13 January 1992, the administrative law judge found "no just cause" for petitioners' dismissal, found the notice of investigatory suspension inadequate, and recommended that petitioners be reinstated to their former positions with full back pay dating back to the date they were initially placed on investigatory suspension.

In a "Decision and Order" dated 26 June 1992, the State Personnel Commission (hereinafter "Personnel Commission") adopted most of the administrative law judge's findings of fact but declined to adopt most of the conclusions of law and the recommended decision. The Personnel Commission found for respondent-ESC on the admissions issue, stating that the administrative law judge "improperly expanded the scope of the respondent[-ESC]'s admissions and improperly excluded testimony regarding the effect of the petitioners' conduct on their continued employment." In upholding respondent-ESC's dismissal of petitioners, the Personnel Commission's "Decision and Order" provided *inter alia* as follows:

> Petitioners were charged with and have admitted to the felonious manufacture of marijuana and possession of drug paraphernalia. The petitioners admitted to riding around Moore and surrounding counties in order to find a remote location because " . . . it was just a [sic] understanding that, you're going to do something illegal you have to have a remote, remote location." These fields were not unlike the fields to which respondent assigned petitioners to carry out the responsibilities of their jobs. Respondent is charged with continuing to maintain the public trust vested in the agency and to employ persons who would not engage in unacceptable conduct. Respondent has established just cause for the dismissals of petitioners White and Eury.

Petitioners sought judicial review of the administrative proceedings pursuant to G.S. 150B-43. By order filed 29 June 1993, the Superior Court found that there was no admissible or substantial evidence in the record which contradicted or warranted rejection of the findings and conclusions of the administrative law judge. The Superior Court reversed the Personnel Commission's decision, holding that there was no just cause for the dismissal of petitioners. From the Superior Court's 29 June 1993 order reversing the decision of the Personnel Commission, respondent-ESC appeals.

Robert J. Willis for petitioner-appellees.

Chief Counsel Thomas S. Whitaker, by Alfreda Williamson and Thelma M. Hill, for respondent-appellant.

EAGLES, Judge.

Respondent-ESC brings forth several assignments of error. After careful review, we reverse the Superior Court's 29 June 1993 order and remand to the Superior Court for remand to the Personnel Commission.

I. *Standard of Review*

[1] The North Carolina Administrative Procedure Act, G.S. 150B-1 *et seq.*, governs both trial and appellate court review of administrative agency decisions. G.S. 150B-51 governs the scope of the Superior Court's review of final agency decisions. G.S. 150B-51(b) provides:

> . . . [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
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> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Regarding the review of the decisions of administrative agencies, in *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674-75, 677, 443 S.E.2d 114, 118-19 (1994), this Court stated:

> Although the statute [G.S. 150B-51(b)] lists the grounds upon which the superior court may reverse or modify a final agency decision, the proper manner of review depends upon the particular issues presented on appeal.

> If [petitioner] argues the agency's decision was based on an error of law, then "*de novo*" review is required. If, however, [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.

"*De novo*" review requires a court to consider a question anew, as if not considered or decided by the agency. The "whole record" test requires the reviewing court to examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence."

As to appellate review of a superior court order regarding an agency decision, however, the APA simply specifies "[a] party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court. . . ." N.C.G.S. § 150B-52.

. . . .

> . . . [O]ur review of a trial court's order under G.S. § 150B-52 "is the same as in any other civil case—consideration of whether the court committed any error of law." Under this approach, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.
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> . . . .
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> . . . . [W]here the initial reviewing court should have conducted *de novo* review, this Court will directly review the State Personnel Commission's decision under a *de novo* review standard.

(Citations omitted.) "It is well established that an agency has the ability to reject the recommended decision of an administrative law judge. . . . Even though the administrative law judge ha[s] already made findings of fact and conclusions of law, the Personnel Commission ha[s] the ability to make its own findings of fact and conclusions of law if it cho[oses] to do so." *Davis v. N.C. Dept. of Human Resources*, 110 N.C. App. 730, 737, 432 S.E.2d 132, 136 (1993) (*citing Webb v. N.C. Dept. of Environmental Health and Natural Resources*,

102 N.C. App. 767, 404 S.E.2d 29 (1991); *Jarrett v. N.C. Dept. of Cultural Resources*, 101 N.C. App. 475, 400 S.E.2d 66 (1991)). *See also Oates v. N.C. Dept. of Correction*, 114 N.C. App. 597, 442 S.E.2d 542 (1994); *Ford v. N.C. Dept. of Environment, Health and Natural Resources*, 107 N.C. App. 192, 199, 419 S.E.2d 204, 208 (1992).

Here, some of the assignments of error have presented errors of law and accordingly we have conducted a *de novo* review of those issues. In light of the errors of law and the resultant incomplete condition of the record, we do not consider respondent-ESC's remaining assignments of error, including whether there was substantial evidence to support the Personnel Commission's order of dismissal. We remand the cause to the Superior Court for remand to the Personnel Commission for further hearing.

II. *Scope of Admissions and Offer of Proof*

[2] Respondent-ESC argues that the Superior Court erred by improperly construing respondent-ESC's admissions and by concluding that respondent-ESC had failed to make a formal offer of proof of testimony excluded by those admissions. We agree.

G.S. 1A-1, Rule 36 provides:

> (a) *Request for admission.*—A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact . . . .
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . .
>
> (b) *Effect of admission.*—Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that

> withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

G.S. 1A-1, Rule 36. *See* G.S. 150B-28(a); 26 N.C.A.C. 03 .0012. The Comment to G.S. 1A-1, Rule 36 notes that "[i]n form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party." *See also* 2 K. Broun, *Brandis & Broun on North Carolina Evidence,* § 198, at 23 (4th Ed. 1993) (failure to respond to a pretrial demand for admissions constitutes a judicial admission). In *Contractors, Inc. v. Forbes,* 302 N.C. 599, 604-05, 276 S.E.2d 375, 379-80 (1981), our Supreme Court set forth the guidelines for the construction of judicial admissions:

> A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. *See generally* 2 Stansbury's North Carolina Evidence § 166 (Brandis rev. 1973). Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence. *E.g., State v. McWilliams,* 277 N.C. 680, 178 S.E.2d 476 (1971). Stipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation, as well as save costs to litigants. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E.2d 79 (1972); *Rural Plumbing and Heating, Inc. v. H. C. Jones Construction* Co., 268 N.C. 23, 149 S.E.2d 625 (1966); *Chisolm v. Hall,* 255 N.C. 374, 121 S.E.2d 726 (1961). Yet, the effect or operation of a stipulation will not be extended by the courts beyond the limits set by the parties or by the law. *Rickert v. Rickert, supra*; *Lumber Co. v. Lumber Co.,* 137 N.C. 431, 49 S.E. 946 (1905). In determining the extent of the stipulation, it is appropriate to look to the circumstances under which it was entered, as well as to the intentions of the parties as expressed by the agreement. *Rickert v. Rickert, supra.* Stipulations will receive a reasonable construction so as to effect the intentions of the parties, but in ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intended to be waived is relinquished. *Id.*

Here, petitioners served on respondent-ESC a "Request For Admissions" on 20 June 1990. The section of the Request entitled "Instructions" stated *inter alia* as follows:

12. Unless otherwise specifically indicated, when used in this discovery request, the phrase "discernible negative impact" shall be defined in the way that that same phrase was used and/or defined in the case of *National Cash Register*, 70 Labor Arbitration Reports 756, 759.

13. Unless otherwise specifically indicated, when used in this discovery request, the phrase "Event #1" shall be defined to refer to and include the information contained in the following sentence: "During the afternoon hours on Wednesday, July 12, 1989, the Plaintiffs admitted to Det. Sgt. T.D. Monroe, Det. Sgt. C. Goodnight, and Sgt. Ralph Simmons that the plaintiffs had been growing marijuana on or before July 12, 1989, and that all the marijuana plants and paraphernalia discovered by those same law officers on or before July 12, 1989 at the turn off of NC 705 onto RUPR 1300, opening near end of road, belonged to the plaintiffs."

14. Unless otherwise specifically indicated, when used in this discovery request, the phrase "Event #2" shall be defined to refer to and include the information contained in the following sentence: "The plaintiffs admitted to Manfred Emmrich and Leroy Singleton in the Plaintiffs' pre-dismissal conference with those two persons in 1989 that they had been growing marijuana on or before July 12, 1989, and that all the marijuana plants and paraphernalia discovered by Det. Sgt. T.D. Monroe, Det. Sgt. C. Goodnight, and Sgt. Ralph Simmons on or before July 12, 1989 at the turn off of NC 705 onto RUPR 1300, opening near end of road, belonged to the plaintiffs."

Respondent-ESC was requested to admit, *inter alia*, each of the following statements:

4. The criminal proceeding(s) against the plaintiffs which resulted from Event #1 did not have any discernable negative impact on the ability of the plaintiffs to circulate freely without any doubt in the minds of the supervisors of the plaintiffs as to the real nature of the plaintiffs' absence from the ESCNC office.

5. The criminal proceeding(s) against the plaintiffs which resulted from Event #1 did not actually create a situation in which there was any discernable negative impact on the plaintiffs' ability to work with any migrant workers, farmers, and agricultural businesses in job placement activities in Richmond, Lee, and Moore County, North Carolina.

. . . .

8. Event #2 did not have any discernable negative impact on the ability of the plaintiffs to circulate freely without any doubt in the minds of the supervisors of the plaintiffs as to the real nature of the plaintiffs' absence from the ESCNC office.

9. Event #2 did not actually create a situation in which there was any discernable negative impact on the plaintiffs' ability to work with any migrant workers, farmers, and agricultural businesses in job placement activities in Richmond, Lee, and Moore County, North Carolina.

Respondent-ESC failed to respond to the request for admissions. The administrative law judge deemed the statements admitted pursuant to G.S. 1A-1, Rule 36. Respondent-ESC contends that the Superior Court erred in reversing the Personnel Commission's conclusion of law which stated as follows:

> The responsibilities of the positions held by the petitioners required that they enjoy a great deal of freedom, independence, discretion and trust in carrying out the day to day requirements of the job requirements of the job. The admissions by the petitioners to the arrest for their actions of growing marijuana in fields not unlike the fields in which they routinely spent their time carrying out the responsibilities of their jobs, reasonably and substantially compromised if not negated respondent's ability to continue to extend this trust in good faith. Respondent so articulated this in its dismissal letters to the petitioners. The letters stated in part:
>
> > This personal conduct of yours on July 12, 1989 has created a situation in which the trust and flexibility necessary for the employer-employee relationship to go forward as in the past has been destroyed. In your role as Rural Manpower Representative, the ability to circulate freely without doubt in the minds of your supervisors as to the real nature of your absence from the office is essential. To have breached that relationship is inexcusable and grounds for dismissal for improper personal conduct.
>
> . . . [T]he Administrative Law Judge *improperly expanded the scope* of the respondent's admissions and improperly excluded testimony regarding the effect of the petitioners' conduct on their continued employment. Respondent addressed this concern specifically in the dismissal letter of October 5, 1989 which pre-

> ceded the request for admissions. Further, *even if admitted*, the admissions relate only to the immediate supervisors of the petitioners as indicated in plaintiff's instructions.

(Emphasis added.) In addition to reversing this conclusion of law by the Personnel Commission, the Superior Court held that respondent-ESC failed to make an adequate offer of proof.

A. Offer of Proof

First, we address the sufficiency of the offer of proof. Generally, in a civil action in our General Courts of Justice when an objection is sustained, an offer of proof must be made. G.S. 1A-1, Rule 43(c). *See Currence v. Hardin*, 296 N.C. 95, 99, 249 S.E.2d 387, 390 (1978) (jury trial for personal injury and property damage; where there is an objection "to the admissibility of testimony . . . the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review"). However, it has been held that evidentiary procedures before administrative agencies are not so formal as litigation conducted in the superior courts. *Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. 488, 491, 265 S.E.2d 647, 649-50 (1980); *Utilities Comm. v. Telegraph Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966). *Accord, Cohn v. Industrial Com'n of Arizona*, — Ariz. —, 874 P.2d 315 (1994) (offer of proof before administrative law judge); *Amey v. Industrial Com'n of Arizona*, 156 Ariz. 390, 752 P.2d 43 (1988) (offer of proof before administrative law judge); *Ray v. Georgia-Pacific Corp.*, 1 Ark.App. 196, 614 S.W.2d 676, *aff'd*, 273 Ark. 343, 619 S.W.2d 648 (1981) (offer of proof before administrative law judge); *Bivins Const. v. State Contractors' Board*, 107 Nev. 281, 809 P.2d 1268 (1991); *cf. Pennsylvania Social Services Union v. Com., Pennsylvania Bd. of Probation and Parole*, 96 Pa.Cmwlth 461, 467, 508 A.2d 360, 364 (1986). *See generally*, G.S. 150B-29(a) (listing exceptions to rules of evidence); 26 N.C.A.C. 03 .0121; 1 K. Broun, *Brandis & Broun on North Carolina Evidence*, § 4, at 13 (4th Ed. 1993).

Here, the substance of the testimony sought to be introduced in light of the admissions was forecast by counsel for respondent-ESC during arguments on petitioners' motion in limine before the administrative law judge at the inception of the hearing. The record further shows that any testimony regarding the issues involved in the admissions, upon objection from petitioners' counsel, was ordered by the administrative law judge to be stricken from the record and not to appear in the transcript. Other than the arguments made during the

motion in limine, respondent-ESC was not permitted to make a showing in the record of what it proposed to prove. *See* G.S. 150B-29(b) ("Evidence in a contested case . . . shall be offered and *made a part of the record.*") Upon review of the record, we conclude that the significance of the substance of the excluded testimony was sufficiently made to appear in the record to effectively preserve the matter for review by the Personnel Commission. We note that, unlike trials before our General Courts of Justice, there was no jury that could have been tainted here: the administrative law judge should have permitted the excluded testimony itself to appear in the transcript of the hearing as an offer of proof. *See Molloy v. Molloy*, 158 Ariz. 64, 68, 761 P.2d 138, 142 (App. 1988) (offer of proof "serves the *dual function* of enabling the trial court to appreciate the context and consequences of an evidentiary ruling and enabling the appellate court to determine whether any error was harmful").

B. Scope of Admissions

Given that respondent-ESC's offer of proof was sufficient to preserve its objection, we next turn to the propriety of the Personnel Commission's decision regarding the scope of the admissions. This Court has held in *civil actions* in our General Courts of Justice that a trial court's decision whether or not to grant a G.S. 1A-1, Rule 36 motion is a discretionary one. *Whitley v. Coltrane*, 65 N.C. App. 679, 681, 309 S.E.2d 712, 715 (1983) ("Rule 36(b) of the North Carolina Rules of Civil Procedure provides that 'the court may permit withdrawal' of the admission, making the ruling upon a motion to withdraw an admission discretionary with the trial court"); *Interstate Highway Express v. S & S Enterprises, Inc.*, 93 N.C. App. 765, 769, 379 S.E.2d 85, 87 (1989) ("We hold that the language of the Rule clearly gives the trial court the discretion to allow or not allow a party to withdraw admissions and that in the exercise of that discretion it was not required to consider whether the withdrawal of the admissions would prejudice plaintiff in maintaining its action"). *See Little v. Penn Ventilator, Inc.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision). However, this is an appeal from an administrative proceeding. Here, the Superior Court serves the function of an initial appellate court. *Rector v. N.C. Sheriffs' Educ. and Training Standards Com'n.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 617 (1991); *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541

(1977). At the other end of the spectrum, the administrative law judge *recommends* a decision to the ultimate factfinder, the Personnel Commission. G.S. 150B-34(a). While the administrative law judge must render a decision on the motion which is presented, G.S. 150B-33(b), 26 N.C.A.C. 03 .0015, the administrative law judge's ruling is subject to review by the ultimate factfinder, the Personnel Commission. G.S. 126-37(a); G.S. 150B-36; 25 N.C.A.C. 01B .0437. While the Personnel Commission's conclusions of law do not explicitly address how the Personnel Commission viewed the administrative law judge's denial of respondent-ESC's motion to withdraw the admissions, we conclude that the abuse of discretion standard is appropriate in reviewing the Personnel Commission's conclusions regarding the scope of the admissions. As correctly noted by the Personnel Commission, admissions 4 and 8 specifically refer only to "supervisors": admissions 5 and 9 do not even refer to "supervisors." Additionally, no admission refers explicitly to members of respondent-ESC's upper level management or administrators. *See* G.S. 1A-1, Rule 36(a) ("Each matter of which an admission is requested shall be *separately* set forth"). We note that the request for admissions specifically defines several terms, but that the term "supervisors" is not one of them. Given this lack of specificity and the rules of construction set forth in *Contractors, Inc., supra*, the Personnel Commission's construction of the admissions cannot be said to be manifestly unsupported by reason on this record. Accordingly, we find no abuse of discretion by the Personnel Commission.

III. *Notice of Investigatory Suspension*

[3] Respondent-ESC argues that the Superior Court erred in concluding that respondent-ESC had not given sufficient notice of the reasons for the investigatory suspension pursuant to 25 N.C.A.C. 01J .0610(6). We agree and reverse.

25 N.C.A.C. 01J .0610(6) provides that "[a]n employee who has been suspended without pay must be furnished a statement in writing setting forth the specific acts or omissions that are the reasons for the suspension and the employee's appeal rights." 25 N.C.A.C. 01B .0432(b) provides that "[f]ailure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. The Personnel Commission, in its discretion, may award back pay, attorney's fees, or both for such a violation." The Personnel Commission made the following conclusion regarding the notice of investigatory suspension:

. . . Respondent has shown that on or about the evening hours of July 13, 1989, the petitioners advised respondent that they had been "arrested for the manufacture of marijuana" on July 12, 1989. On the advice of counsel, the petitioners declined to share any further details surrounding the arrest. Following a discussion with the appropriate management personnel, respondent placed the petitioners on investigatory suspension without pay, based on the petitioners' admissions regarding their arrest. The July 14, 1989 letter notifying the petitioners of the suspension indicated that the purpose of the suspension was to "provide time to investigate, establish facts, and reach a decision concerning your employment status." The letter further indicated that the specific reason for the suspension was the "need to investigate allegations concerning your personal conduct which could affect your work status."

Petitioners have alleged that respondent failed to comply with procedure in placing them on investigatory suspension without pay. Such failure if established, would constitute a procedural violation pursuant to 25 N.C.A.C. 01B .0432(b). This Commission concludes that respondent complied with the procedures based on the limited information available at the time. Petitioners were given oral notice of the investigatory suspension, followed by the July 14, 1989 letter citing the personal conduct admitted by the petitioners as the event that triggered the need for the investigation. All these events occurred immediately following petitioners' admission to their arrest for marijuana and at a time when no other performance or personal conduct violations were known or alleged. Respondent's only knowledge of the arrest at this time came from the admission by the petitioners as required by policy. Beyond the bare admission, the petitioners refused to share any further details, requiring the Respondent to initiate its own investigation to determine what if any effect the incident would have on the petitioners' employment status. Petitioners knew or reasonably should have known the basis for the suspension.

Before petitioners notified respondent-ESC of their misconduct, law enforcement authorities had arrested petitioners. This is significantly different from a situation in which an agency unilaterally points to an employee's conduct as the basis for imposing an investigatory suspension: there, the significance of notification of specific acts or omissions becomes critical because the employee may be

completely unaware that some standard or expectation of the agency has been violated. Here, petitioners' apprehension, arrest, and notification to respondent-ESC amply demonstrated that petitioners knew that they had acted in derogation of the law. Upon initially communicating with respondent-ESC, petitioners sought to protect their interests by withholding information from respondent-ESC. Respondent-ESC knew only what the petitioners had told them, i.e., that the arrest had occurred. *See Burrow v. Randolph County Board of Education*, 61 N.C. App. 619, 627, 301 S.E.2d 704, 708 (1983); *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). Ultimately, petitioners' dismissal arose from the conduct leading to their 12 July 1989 arrest. Given (1) the apprehension and arrest of petitioners; (2) the close proximity in time of the issuance of the letter by respondent-ESC to the time that petitioners first notified respondent-ESC, and; (3) the letter's express reference to "personal conduct," State Personnel Manual, Sec. 9, at 2-3, 25 N.C.A.C. 01J .0604, we conclude that the Personnel Commission did not err in concluding that "[p]etitioners knew or reasonably should have known the basis for the suspension." *Cf. In re Gregory v. N.C. Dept. of Revenue*, 93 N.C. App. 785, 786, 379 S.E.2d 51, 52 (1989) (rejecting Department of Revenue employee's argument that his failure to timely file tax returns did not constitute misconduct under G.S. 96-14(2) because the Department did not have such a rule; noting that "[p]etitioner's conduct being forbidden by statute, a work rule to the same effect was unnecessary"); *Woodland Joint Unified School Dist. v. Commission on Professional Competence*, 2 Cal.App.4th 1429, 1453, 4 Cal.Rptr.2d 227, 242 (1992). We note that the record contains letters dated 4 and 10 August 1989 from petitioners explicitly stating that it was their understanding "that they were suspended because of their arrest." Additionally, the record reflects that petitioners ably responded to the agency's charges during the period of their appeal. *See Employment Security Commission v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981) ("An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation").

IV. Showing Required by the Agency for Dismissal Based Upon Criminal Acts by Employees

[4] Respondent-ESC argues that the Superior Court erred in requiring respondent-ESC to show "that it was actually harmed by petitioners' personal misconduct and that petitioners actually lacked the ability to continue to work with respondent-ESC's clients." Our

research reveals no cases addressing an agency's dismissal of a state employee for criminal conduct occurring during off-duty hours. However, in a case rejecting an employee's claim for unemployment insurance benefits pursuant to G.S. 96-14(2), this Court held that "[a]n employee's misconduct need not occur at the workplace or in connection with employment tasks to violate expectable behavioral norms." *Lynch v. PPG Industries*, 105 N.C. App. 223, 225, 412 S.E.2d 163, 165 (1992) (*citing In re Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982), *disc. review denied*, 307 N.C. 469, 299 S.E.2d 221 (1983)).

In May 1989, respondent-ESC had established a "Policy for An Alcohol and Drug Free Workplace" which provided *inter alia* as follows:

> EMPLOYMENT SECURITY COMMISSION
> OF NORTH CAROLINA
>
> POLICY FOR AN ALCOHOL AND DRUG FREE WORKPLACE
>
> It is the policy of the Employment Security Commission of North Carolina that all employees shall have the right to a work place which is free of alcohol and drugs. This policy is established to ensure the safety and well being of employees of the Employment Security Commission, as well as the general public. All ESC employees including permanent full time, permanent part-time, trainee, and temporary will be covered by this policy.
>
> It is the responsibility of management, supervisors, and employees to become familiar with the expectations of the Agency and to comply with the provisions of this policy.
>
> Alcohol and drug abuse are a legitimate concern of management when they impact on the worksetting. Such abuse can directly affect the safety, productivity and general well-being of everyone concerned.
>
> Therefore the Employment Security Commission has adopted the following position to address this concern:
>
> . . . .
>
> DEFINITIONS
>
> For the purposes of this policy:
>
> . . . .

WORKSITE or WORKPLACE shall be defined as any office, building, or property (including parking lots) or vehicle that is owned or operated by the State of North Carolina at which an employee is to perform work for the Employment Security Commission of North Carolina.

ILLEGAL DRUGS are drugs which are not legally obtainable and drugs which are legally obtainable but have been obtained illegally.

DISCIPLINARY ACTION UP TO AND INCLUDING DISMISSAL shall include both oral and written warnings, a transfer, a demotion in classification and/or pay, leave without pay for up to three days and dismissal. In keeping with State Personnel Regulations, the intent is to utilize the disciplinary process in a constructive, rather than punitive manner.

. . . .

SECTION I

ALCOHOL AND DRUG ABUSE AT THE WORKPLACE

A. ILLEGAL DRUG ACTIVITY

1. The manufacture, distribution, dispensing, possession or use of an illegal substance is prohibited.

An employee who violates this provision at the workplace is subject to disciplinary action up to and including dismissal. Any illegal drug activity will be reported to the appropriate law enforcement authority.

2. The employee is responsible for notifying management of the Employment Security Commission within five calendar days after arrest. Also, after indictment takes place, the employee is responsible for notifying management within five calendar days. Failure to do so will be addressed as a performance of duty requirement that has not been met.

3. Any employee convicted of any criminal drug statute violation must notify in writing the appropriate supervisor or management person no later than five (5) calendar days after such conviction. Failure to provide notification will result in automatic dismissal.

4. Any employee convicted of an off-the-job drug-related offense which could directly or indirectly affect the duties and

> responsibilities of his/her position with the Agency shall be subject to disciplinary action up to and including dismissal.

Petitioner Eury (on 8 June 1989) and petitioner White (on 14 June 1989) each signed forms indicating that he had received a copy of the policy and that he realized that a violation of the policy could subject each of them "to discipline up to and including termination." At the time of petitioners' dismissal, respondent-ESC's "Policies for Corrective Action, Suspension and Dismissal" (hereinafter "Corrective Action Policy") provided *inter alia* as follows:

> It is the intent of the Employment Security Commission to provide for employees and management a fair, clear and useful tool for correcting and improving performance problems, as well as to provide a process to assist management in handling instances of unacceptable personal conduct.
>
> Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by the appointing authority. The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this policy.
>
> The basis for any corrective or disciplinary action taken in accordance with this policy falls into one of the two following categories:
>
> (1) Discipline imposed on the basis of job performance;
>
> (2) Discipline imposed on the basis of personal conduct.
>
> . . . PERSONAL CONDUCT discipline is intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings. . . .
>
> . . . .
>
> II. PERSONAL CONDUCT
>
> Employees may be dismissed, demoted, suspended, warned or otherwise disciplined on the basis of unacceptable personal conduct. . . . Discipline may be imposed, as a result of unacceptable conduct, up to and including dismissal without any prior warning to the employee.

See also State Personnel Manual, Sec. 9, at pp. 2-3; 25 N.C.A.C. 01J .0604; 25 N.C.A.C. 01J .0608. Regarding actions involving personal conduct, the State Personnel Manual provides:

> Generally, the form of discipline most often used in the PERSONAL CONDUCT process is dismissal. This is because PERSONAL CONDUCT discipline, unlike JOB PERFORMANCE discipline, is not progressive.

Manual, Sec. 9, at p. 8.3. In rejecting the petitioner's contention that an employer had to show actual harm to its interests to prove employee "misconduct" under G.S. 96-14, the *Lynch* Court stated:

> . . . Petitioner was discharged from employment with PPG Industries following his conviction for possession of cocaine with intent to sell or deliver, in violation of N.C.G.S. § 90-95(a)(1). The ESC accepted the appeal referee's findings of fact that petitioner "never consumed illegal drugs while at work" and "never reported to work while impaired by illegal drugs." The ESC concluded as a matter of law, however, that petitioner's drug conviction was misconduct within the meaning of N.C.G.S. § 96-14(2), disqualifying him from drawing unemployment benefits. On petitioner's appeal, the trial court upheld the ESC's decision. We affirm.
>
> . . . .
>
> By enacting the new provision in N.C.G.S. § 96-14(2), the legislature was manifestly addressing the serious drug problem in the work force. Sound reasons exist for legislating that conduct related to substance abuse is misconduct giving rise to discharge. A drug-dealing employee may so conduct himself that (i) fellow employees are tempted to engage in the use of drugs; (ii) use of drugs may affect work performance and quality; and (iii) the employer's good will and business interests could thereby be threatened. *An employer is not, however, required to prove actual harm to its interests in order to meet its burden of showing employee misconduct. In re Gregory v. N.C. Dept. of Revenue*, 93 N.C. App. 785, 379 S.E.2d 51 (1989).

Lynch, 105 N.C. App. at 223-26, 412 S.E.2d at 164-65 (emphasis added).

Here, petitioners' conduct clearly violated respondent-ESC's Policy for an Alcohol and Drug Free Workplace, *supra*, and constituted personal conduct under respondent-ESC's Corrective Action Policy and under the State Personnel Manual. The dismissal of petitioners was an option for respondent-ESC under these policies. Like G.S. 96-14(2), these policies and G.S. 126-35(a) speak only of conduct and do not mention the necessity of demonstrated negative consequences upon the agency. *In re Gregory*, 93 N.C. App. at 786, 379 S.E.2d at 52.

Given these policies and the general principles found in *Lynch* and *In Re Gregory*, we hold that where an employee has engaged in off-duty criminal conduct, the agency need not show actual harm to its interests to demonstrate just cause for an employee's dismissal. However, it is well established that administrative agencies may not engage in arbitrary and capricious conduct. *Lewis*, 92 N.C. App. at 740, 375 S.E.2d at 714; *Com'r of Ins. v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980); G.S. 150B-51(b)(6). Accordingly, we hold that in cases in which an employee has been dismissed based upon an act of off-duty criminal conduct, the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency. *Accord, Rogliano v. Fayetteville County Board of Education*, 176 W.Va. 700, 347 S.E.2d 220 (1986); *Chicago Board of Education v. Payne*, 102 Ill.App.3d 741, 430 N.E.2d 310 (1981); *Board of Trustees of Santa Maria Joint Union High School Dist. v. Judge*, 50 Cal.App.3d 920, 123 Cal.Rptr. 830 (1975). In determining whether a rational nexus exists, the Commission may consider the following factors:

—the degree to which, if any, the conduct may have adversely affected clients or colleagues;

—the relationship between the type of work performed by the employee for the agency and the type of criminal conduct committed;

—the likelihood of recurrence of the questioned conduct and the degree to which the conduct may affect work performance, work quality, and the agency's good will and interests;

—the proximity or remoteness in time of the conduct to the commencement of the disciplinary proceedings;

—the extenuating or aggravating circumstances, if any, surrounding the conduct;

—the blameworthiness or praiseworthiness of the motives resulting in the conduct; and

—the presence or absence of any relevant factors in mitigation.

Although we now recommend certain factors which could be considered by the Commission in employing the rational nexus test, we caution that no list of factors should be viewed as all-inclusive.

Given the disposition of this appeal reversing the Superior Court's conclusions regarding the scope of the admissions and the sufficiency of the offer of proof, we remand the cause to the Superior Court for remand to the Personnel Commission. The Personnel Commission shall conduct, or cause to be conducted, a further hearing and shall make appropriate findings of fact and conclusions of law regarding the agency's demonstration or failure to demonstrate a rational nexus. *See N.C. Dept. of Correction v. Gibson*, 308 N.C. 131, 148, 301 S.E.2d 78, 88 (1983). *See also Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 737, 381 S.E.2d 487, 491 (1989).

In the interest of clarity, we particularly note that we are aware of the provisions of G.S. 150B-51(a):

> Initial Determination in Certain Cases.—In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. *If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record.*

(Emphasis added.) However, given the circumstances here in which respondent-ESC was precluded by the administrative law judge from introducing, or even including in the record of proceedings, critical testimony, upon remand the Personnel Commission shall have the authority to supplement the official record by conducting, or causing to be conducted, a hearing to receive further evidence as necessitated to resolve the foregoing issues addressed by this appeal. *See Employment Security Commission v. Lachman*, 305 N.C. 492, 507, 290 S.E.2d 616, 627 (1982). *See also Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 91 N.C. App. 147, 370 S.E.2d 700 (1988).

V. *Conclusion*

In light of the incomplete state of the record here, we may not properly consider, and accordingly decline to consider, respondent-ESC's remaining assignments of error, including whether there was substantial evidence to support the Personnel Commission's conclusions of law and its resulting order of dismissal. *See N.C. Dept. of Correction*, 308 N.C. at 147, 301 S.E.2d at 88.

In summary, we hold that the Superior Court erred by not remanding the matter to the Personnel Commission pursuant to G.S. 150B-51 for a hearing as to whether respondent-ESC had demonstrated a rational nexus to justify the dismissal of petitioners based upon their off-duty criminal conduct. For the reasons stated, the 29 June 1993 order of the Superior Court is reversed and this cause is remanded to the Superior Court for remand to the Personnel Commission for additional proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and WYNN concur.

REBA C. ELLIOT, GUARDIAN FOR BOBBY G. CASSTEVENS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

BILLY PAGE SEXTON, ADMINISTRATOR FOR WILMA J. SEXTON v. DAVID H. FLAHERTY, SECRETARY NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES AND MARY DEYAMPERT, DIRECTOR, DIVISION OF SOCIAL SERVICES, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES IN THEIR OFFICIAL CAPACITIES

No. 9317SC352
No. 9323SC718

(Filed 2 August 1994)

1. Social Services and Public Welfare § 24 (NCI4th)— Medicaid—resource spend-down defined

"Resource spend-down" is the process which allows Medicaid applicants to offset their resources by incurred but unpaid medical bills.

Am Jur 2d, Welfare Laws §§ 40 et seq.

2. Social Services and Public Welfare § 24 (NCI4th)— federal Medicaid plan—resource spend-down permitted but not required

Federal Medicaid law permits but does not require states to implement resource spend-down.

Am Jur 2d, Welfare Laws §§ 40 et seq.

3. Social Services and Public Welfare § 24 (NCI4th)— North Carolina Medicaid plan—resource spend-down not required

The North Carolina Medicaid plan does not require DHR to utilize resource spend-down when evaluating Medicaid eligibility, since the North Carolina Medicaid statute does not have a specific resource spend-down provision in its plan; pursuant to N.C.G.S. §§ 108A-25(b) and -54, which grant DHR plenary authority to adopt rules and regulations to administer the Medicaid program, DHR has established rules which prohibit the use of resource spend-down in North Carolina's Medicaid program; the federal Medicaid statute contains language similar to language in N.C.G.S. § 108A-55, and the federal statute does not require resource spend-down; and an interpretation of 42 U.S.C. § 1396(a)(34) as mandating resource spend-down would conflict with 42 U.S.C. § 1396a(f).

Am Jur 2d, Welfare Laws §§ 40 et seq.

Judge JOHN dissenting.

Appeal by petitioner from order signed 30 December 1992 by Judge James M. Long in Stokes County Superior Court, and filed with the Clerk of Court 8 January 1993. Heard in the Court of Appeals 31 January 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Jane T. Friedensen and Associate Attorney General Elizabeth J. Weese, for respondent-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Joseph P. Henry, for petitioner-appellant.

Appeal by petitioner from order entered 3 May 1993 by Judge D. Marsh McLelland in Alleghany County Superior Court. Heard in the Court of Appeals 31 January 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Claud R. Whitener, III, for respondent-appellee.

Legal Services of the Blue Ridge, Inc., by Charlotte Gail Blake, for petitioner-appellant.

McCRODDEN, Judge.

Upon motions of respondents, this Court has consolidated these appeals, both of which arise out of the Department of Human

Resources's (DHR's) denial of medical assistance benefits (Medicaid) sought by petitioners. Respondents denied Medicaid benefits to petitioners because petitioners' resources exceeded the allowable reserve limit. For a single person such as Mr. Casstevens, the applicable asset limit to receive Medicaid benefits through DHR is $1,500.00. N.C. Admin. Code tit. 10, r. 50B.0311(c) (August 1993). The asset limit for a two-person household, applicable to the Sextons, is $2,250.00. *Id.*

The pertinent facts in No. 9317SC352 are as follows. Petitioner Reba Elliot is the sister and guardian of Bobby G. Casstevens, who is mentally disabled, resides in Knollwood Hall Nursing Facility ("Knollwood"), and who had been receiving Medicaid benefits prior to 1 January 1991. On 1 January, Mr. Casstevens inherited $4,874.97 from his father's estate, which Ms. Elliot reported to the Stokes County Department of Social Services ("DSS"). DSS informed her that, because her brother was no longer eligible for Medicaid, his benefits would be terminated. DSS also told her that she should reapply for Medicaid when his reserve was reduced to the $1,500.00 allowable reserve limit.

Knollwood was not aware of the termination of Mr. Casstevens' Medicaid benefits, and consequently did not bill Ms. Elliot for her brother's care for the period from January until May. Ms. Elliot reapplied for Medicaid on 30 May 1991, after having paid Knollwood $3,700.00, thereby reducing his balance to below the reserve limit. On 5 July 1991, DSS granted prospective Medicaid coverage effective 30 May 1991, but denied retroactive coverage from the period of 3 April through 30 May 1991. The nursing home bills, incurred between 3 April and 30 May, totalled $3,938.99.

Ms. Elliot appealed DSS' decision to DHR, which affirmed the denial of retroactive benefits. Pursuant to N.C. Gen. Stat. § 108A-79(k) (1988), petitioner Elliot appealed the final decision to the superior court. From the superior court's order affirming the agency decision, petitioner Elliot appeals.

The facts in No. 9323SC718 are as follows. Petitioner Billy Page Sexton was married to Wilma J. Sexton, who was hospitalized for her final illness at Forsyth Medical Center in 1992. When Mr. Sexton applied for Medicaid benefits on his wife's behalf on 2 March 1992, he disclosed that he owned stock valued at $5,500.00 in Blue Ridge Bank. He was informed that, because the stock put them over the state

agency's resource level of $2,250.00 for a two-person household, his wife could not qualify for Medicaid until he transferred the stock. Mr. Sexton planned to transfer the stock to his daughter, Glenda Medley, on 5 March 1992. However, before he was able to transfer the stock, he received a call from the hospital informing him that his wife was dying. Ms. Sexton died on 6 March 1992. Blue Ridge Bank issued a stock certificate dated 6 March 1992, which transferred ownership of the stock to Glenda Medley on 26 March 1992.

Ms. Sexton's medical bills at the time of the hearing exceeded $50,000.00. Alleghany County DSS denied Mr. Sexton's application for Medicaid benefits because the excess reserve had not been reduced at the time of Ms. Sexton's death. Mr. Sexton ultimately filed a petition for judicial review in the superior court. Mr. Sexton appeals from Judge D. Marsh McLelland's order of 3 May 1993, affirming the final administrative decision.

I.

The Administrative Procedures Act governs the standard of review of an administrative agency's decision. *Henderson v. N.C. Department of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988). Section 150B-51 of the North Carolina General Statutes provides in pertinent part that a reviewing court may reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings or conclusions are:

(1) In violation of constitutional provisions;

(2) In excess of statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . .; [or]

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51 (1991). The appropriate standard of review is the "whole record" test, in which the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions. *Henderson*, 91 N.C. App. at 530, 372 S.E.2d at 889. In turn, the scope

of appellate review of a superior court's consideration of a final agency decision is whether the lower court committed any errors of law in applying the whole record test. *Sherrod v. N.C. Dept. of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992).

II.

Congress established the Medicaid program as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301, 65 L. Ed. 2d 784, 794 (1980). States choosing to participate in this optional program are reimbursed for a portion of their costs in providing medical treatment to needy persons. *See Atkins v. Rivera*, 477 U.S. 154, 156-57, 91 L. Ed. 2d 131, 137 (1986). "Although participation in the Medicaid program is entirely optional, once a state elects to participate, it must comply with the requirements of Title XIX," *Harris*, 448 U.S. at 301, 65 L. Ed. 2d at 794, and the requirements of the Secretary of Health and Human Services. *Atkins*, 477 U.S. at 157, 91 L. Ed. 2d at 137.

In general, states serve two groups of persons through their Medicaid programs. First, states must serve the "categorically needy," defined to include families with dependent children eligible for public assistance under the Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. § 601 *et seq.*, and aged, blind, and disabled persons eligible for benefits under the Supplemental Security Income ("SSI") program, 42 U.S.C. § 1381 *et seq. See* 42 U.S.C. § 1396a(a)(10)(A); *Harris*, 448 U.S. at 301 n.1, 65 L. Ed. 2d at 795 n.1. Second, states are permitted, but not required, to serve the "medically needy," which refers to those persons in need of medical assistance whose income levels disqualify them from the AFDC or SSI programs. *See* 42 U.S.C. § 1396a(a)(10)(C); *Harris*, 448 U.S. at 301 n.1, 65 L. Ed. 2d at 795 n.1.

Congress created the SSI program in 1972, to take effect 1 January 1974. The new SSI eligibility criteria were broader than some of the prior state-established criteria. *Schweiker v. Hogan*, 457 U.S. 569, 581-82, 73 L. Ed. 2d 227, 237 (1982). In 1974, Congress, fearing that participating states would withdraw from the Medicaid program, added § 209(b) to the Supplemental Security Income Act, 42 U.S.C. § 1396a(f), to encourage continued participation by states with stricter criteria. *See Morris by Simpson v. Morrow*, 783 F.2d 454, 456-57 (4th Cir. 1986). States choosing the § 209(b) option are not

required to provide Medicaid to persons who would not have been eligible under the state medical assistance plan in effect on 1 January 1972, prior to the enactment of SSI. States electing the § 209(b) option are required to operate a program for the medically needy, *Morris*, 783 F.2d at 457, and to adopt an income spend-down provision, *Schweiker v. Gray Panthers*, 453 U.S. 34, 38-39 n.5, 69 L. Ed. 2d 460, 467 n.5 (1981). Since North Carolina has elected to utilize the § 209(b) option, it must have a program for the medically needy, and it may utilize its 1 January 1972 eligibility criteria, if they are more restrictive than the SSI criteria. *See id.* at 38-39, 69 L. Ed. 2d at 466-67.

[1] When a "medically needy" applicant's income or resources exceed the applicable state's Medicaid eligibility limits, the "spend down" rule may apply. *See* 42 U.S.C. § 1396a(a)(17). Under this rule, the applicant may be able to "spend down" excess income or assets, by applying them to outstanding medical bills, to become eligible for Medicaid. "Income spend-down" is the process whereby an applicant's income is reduced for the purpose of determining Medicaid eligibility by the amount of incurred but unpaid medical expenses. "Resource spend-down" is the process which allows Medicaid applicants to offset their resources by incurred but unpaid medical bills. North Carolina currently requires that applicants actually spend excess resources to pay their medical bills before they can qualify for Medicaid. *See* N.C. Admin. Code tit. 10, r. 50B.0311 and 50B.0403 (August 1993).

III.

In the cases under consideration, the critical question is whether federal and state laws require DHR to use the resource spend-down procedure. After review of this issue, we have concluded that neither federal nor state law requires resource spend-down. We affirm the decisions of the superior courts.

A.

[2] In determining whether the federal Medicaid program requires states to adopt the spend-down rule, we must examine the following portion of the Medicaid statute:

> (a) A State plan for medical assistance must . . .
>
> (17) . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and

> resources as are . . . available to the applicant or recipient . . . , (C) provide for reasonable evaluation of any such income or resources, and (D) . . . provide for flexibility in the application of such standards with respect to income by taking into account . . . the costs . . . incurred for medical care or for any other type of remedial care recognized under State law.

42 U.S.C. § 1396a(a)(17).

Courts recognize section 1396a(a)(17)(D) as the "income spend-down rule," finding that state plans must permit a Medicaid applicant to spend down excess income to comply with a state's eligibility standards. *See, e.g., Atkins*, 477 U.S. at 158, 91 L. Ed. 2d at 137-38 (the spend-down mechanism of 42 U.S.C. § 1396a(a)(17) allows the medically needy to spend down the amount by which their income exceeds the eligibility level).

At issue in this case is whether the federal Medicaid regulations, in addition to requiring states to allow income spend-down, require states to allow Medicaid applicants to spend down assets. Petitioners contend that section 1396a(a)(17) obligates states to require resource spend-down. In support of their argument, petitioners emphasize language in section 1396a(a)(17), stating that a Medicaid plan must "provide for reasonable evaluation of any such income or resources."

We find that federal Medicaid law permits, but does not require, states to implement resource spend-down. The federal Medicaid statute does not mention resource spend-down, and this silence has convinced most courts that the rule is permitted, but not required, by the Act. *See, e.g., Roloff v. Sullivan*, 975 F.2d 333, 342 (7th Cir. 1992) ("Indiana's failure to adopt a resource spend down rule does not violate Section 1396a(a)(17)."); *Hession v. Illinois Dept. of Public Aid*, 544 N.E.2d 751, 757 (Ill. 1989) ("Simply stated, we perceive nothing in section 1396a(a)(17) which precludes a State that participates in the Medicaid program from using the resource spend down methodology if it chooses to do so."); *Harriman v. Commissioner DHS*, 595 A.2d 1053, 1055 n.2 (Me. 1991) (federal Medicaid statute "only permits, and does not require, a state to use an asset spend-down"). Accordingly, we conclude that DHR's prohibition of resource spend-down comports with federal law.

B.

[3] Since North Carolina may, but is not obligated to, utilize resource spend-down, we must now determine whether the North Carolina

Medicaid plan mandates that resource spend-down be used in deciding Medicaid eligibility. Petitioners rely upon *Kempson v. N.C. Dept. of Human Resources*, 100 N.C. App. 482, 397 S.E.2d 314 (1990), *aff'd by an equally divided Court*, 328 N.C. 722, 403 S.E.2d 279 (1991), and section 108A-55 of the North Carolina General Statutes, in support of their assertion that North Carolina law requires DHR to utilize resource spend-down.

We must, however, analyze this question without regard to this Court's decision in *Kempson*. Since the members of our Supreme Court were equally divided in voting to affirm and voting to reverse the decision of the Court of Appeals in *Kempson*, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *Kempson*, 328 N.C. at 723, 403 S.E.2d at 279.

Thus, we turn to section 108A-55 of the North Carolina General Statutes, which provides that DHR:

> [M]ay authorize, within appropriations made for this purpose, payments of all or part of the cost of medical and other remedial care for any eligible person when it is essential to the health and welfare of such person that such care be provided, and when the total resources of such person are not sufficient to provide the necessary care.

N.C. Gen. Stat. § 108A-55 (Supp. 1993). Petitioners assert that DHR's policy of looking at an applicant's gross, rather than net, assets violates this statute because DHR does not evaluate an applicant's "total resources," as required by N.C.G.S. § 108A-55.

We believe that the North Carolina Medicaid plan does not require DHR to utilize resource spend-down when evaluating Medicaid eligibility for the following reasons. First, the North Carolina Medicaid statute, like the federal statute, does not have a specific resource spend-down provision in its plan. Petitioners have shown us, and we find, no compelling evidence showing that the legislature intended that North Carolina employ a resource spend-down approach. Rather, pursuant to N.C. Gen. Stat. §§ 108A-25(b) and -54 (1988), which grant DHR plenary authority to adopt rules and regulations to administer the Medicaid program, DHR has established rules which prohibit the use of resource spend-down in North Carolina's Medicaid program. N.C. Admin. Code tit. 10, r. 50B.0311 and .0403. "[T]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference. . . . Moreover, the

agency's construction need not be the only reasonable one in order to gain judicial approval." *Connecticut Department of Income Maintenance v. Heckler*, 471 U.S. 524, 85 L. Ed. 2d 577, 583-84 (1985).

Second, the federal Medicaid statute contains language similar to language in N.C.G.S. § 108A-55, and the federal statute does not require resource spend-down. Federal law describes the purpose of the Medicaid program as enabling the states to furnish assistance to those "whose income and resources are insufficient to meet the costs of necessary medical services." Similarly, North Carolina law mandates assistance to those persons whose "total resources . . . are not sufficient to provide the necessary care." Since federal law and North Carolina law contain similar language, we follow 42 U.S.C. § 1396a(a)(17), which permits, but does not require, states to implement a resource spend-down rule. *See supra.* Likewise, we conclude that the North Carolina Medicaid plan does not require resource spend-down.

Next, we believe that an interpretation of section 1396a(a)(34), as mandating resource spend-down, would conflict with 42 U.S.C. § 1396a(f) (the § 209(b) provision) and 42 C.F.R. § 435.851. Section 1396a(f) permits North Carolina to limit Medicaid coverage to persons who would have qualified for benefits under the state eligibility methodologies in effect on 1 January 1972. Under 42 C.F.R. § 435.851(c), resource methodologies that were in effect on 1 January 1972 are presumed reasonable. North Carolina's eligibility methodologies have prohibited resource spend-down since the adoption of the Medicaid program in 1970.

Finally, the history of this issue prior to the adoption of N.C.G.S. § 108A-55 persuades us that our resolution of the issue is the correct one. In August 1980, the U.S. Department of Health and Human Services, the federal administrator of the Medicaid program, sent a Medicaid transmittal letter requiring a revision of state plans to eliminate the provision for a spend-down of incurred medical expenses for determining resource eligibility. Subsequent to that letter, in 1981, the North Carolina General Assembly enacted section 108A-55. We do not believe that the General Assembly could have intended that statute to embody resource spend-down when federal rules prohibited such spend-down.

The instant case is distinguishable from cases cited by petitioners from other jurisdictions in which the courts have found a state mandate for resource spend-down. In *Haley v. Com'r of Public Welfare*,

476 N.E.2d 572 (Mass. 1985), the Supreme Judicial Court of Massachusetts examined federal and its own state Medicaid laws to determine if resource spend-down was mandated or just permitted. The court first determined that resource spend-down was a reasonable method of calculating resources and consistent with the goals of Title XIX. *Id.* at 578. The court found a statute "explicitly appl[ying] a resource spend down," *id.* at 579 n.9, as evidence of "the Legislature's determination to ensure an individual's retention of a certain level of resources." *Id.* at 579. Thus, the court held that the Massachusetts Medicaid plan required resource spend-down.

In *Hession*, the Illinois court, relying upon the specific state statute, stated that "[i]n establishing an assistance program for these individuals, the legislature has noted that it is of special importance that their incentives for continued independence be maintained and that their limited resources be preserved." 544 N.E.2d at 757. Based upon this manifestation of legislative intent, the court ruled that individuals should be allowed to retain a certain level of assets and still qualify for medical assistance.

We find nothing in the North Carolina Medicaid plan or its regulations that requires the utilization of resource spend-down. DHR's interpretation of North Carolina's Medicaid plan, prohibiting the use of resource spend-down, is a reasonable one. In drawing this conclusion, we realize the hardship that will befall those whose unspent resources pale in comparison to their medical obligations. In defining eligibility, however, the state has "undisputed power . . . to set the level of benefits and the standard of need." *Dandridge v. Williams*, 397 U.S. 471, 478, 25 L. Ed. 2d 491, 498 (1970). Unfortunately, there are few standards that will not, under some circumstances, produce results which appear harsh. So it is with the cases here.

C.

Petitioner Elliot also argues that DHR violated Mr. Casstevens' due process rights because it refused to pay retroactive medical coverage. Specifically, Ms. Elliot asserts that due process requires government agencies to advise applicants of their programs and of their rights under the programs and to restore benefits when they fail to do so. We find this argument to be without merit since we discern no evidence showing that Ms. Elliot was not aware of DHR's policy concerning Medicaid eligibility requirements, of Mr. Casstevens' responsibility for his own nursing home bills after 31 January 1991,

and of the necessity of Ms. Elliot's reapplication for Medicaid benefits when Mr. Casstevens' resources fell below the $1,500.00 limit.

D.

Petitioner Sexton alleges that he is entitled to Medicaid benefits since Ms. Sexton qualified for Medicaid on 6 March 1992. He asserts that Ms. Sexton was eligible for Medicaid on 6 March, the day that he called Blue Ridge Bank and requested that they transfer his stock to his daughter. The record is clear, however, that he accomplished the stock transfer on 26 March 1992, rather than 6 March 1992. Accordingly, we find this contention meritless.

IV.

In conclusion, we rule that neither federal nor North Carolina law mandates resource spend-down. Accordingly, it is reasonable for DHR to have established rules administering the Medicaid plan which prohibit resource spend-down. Since petitioners assets were greater than the allowable reserve limit, respondent properly denied their Medicaid applications, and the trial courts' orders affirming the denials were free of any errors of law.

Affirmed.

Judge WELLS concurs.

Judge JOHN dissents.

Judge WELLS concurred in this opinion prior to 30 June 1994.

Judge JOHN dissenting.

I dissent for the reasons stated by Judge (now Chief Judge) Arnold in *Kempson v. N.C. Dept. of Human Resources*, 100 N.C. App. 482, 397 S.E.2d 314 (1990), *aff'd by an equally divided Court*, 328 N.C. 722, 403 S.E.2d 279 (1991). In *Kempson* we held that "DHR must employ the resource spend-down methodology when determining Medicaid eligibility . . . ." *Id.* at 489, 397 S.E.2d at 318. Although *Kempson* is without precedential authority, the reasoning contained therein is sound and consistent with both federal and state legislation. Consequently, I would adopt the *Kempson* rationale and hold that DHR is required to utilize "resource spend-down" in determining an individual's eligibility for Medicaid payments.

Denial of Medicaid benefits to one whose total assets exceed the allowable limit, yet who has already become obligated to pay medical bills far in excess of that individual's total assets, contravenes the legislative purpose underlying both the Federal and North Carolina medical assistance acts. As the majority points out, federal and state programs were established to furnish assistance to those whose income and resources are insufficient to meet the costs of necessary medical care. The rigidly bureaucratic interpretation urged by respondent DHR ignores the remedial status of our medical assistance legislation. As such, it must be "liberally construed so that the beneficial purpose intended by [its] enactment may be accomplished." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). As aptly stated by Judge Lewis in a recent dissent, "[w]hen the literal interpretation of a statute contravenes the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter of the statute will be disregarded." *State v. Williams*, 113 N.C. App. 686, 694-95, 440 S.E.2d 324, 328 (1994) (Lewis, J., dissenting).

For the aforementioned reasons, I respectfully dissent.

DEBORAH ROBERTSON MICKLES, INDIVIDUALLY, AND AS THE ADMINISTRATRIX OF THE ESTATE OF FRED DAVID MICKLES, PLAINTIFF v. DUKE POWER COMPANY, KLEIN TOOLS, INC., AND BUCKINGHAM MANUFACTURING, INC., DEFENDANTS

No. 9321SC762

(Filed 2 August 1994)

Workers' Compensation § 62 (NCI4th)— workplace death—employer's misconduct—substantial certainty of causing injury or death—lineman's use of faulty, incompatible, or insufficient equipment—sufficiency of evidence

The trial court erred in granting summary judgment for defendant employer in this case involving a workplace death where a jury could conclude that defendant's act of sending a lineman up an electrical tower with faulty or incompatible safety equipment was substantially certain to result in the death of a lineman, based on the number of falls over the years experienced

by Duke Power lineman, as well as the heights at which linemen work and the absolute certainty of serious injury or death resulting from a fall; and a jury could conclude that defendant knew with substantial certainty that its continued use of only body-belts and pole straps as safety equipment, as opposed to alternative apparatus or fall arrest measures, would inevitably result in death or serious bodily injury.

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Appeal by plaintiff from order filed 4 June 1993 by Judge Thomas W. Ross in Forsyth County Superior Court. Heard in the Court of Appeals 13 April 1993.

Robinson Maready Lawing & Comerford, by William F. Maready and Clifford Britt, for plaintiff-appellant.

Duke Power Company, by W. Edward Poe, Jr. and Jeff D. Griffith, III; and Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts, W. Winburne King III and Edward L. Bleynat, Jr., for defendant-appellant Duke Power.

JOHN, Judge.

In this case involving a workplace death, plaintiff contends the trial court erred by granting defendant Duke Power's motion for summary judgment. We are persuaded that plaintiff is correct.

On 7 August 1991, Fred David Mickles (Mickles), a lineman in the employ of defendant Duke Power Company (Duke Power), was killed when he fell approximately 100 feet from a large electric transmission tower. At that time, Mickles was secured to the tower by a "body belt" and a "pole strap," but had no back-up safety device.

Mickles' body belt, manufactured by defendant Klein Tools Inc. (Klein), was fastened around his waist and had two steel "D-rings," one on each side. The pole strap, manufactured by defendant Buckingham Manufacturing, Inc. (Buckingham), was wrapped around a ladder and equipped with a metal safety hook on each end. These hooks attach to the body belt's D-rings and are known as "safety snaps" because there is a spring loaded snap on each hook to prevent

the D-ring from escaping. Immediately before Mickles' fall, the safety snaps were attached to the D-rings of his body belt.

Mickles fell as the result of "roll-out," the disengagement of a safety snap from the body belt. Roll-out occurs when a safety snap becomes positioned such that the D-ring's outer edge forces open the hook's spring-loaded snap. At the time of Mickles' death, roll-out had been a recognized industry hazard for over ten (10) years.

Plaintiff, Mickles' widow and administratrix, brought this action seeking damages in her representative capacity as well as for loss of consortium. Plaintiff alleged Duke Power was willfully and wantonly negligent in providing equipment to Mickles which Duke Power knew was substantially certain to result in death or serious bodily injury. Plaintiff further alleged all three defendants (1) were strictly liable and (2) had breached implied warranties.

On 25 March 1993, plaintiff voluntarily dismissed her claims against defendant Klein. Likewise, on 30 June 1993, she dismissed her claims against defendant Buckingham. Duke Power, the remaining defendant, moved for summary judgment. After considering the pleadings, affidavits, discovery, and arguments of the parties, the trial court granted Duke Power's motion.

The question before us is whether the trial court properly allowed Duke Power's motion for summary judgment. Summary judgment is appropriate only when there exists no genuine issue of material fact and the undisputed facts establish that a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Duke Power, as the party moving for summary judgment, has the burden of establishing the lack of any triable issue. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). The movant may meet its burden by showing: (1) an essential element of plaintiff's claim is nonexistent; (2) discovery indicates plaintiff cannot produce evidence to support an essential element; or (3) plaintiff cannot surmount an affirmative defense. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. Because plaintiff is the non-moving party, all the evidence must be considered in the light most favorable to her and all inferences of fact must be drawn in her favor. *Id.*

In the case *sub judice*, Duke Power argues the evidence fails to support any of plaintiff's claims for relief. According to Duke Power, the Worker's Compensation Act, N.C.G.S. § 97-1 to -101 (1991) (the Act), provides the exclusive remedy for plaintiff's injuries. *See* G.S.

§§ 97-9 and -10.1 (if plaintiff is attempting to recover from his employer or a co-worker for injuries suffered in a workplace "accident," the Act provides an exclusive remedy); *see also Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966). Plaintiff, however, responds that the exclusivity provisions of the Act are inapplicable because this case falls within the common-law exception enunciated in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson was a wrongful death action wherein the plaintiff's decedent, a sewer worker, died when a ditch caved in on him. The facts of *Woodson* indicated substantial negligence on the part of the decedent's employer, a sub-contractor: the employer had been cited four times in the previous six and a half years for violation of trenching regulations; the trench which collapsed was too deep and was not properly sloped, shored, or braced; a safety device (a trench box) was available but not utilized; the general contractor had refused to let its employees work in the dangerous ditch; and the employer had ordered his workers into the trench and was supervising the job at the time of the accident. Under these circumstances, the Supreme Court concluded that the exclusivity provisions of the Workers' Compensation Act were not a bar. According to the Court:

> *[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct*, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228 (emphasis added).

Misconduct which satisfies *Woodson's* "substantial certainty" standard is further illustrated by the following example from the Restatement (Second) of Torts:

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

Restatement (Second) of Torts § 8A illus. 1 (1965) (quoted as an illustration of "substantial certainty" in *Powell v. S & G Prentress Co.*, 114

N.C. App. 319, 325, 442 S.E.2d 143, 147 (1994)). As the Restatement example and the facts of *Woodson* indicate, "substantial certainty" requires more than the mere possibility or substantial probability of serious injury or death. *Woodson*, 329 N.C. at 345, 407 S.E.2d at 231; *see also Powell*, 114 N.C. App. at 325, 442 S.E.2d at 147. Moreover, as *Woodson* and its progeny make clear, the validity of a *Woodson* claim does not rest on the presence or absence of any particular factor; instead, all the facts, as indicated by the evidence, must be considered in order to determine whether the "substantial certainty" standard has been satisfied.

In the case *sub judice*, the evidence, taken in the light most favorable to plaintiff, indicates the following: Mickles died as the result of "roll-out," a safety hazard well-recognized in the power industry. Roll-out occurs when a safety snap becomes positioned such that the D-ring's outer edge forces open the hook's spring-loaded snap. This disengagement occurs only when there is a size incompatibility between the D-ring and the safety snap; Duke Power knew this was the cause of roll-out prior to Mickles' death.

At the time of Mickles' fall, co-workers heard a "clicking" sound, the identical noise made as a spring-loaded safety snap locks back into position. A similar sound was heard at the time of two earlier accidents involving Duke Power linemen: a fatal fall in 1975 and one which left a lineman paraplegic in July of 1990. In all three, the only safety device being worn by the linemen was a body-belt and pole strap combination. In the 1990 occurrence, as in the Mickles fall, the injured employee was wearing a body-belt manufactured by Klein and a Buckingham pole strap. It should be noted, however, that the pole strap worn on the 1990 occasion was manufactured in 1984 while that of Mickles was manufactured in 1986.

Duke Power investigative reports from both the 1975 and 1990 incidents indicate that company officials were aware of the danger posed by the possibility of roll-out. The investigating committee which compiled these reports recommended that linemen visually check their safety snaps and D-rings whenever they changed position in order to avoid roll-out. However, the extent to which these warnings were actually implemented is unclear. An OSHA investigation after the Mickles accident disclosed that only some Duke Power linemen received instruction as to inspection of the ring/safety snap connection and many linemen had not seen a roll-out demonstration. The linemen given instruction were advised to be certain there was no

twist in the strap which could cause roll-out and to check the connection whenever slack was introduced into the strap. It does appear, however, that Mickles received these warnings prior to his fall as his initials appear on a copy of the 1990 accident report.

Plaintiff produced evidence indicating the admonitions, even if presented, were insufficient. An expert witness for plaintiff stated in his affidavit that because linemen must frequently shift positions while performing their duties, it was unreasonable to expect them constantly to check pertinent safety equipment connections during the course thereof.

There is also evidence Duke Power officials informed equipment manufacturers of problems with the D-rings and pole straps after both the 1975 and 1990 occurrences. Contact with manufacturers after the 1975 death resulted in redesign of the D-rings. After the July 1990 fall, John Francis (then Duke Power's Manager of Health & Safety Affairs), examined the body-belt and pole strap involved and was able to duplicate roll-out by twisting the pole-strap. He thereafter visited Buckingham (the strap manufacturer) and took part in several tests with the subject equipment as well as other comparable equipment. After meeting with Francis and testing the 1984 Buckingham strap involved in the July 1990 accident, Buckingham discovered that certain straps it manufactured were incompatible with Klein body-belts. Consequently, in October of 1990, Buckingham issued a recall for pole straps manufactured in the years 1982-84. In this notice, Buckingham acknowledged there had been a number of roll-out incidents arising from incompatibility between the Klein and Buckingham equipment. Duke Power complied with this recall notice by removing the designated straps from service.

In a memorandum dated 17 September 1990 (nearly a year before Mickles' death) and directed only to Duke Power's legal department, Francis expressed his opinion that roll-out was caused by a size incompatibility between the D-ring and safety snap. He also observed that body-belt and safety snaps made by different manufacturers might be incompatible. Despite these observations, Francis stated that an additional safety device known as a fall arrest system "may not be the way to go." A fall-arrest system is a safety device which is not triggered until a fall begins. According to Francis' memorandum: (1) this would be the same as telling linemen that roll-out was a "recognized hazard"; and (2) such a position would be in direct conflict with what Duke Power and other utilities had argued during the

development of certain OSHA safety regulations. Although Francis considered his memo only "a place to start," he recommended that Duke Power examine belts and straps for mix/match compatibility and visit other companies using fall arrest systems before "seriously developing" any fall arrest system plan. Aside from compliance with the Buckingham recall, however, *there is no evidence that an examination of Duke's inventory for incompatible equipment was ever conducted* nor was any system or regulation implemented to ensure that only compatible belts and straps were used by the company's linemen. Moreover, Devaney Putnam, a Duke Power safety supervisor who ranked below Francis, disagreed with Francis' recommendations, particularly concerning withholding from linemen information about the possibility of additional safety devices. In his deposition, Putnam stated, "I think we need to let people know when there may be a problem and work toward that."

Further evidence showed that prior to Mickles' death, manufacturers of fall protection equipment recommended in catalogs distributed to the industry that body-belts and pole straps not be used for fall protection because of potential compatibility problems between body-belts and pole straps of different manufacturers. In addition, Duke Power officials, including Francis, attended national safety meetings with equipment manufacturers where roll-out was discussed. According to equipment manufacturers, additional safety devices had been on the market for years and Duke Power had been informed of such devices which included: a fall arrest system, a "rope grab" system, a new and redesigned D-ring, and double-locking safety snaps. According to one manufacturing consultant, double-locking safety snaps had been available since 1984 and could be operated safely with one hand by a lineman wearing gloves. Buckingham demonstrated available safety equipment to Duke Power in March of 1991 but was informed by Duke Power that it had no need for a fall arrest system. Buckingham also sent follow up letters to Duke Power after the March 1991 meeting, but Duke Power never responded to Buckingham's offers of assistance.

Despite manufacturers' warnings, Duke Power employed no new safety devices prior to Mickles' fall. Duke Power defended its position by offering evidence it had tried at least one new device (a double locking safety snap) which had been rejected because it could not be fastened with a single, rubber-gloved hand. Consequently, Duke Power felt it would have been dangerous to require these new snaps for high altitude electrical work.

Ironically, on the day of Mickles' death, agents for Duke Power were filming his work crew in order to develop a company safety film. By all accounts, Mickles was an experienced and skilled lineman with approximately twelve years of experience. Scott Price, a Duke Power safety manager who reviewed the film, found no fault with Mickles' technique with the exception that Mickles had secured himself only to a ladder rung. According to Price, linemen were supposed to utilize both the ladder rung and the ladder rail. Securing only to the rung, he continued, increased the likelihood of roll-out since there would be more slack in the pole strap.

After the incident, an OSHA investigation was conducted. The investigator recreated Mickles' fall utilizing the identical body-belt and safety strap with a ladder leaned against a wall. During the recreation, a subject would walk two steps up and then two steps down the ladder, putting slack into the pole strap. Roll-out was achieved nine (9) out of every (10) times. The experiment was duplicated with a pole strap made by a different manufacturer and again roll-out occurred. The investigation further revealed that Duke Power was "very aware" that roll-out could occur, yet instructed "linemen only to 'check their snap hooks and D-rings' (nothing more specific)." Moreover, it was determined that Duke Power knew of additional safety devices on the market but failed to require such devices. The OSHA investigator was highly critical of Duke Power's protracted response to the similar 1975 and 1990 incidents. He interviewed a Duke Power safety official who reported, according to the investigator, that "he would have liked to have required" a better form of protection for linemen, "*but upper management would not support [it].*" The investigator found that Duke Power's only reaction to the 1975 and 1990 accidents—instructing linemen to inspect the safety snap/pole strap connection whenever slack was introduced into the strap—was "unreasonable and ridiculous" since linemen must constantly shift positions in high places, thereby introducing slack into the pole strap. It should be noted, however, that Duke Power's use of a body-belt and pole strap as the sole safety device for linemen was the accepted industry practice at the time Mickles fell.

Although Mickles' strap was manufactured in 1986 and thus not subject to the Buckingham recall, the OSHA investigator determined that the recall should have placed Duke Power on notice to inspect its inventory for potential incompatibility between body-belts and safety snaps, "no matter who made [them]." Duke Power, however, never undertook any such inspection. Based upon the OSHA investigation,

it was recommended that Duke Power be cited for "willful serious" violations of 29 CFR 1910.132(a) and 29 CFR 1910.132(c). These Code sections are general safety obligations and are utilized in the absence of a specific industry standard. However, after Duke Power contested the charges, the subsection .132(a) violation was dismissed and the subsection .132(c) violation was reduced to a "serious" violation.

Applying *Woodson's* "substantial certainty" test to all the facts of the case *sub judice*, we determine the forecast of evidence to be sufficient to survive summary judgment. We acknowledge both that: (1) Duke Power's use of a body-belt and pole strap as the sole safety device for linemen was the accepted industry practice, and (2) OSHA did not issue a citation after the similar 1975 accident and there is no evidence of a citation after the 1990 accident. However, as *Woodson* and its progeny demonstrate, the presence or absence of any one factor is not determinative. Instead, the complete preview of the evidence must be examined. We reiterate that because we are reviewing the grant of summary judgment, the evidence presented and all reasonable inferences must be taken in the light most favorable to plaintiff. *Woodson*, 329 N.C. at 344, 407 S.E.2d at 231.

Pursuant to *Woodson*, plaintiff herein was required to present a forecast of evidence indicating that Duke Power had "intentionally engage[d] in misconduct knowing it [was] substantially certain to cause serious injury or death" to its linemen. The report and recommendation of the OSHA investigator constitute some evidence tending to show Duke Power intentionally engaged in misconduct. Intentional misconduct may also be inferred from the 17 September 1990 memorandum of John Francis which reveals that Duke Power understood the danger of incompatibility presented by mixing and matching equipment from different manufacturers. Despite this knowledge, Mickles' death resulted from the mismatch of a Klein body-belt and a Buckingham pole strap—the same manufacturer combination involved in the July 1990 fall (as well as in the fall of a New York lineman, details of which were known to Duke Power). Intentional misconduct is further suggested by evidence of Duke Power's decision not to pursue additional safety equipment even after (1) a Duke Power safety official had requested such equipment and (2) manufacturers informed Duke Power that such devices were available. Indeed, the power company reportedly told one manufacturer that it had no need for additional safety equipment. As opposed to implementing new safety procedures or purchasing new equipment, Duke Power relied upon what the OSHA investigator described

as "unreasonable and ridiculous" warnings to its linemen to check their connections while working. Moreover, there is evidence that even after Duke Power learned of the Buckingham recall (which was due to an incompatibility between a Klein belt and a Buckingham safety snap—the same type of equipment worn by Mickles), Duke Power conducted no internal investigation to discover whether other belt/strap combinations were susceptible to roll-out, nor established any company-wide procedure or regulation to prevent use of incompatible equipment. This failure is particularly noteworthy since experimentation with Mickles' equipment after his death resulted in a 90% occurrence rate of roll-out.

From the number of falls over the years experienced by Duke Power linemen, as well as the heights at which linemen work and the absolute certainty of serious injury or death resulting from a fall, a reasonable juror could determine that Duke Power's act of sending a linemen up an electrical tower with faulty or incompatible safety equipment was "substantially certain" to result in the death of a lineman. Moreover, a jury could conclude from the evidence that Duke Power knew with substantial certainty that its continued use of only body-belts and pole straps as safety equipment, as opposed to alternative apparatus or fall arrest measures, would inevitably result in death or serious bodily injury.

Because plaintiff presented evidence sufficient to send her *Woodson* claim to the jury, we reverse the trial court's order of summary judgment and remand for further proceedings consistent with our opinion. We observe, however, that plaintiff has made no argument concerning either her (1) strict liability or (2) breach of implied warranty claims. Consequently, these claims are deemed abandoned and may not be pursued by plaintiff on remand.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

Judge WELLS concurred prior to 30 June 1994.

IN RE: STANLEY A. GERTZMAN, ATTORNEY AT LAW

No. 9326SC898

(Filed 2 August 1994)

Attorneys at Law § 48 (NCI4th)— funds given to attorney to invest—no attorney-client relationship—no reimbursement from Client Security Fund

Where appellants gave deceased attorney funds to invest in a corporation and the attorney failed to do so, appellants were not entitled to reimbursement from the Client Security Fund of the North Carolina State Bar, since they were "investors" in a debtor-creditor relationship with the attorney and not "clients" in a fiduciary relationship customary to the practice of law.

Am Jur 2d, Attorneys at Law §§ 197-216.

Appeal by claimants from order entered 19 March 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 1994.

Daniel J. Clifton; and David R. Caudle, for claimant appellants.

R. David Henderson for claimant appellee.

COZORT, Judge.

Claimants petitioned the superior court seeking to obtain a portion of the funds held by a trustee/conservator appointed to protect the interest of the clients of an attorney who had committed suicide. Claimants had loaned money to the attorney to invest in a corporation. The trial court denied the claimants' request, holding that claimants were "investors" in a debtor-creditor relationship with the attorney, and not "clients" in a fiduciary relationship customary to the practice of law. We affirm.

Stanley A. Gertzman, attorney at law, was a sole practitioner in Charlotte, North Carolina. Prior to October 1991, the North Carolina State Bar received information that Mr. Gertzman had misappropriated client funds. When an investigation revealed that Mr. Gertzman had misappropriated client funds, the State Bar obtained an order restraining Mr. Gertzman from handling client trust funds and preserving over $27,000.00 of client trust funds which were in Mr. Gertzman's trust account. On 17 October 1991, Mr. Gertzman committed suicide in his office.

On 18 October 1991 the State Bar petitioned the Superior Court of Mecklenburg County for the appointment of a trustee/conservator pursuant to N.C. Gen. Stat. § 84-28(j) (1985) and Article IX, Rule 22 of the Rules and Regulations of the North Carolina State Bar to "inventory all client files, audit all fiduciary accounts, and generally take such actions as are necessary to protect the interests of the clients of Stanley A. Gertzman." On 21 October 1991, the court appointed W. Donald Carroll, Jr., as trustee/conservator of the practice of Mr. Gertzman.

The trustee's review of Mr. Gertzman's trust account records indicated that client funds were used by Mr. Gertzman to purchase two life insurance policies on his life and that the proceeds of these policies were to be paid, upon his death, to his wife, Mrs. Jeri P. Gertzman. On 22 April 1992, the trustee/conservator obtained from the superior court an order authorizing him to bring suit "against any identified party or parties to recover funds or assets which may in any manner be traced to the wrongful use of client trust funds by Stanley A. Gertzman." That same day, the trustee/conservator sued Mrs. Gertzman to impose constructive trust on the proceeds of the life insurance policies, which totaled $500,000.00.

By consent order dated 30 July 1992, the trustee and Mrs. Gertzman stipulated to, and the court approved, a settlement of the action which provided that the trustee/conservator have and recover approximately $400,000.00 of the proceeds of the policies.

Throughout 1992 and early 1993, the Client Security Fund of the North Carolina State Bar received numerous claims concerning Mr. Gertzman. The Client Security Fund (CSF) is a standing committee of the State Bar Council, established by the Council pursuant to an Order of the Supreme Court of North Carolina dated 29 August 1984, as amended. Its purpose is to reimburse, subject to certain limitations, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina. Amended and Restated Rules of Administration and Governance North Carolina Bar Client Security Fund, p. 1 (hereinafter CSF Rules).

The responsibility of operating the Fund rests with a five member board. CSF Rules at 3-4. When the CSF receives a claim, it conducts an investigation and then places the claim on the agenda of the next Board meeting. CSF Rules at 7. If the Board approves payment to a claimant, the State Bar is subrogated to the rights of the claimant to

the extent of any reimbursement by the Fund plus expenses. CSF Rules at 10-11.

Appellants are twenty-two claimants who filed claims with the CSF alleging that Mr. Gertzman defrauded them of $600,000.00 by advising them that he was the attorney for Primary Physicians Care, Inc. (PPC), which had entrusted him to secure capital in order to franchise PPC on a national level and establish a medical insurance program. Appellants also alleged that Mr. Gertzman falsely advised them that he was empowered with the authority to issue and personally sign notes for PPC. Of the twenty-two appellants, eighteen had no relationship with Mr. Gertzman other than lending money to him or PPC. The remaining four had an attorney-client relationship with Mr. Gertzman either at or prior to the time the money was borrowed. However, neither of these four nor the other twenty-two appellants had an attorney-client relationship with Mr. Gertzman in connection with their loaning money to or investing funds with PPC.

On 23 October 1992, the CSF rejected appellants' claims because they "were one of investment rather than embezzlement, and no attorney/client relationship existed."

By Motion to Approve Accounting, Disbursement and Other Relief dated 26 January 1993, the trustee/conservator, among other things, recommended that all funds held by him be paid to the CSF in partial reimbursement of: (1) fees and expenses incurred in obtaining the life insurance proceeds, and (2) the amount of misappropriated trust funds which the CSF had reimbursed to Mr. Gertzman's clients. Superior Court Judge Robert M. Burroughs set a hearing for 19 March 1993 and directed the trustee/conservator to send notice of the hearing to all possible claimants. Pursuant to the notice of hearing, persons wishing to file a claim or object to the trustee/conservator's recommendation were required to file a claim at least five days prior to the hearing. On 11 March 1993, appellants filed a Claim, Objection to Trustee/Conservator's Recommendation of Disbursement, Petition for Declaratory Judgment and Motion for Intervention. On 12 March 1993 the State Bar filed a motion requesting an order requiring the trustee/conservator to disburse the remaining trust funds to the CSF.

At the 19 March 1993 hearing, the court reviewed all claims and heard arguments of counsel for all claimants, including appellants. At the conclusion, the court ordered the trustee/conservator to transfer the funds held by him to the CSF in reimbursement of the fees and costs incurred in obtaining life insurance proceeds and in partial

reimbursement for the amount of misappropriated trust funds the Board had paid Mr. Gertzman's clients. The court denied appellants' claims, holding appellants were investor creditors whose claims were previously rejected by the CSF and which did not arise out of an attorney-client relationship and thus "were not in the class of beneficiaries for whom the trustee/conservator has protected and preserved the trust estate." The court stated that "[t]heir remedy lies against the Estate of Mr. Gertzman as creditors not here . . . ." From this order, claimants appeal.

Appellants raise three issues on appeal: (1) whether the trial court erred in denying appellant's motion for intervention, (2) whether the court erred in ordering the Gertzman trust funds held by the trustee/conservator to be transferred to the CSF, and (3) whether the trial court erred in denying appellant's petition for declaratory judgment. We affirm.

Because the first two issues overlap, we consider them together.

Pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure, a party can intervene in an action upon timely application when he "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (1990). There are three prerequisites to intervention as of right: "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties." *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978). Because we find that appellants did not have an interest in the funds held by the trustee/conservator, we hold that the trial court properly denied appellants' motion for intervention. We also find that the trial court did not err in ordering the Gertzman trust funds held by the trustee/conservator to be transferred to the CSF.

Appellants contend that they have an interest in the insurance proceeds held by the trustee/conservator and that the trial court erred in ordering the Gertzman trust funds to be transferred to the CSF because: (1) appellants had valid claims pursuant to the North Carolina State Bar Client Security Fund Definition of "Dishonest conduct" as the result of a fiduciary relationship between Mr. Gertzman and the claimant appellants customary to the practice of law; and (2)

a constructive trust should be applied to the funds held by the conservator/trustee of Mr. Gertzman's law practice. We find that appellants did not have valid claims under the CSF Rules and that appellants were not entitled to a constructive trust.

Rule 1.7 of the CSF allows reimbursement for losses resulting from "the Dishonest Conduct of an Attorney acting either as an attorney for the Applicant or in a fiduciary capacity for the benefit of the Applicant customary to the private practice of law in the matter in which the loss arose." Appellants argue that their claims are reimbursable under Rule 1.7 because their relationship with Mr. Gertzman was a fiduciary relationship customary to the practice of law. We disagree. We find the relationship between claimants and Mr. Gertzman was not fiduciary but was merely that of debtor and creditor, and the solicitation of funds for investment is not customary to the practice of law. Thus, appellants' claims were not reimbursable under Rule 1.7.

Appellants argue that a fiduciary relationship was created when they entrusted their funds with Mr. Gertzman with instructions to invest the money in PPC. We disagree. In *Abbitt v. Gregory*, our Supreme Court held:

> [A fiduciary] relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. "It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, . . . trustee and *cestui que trust*, but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other."

201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C.J., 1119).

Appellants argue that they reposed a special confidence in Mr. Gertzman who in equity and good conscience was bound to act in good faith and with due regard to the interests of the one reposing confidence. Appellants presented no evidence, however, that they placed a special confidence in Mr. Gertzman or that Mr. Gertzman exercised domination and influence over appellants. The record shows that appellants gave funds to Mr. Gertzman as the purported attorney and promoter for PPC. As signatory on the notes, Mr. Gertzman's only obligation was to repay the amount borrowed with

interest. Thus, the record shows a debtor-creditor relationship between the appellants and Mr. Gertzman. A debtor-creditor relationship does not generally create a fiduciary relationship. *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). *See also, Security National Bank of Greensboro v. Educators Mutual Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965).

Appellants further argue that the alleged fiduciary relationship between Mr. Gertzman and appellants was customary to the practice of law because attorneys handle finances for clients in a variety of circumstances, such as real estate closings and personal injury claims. Appellants cite *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987), for support. We find *Fox* distinguishable.

In *Fox*, plaintiff sued attorneys and their professional corporation for, among other things, constructive fraud in the handling of a transaction in which plaintiff sold a newspaper she owned to a corporation owned by some of the defendants. *Fox*, 85 N.C. App. at 293, 296, 354 S.E.2d at 740. Plaintiff alleged that defendant attorney and another attorney, who was also an officer and employee of defendant professional corporation, undertook to represent her in February, 1985, in reacquiring the assets of a newspaper. Plaintiff alleged a confidential relationship existed between her and defendant attorney. *Id.* at 293, 354 S.E.2d at 738-39. The complaint alleged that the defendants deceived plaintiff about the payment of a promissory note another party had taken out with plaintiff in order to buy the assets of the newspaper. *Id.* at 294-95, 354 S.E.2d at 739. Defendants prevailed upon plaintiff to sign a default letter and to arrange for the transfer of the assets of the newspaper to plaintiff and, shortly thereafter, the sale of the paper to a corporation owned by some of the defendants. *Id.* The *Fox* court concluded that plaintiff had alleged facts sufficient to show a relationship of trust and confidence and that defendants took advantage of that relationship to plaintiff's detriment. *Id.* at 299-300, 354 S.E.2d at 742. Thus the plaintiff in *Fox* had formed an attorney-client relationship with respect to the very subject matter in which the plaintiff's claim was based. In the instant case, no attorney-client relationship or any other fiduciary relationship existed between appellants and Mr. Gertzman in connection with the PPC funds.

In holding that the relationship between appellants and Mr. Gertzman was not customary to the practice of law, we find *Smith v.*

Travelers Indemnity Company, 343 F. Supp. 605 (M.D.N.C. 1972), instructive. In *Smith*, plaintiff sued a Virginia attorney and his malpractice insurance company to recover $15,000.00 which he gave to the attorney for investment. *Travelers Indemnity Company*, 343 F. Supp. at 605-06. The attorney executed a six-month demand note for the same amount. After making two interest payments, the attorney failed to make any further payments. *Id.* at 606. Plaintiff sued the malpractice insurance company on the theory that the attorney was engaged in the practice of law when he received plaintiff's money. *Id.* at 608. The court considered whether the professional liability policy, which covered claims resulting from professional services in the insured's capacity as a lawyer, would apply to defendant attorney's solicitation of funds for investment from plaintiff. *Id.* at 608-10. The court cited N.C. Gen. Stat. § 84-2.1, which defines the practice of law in North Carolina as " 'performing any legal service for any other person, firm or corporation, with or without compensation, . . . or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation.' " *Id.* at 609 (quoting N.C. Gen. Stat. § 84-2.1). After reviewing cases from other jurisdictions, the court held that the attorney was not acting in any legal capacity when he accepted the $15,000.00 from the plaintiff. *Id.* In so holding, the court emphasized that the attorney sought out plaintiff and suggested that he be allowed to invest plaintiff's money. The court stated: "The transaction itself is one that requires no legal skill or training and indeed, is done every day by thousands of individuals who are without legal training but who are probably better qualified in the investment field than most attorneys." *Id.* at 610.

Appellants also claim they are entitled to a proportional share in the funds under a constructive trust theory because the trust accounts from which Mr. Gertzman drew money to purchase the life insurance contained funds he fraudulently obtained from appellants. We disagree. "A constructive trust does not arise where there is no fiduciary relationship and there is an adequate remedy at law." *Security National Bank of Greensboro v. Educators Mutual Life Insurance Co.*, 265 N.C. at 95, 143 S.E.2d at 276 (citing *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E.2d 666 (1945)). Since the relationship between appellants and Mr. Gertzman was not a fiduciary one, but one of debtor and creditor, and appellants can sue the estate as creditors, appellants were not entitled to a constructive trust. The claimants failed to introduce evidence tracing their investment funds

into the trust account from which Mr. Gertzman drew funds to invest in the life insurance policies. Thus, even if appellants had established the existence of a fiduciary relationship, appellants were not entitled to a constructive trust because appellants offered no proof to establish their funds were used in part to pay for the life insurance premiums.

Lastly, we consider whether the court erred in denying appellants' petition for declaratory judgment. 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 were not apparent. N.C.R. App. P. 10(b)(1) (1994). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." N.C.R. App. P. 10(b)(1). We do not consider this assignment of error because appellants failed to obtain a ruling from the trial court as required under N.C.R. App. P. 10(b)(1).

The order below is

Affirmed.

Judges ORR and MARTIN concur.

COY D. BARBEE AND VIRGINIA T. BARBEE v. ATLANTIC MARINE SALES & SERVICE, INC., AND MAKO MARINE, INC.

MAKO MARINE, INC. v. ATLANTIC MARINE SALES AND SERVICE, INC., AND CHRISTOPHER FLOYD

No. 9226SC1141

(Filed 2 August 1994)

1. Unfair Competition or Trade Practices § 39 (NCI4th)—sale of defective boat—bad faith relevance on commercial use exclusion—sufficiency of evidence of unfair practice

The evidence was sufficient to support the trial court's submission to the jury of issues of unfair and deceptive acts or practices under N.C.G.S. § 75-1.1 where the evidence tended to show that plaintiffs complained about water accumulating in the stern of a boat, which was manufactured in 1985 by the defendant, from

the time they bought it in May 1988 until the manufacturer's representative visited the boat in July 1989; after the representative's visit, defendant refused to take any further action, insisting that the boat was being used commercially and was thus excepted from the written warranty; defendant's former warranty manager testified that the commercial exclusion applied only to boats manufactured after 1987; and this was sufficient evidence for the jury to conclude that, once defendant realized that the problem with plaintiffs' boat could not be remedied, it seized upon the commercial use exclusion in a bad faith attempt to avoid responsibility for the defective boat.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

2. Unfair Competition or Trade Practices § 54 (NCI4th)— attorney's fees—reasonableness—sufficiency of evidence

The evidence was sufficient to support the trial judge's findings and those findings in turn supported the award of attorney's fees in an unfair practices case where the record was rife with evidence of defendant's intractability; this evidence was sufficient to support the court's findings on the issues of willfulness and refusal to resolve the matter; and affidavits supported the court's finding on the reasonableness of the fees where they revealed the time spent by the attorneys and their support staffs, the complexity of the issues, the length and complexity of the trial, the customary hourly fee for each of the attorneys, and the level of experience of each of the attorneys.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR4th 12.

3. Limitations, Repose, and Laches § 48 (NCI4th)— unfair practices claim—no bar by state of limitations

Plaintiffs' claim against a boat manufacturer for unfair and deceptive practices was not barred by the four-year statute of lim-

itations of N.C.G.S. § 75-16.2 where plaintiffs' cause of action could not have accrued until after they purchased the boat, and they purchased the boat on 15 May 1988 and instituted this action on 27 February 1990.

Am Jur 2d, Limitation of Actions § 82.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts. 18 ALR4th 1340.

4. Unfair Competition or Trade Practices § 46 (NCI4th)— treble damages on unfair practices claim—recovery for breach of implied warranty—double recovery

The trial court's entry of judgments against defendant manufacturer of a boat for treble damages on an unfair and deceptive practices claim and against defendant seller of the boat for breach of implied warranty combined with the court's order that defendant manufacturer fully indemnify defendant seller allowed plaintiff double recovery, since the injury plaintiffs suffered because of the breach of warranty was compensated by the award for the unfair and deceptive practices claim.

Am Jur 2d, Damages §§ 566 et seq.

Appeal by defendant Mako Marine, Inc. from judgment entered 9 April 1992 by Judge F. Fetzer Mills in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1993.

After our decision was filed in *Barbee v. Atlantic Marine Sales and Service*, 113 N.C. App. 80, 437 S.E.2d 682 (1993), plaintiffs petitioned for rehearing. We granted that petition and now replace that opinion with the following one.

This appeal arises out of plaintiffs' claims against defendant Atlantic Marine Sales and Service, Inc. (Atlantic) for an allegedly defective boat which Atlantic sold to plaintiff and against defendant Mako Marine, Inc. (defendant), which manufactured the boat. After a jury trial, the trial court entered judgments in favor of the plaintiffs against defendant, ordered defendant to indemnify Atlantic for any liability it might have to plaintiffs and ordered defendant to pay attorney's fees to plaintiff and Atlantic. From these judgments, defendant appeals.

Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris and Jeffrey D. Penley, and Blair, Conaway, Bograd & Martin, by Bentford E. Martin and Brien D. Stockman, for appellant Mako Marine, Inc.

Horack, Talley, Pharr & Lowndes, P.A., by Robert C. Stephens and James H. Pulliam, for plaintiff-appellees Coy D. Barbee and Virginia T. Barbee.

Parker, Poe, Adams & Bernstein, by William E. Poe, Frank A. Hirsch, Jr., and Andrew D. Shore for defendant-appellee Atlantic Marine Sales & Service, Inc.

McCRODDEN, Judge.

This case tests the propriety of (I) the trial court's instructions to the jury, (II) its submission to the jury of issues of unfair and deceptive acts or practices under Chapter 75 of the General Statutes, (III) the court's award of attorney's fees under the same chapter, (IV) its refusal to dismiss plaintiff's action on the basis that the statute of limitations had run, and (V) the amount of damages the trial court ordered it to pay.

The pertinent facts in this case are as follows. In 1985, defendant manufactured and sold to Atlantic a model 285-B boat hull, a 28-foot craft intended to be powered by outboard engines. Atlantic outfitted the hull with engines and accessory equipment. It never titled the boat and used it only as a demonstration model before selling it to plaintiffs on 15 May 1988. Plaintiffs purchased the boat with the intention of chartering it for fishing and diving. Almost immediately after purchasing the boat, they complained to Atlantic that excessive water was accumulating in the stern of the boat when it was idling or anchored in the open sea. As water flowed into the boat, the stern of the boat was pushed deeper in the water, allowing more water to flow over the back wall of the boat, known as the transom. As the boat filled with water, the scuppers, holes in the bottom of the transom out of which water in the boat is supposed to drain, went below the waterline and were rendered ineffective. At that point, the only way to drain the boat was to drive it fast enough to plane, bringing the scuppers above the waterline.

Atlantic contacted defendant to inform it of the problem and defendant offered several suggested solutions to the problem. Each

of these suggestions, however, proved ineffective. After repeated attempts to remedy the problem, plaintiffs' son, who was the principal operator of the boat, wrote to defendant stating that he thought the problem could be solved by keeping water out of the boat, instead of trying to remove it more quickly. Defendant responded to the letter by saying that it was "the inherent nature of water to pass over the transom on an outboard powered boat" and recommended two modifications intended to minimize the amount of water entering the boat. Plaintiffs rejected both of these suggestions. Atlantic requested that defendant send a representative to examine the boat and assess the problem. On 25 July 1989, Marty Bistrong, defendant's vice president of sales, visited Atlantic's marina. He refused, however, to ride in the boat or to examine the problem. Thereafter, David Floyd, Atlantic's vice president, contacted defendant on plaintiffs' behalf. Defendant informed Floyd that since the boat was being used as a charter boat, a fact Bistrong had observed during his visit, it would do nothing further for plaintiffs. Defendant suggested instead that plaintiffs trade the model 285-B boat for a new or different model, a suggestion plaintiffs declined to follow.

On 27 February 1990, plaintiffs filed this action, alleging breach of an implied warranty of fitness for a particular purpose, breach of an implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, breach of contract, breach of express warranty, violations of N.C. Gen. Stat. § 75-1.1 (1988) (unfair and deceptive acts or practices), and negligent failure to warn of known dangerous defects in the design of the boat hull. Defendant cross-claimed against Atlantic which in turn sought indemnity from defendant and Chapter 75 damages for its efforts in effecting a remedy for the alleged design defects. The court directed verdicts in favor of Atlantic on its cross-claim for indemnity against defendant, in favor of Atlantic on plaintiffs' claim of breach of express warranty against it, and in favor of Atlantic and defendant on plaintiffs' Magnuson-Moss, breach of contract and negligence claims. It submitted to the jury the balance of the issues. After verdicts in plaintiffs' favor, the trial court entered judgments against defendant in the amounts of $178,732.65 for violations of N.C.G.S. § 75-1.1, which represented treble damages pursuant to N.C. Gen. Stat. § 75-16 (1988); $49,980.00 for attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 (1988); and $59,557.55 for breach of warranty. The court also ordered defendant to compensate Atlantic $37,185.00 for a violation of N.C.G.S. § 75-1.1 and $43,238.00 for attorney's fees.

I.

The first set of arguments we review pertains to the trial court's peremptory instruction on the existence of an express warranty. Defendant did not assign error to the court's peremptory instruction on the existence of an express warranty in the record on appeal, and indeed, failed to object to the court's submission of this issue to the jury. Under N.C.R. App. P. 10(a), we must confine our consideration to errors assigned in the record on appeal. Moreover, under Rule 10(b), a party may not assign error to any portion of the jury charge unless he objects thereto before the jury retires. The trial court must be given the opportunity to correct any allegedly erroneous statement in its instruction. *See Rudd v. Stewart*, 255 N.C. 90, 96, 120 S.E.2d 601, 606 (1961). In the instant case, therefore, defendant not only failed to assign error, but it failed to lay the foundation for assigning error. We decline its invitation to exercise our discretion under N.C.R. App. P. 2 to suspend or vary the requirement of this rule, and we consequently reject the first part of defendant's argument.

For similar reasons, we also decline to review the second portion of defendant's attack on the jury instructions. Despite the trial court's request for corrections, defendant made no objection to the instructions to which it has assigned error, thus failing to provide a foundation for its assignment.

II.

[1] We next consider defendant's set of arguments concerning the court's submission to the jury of issues of unfair and deceptive acts or practices under N.C.G.S. § 75-1.1. Defendant argues that there was insufficient evidence as a matter of law to support the findings of the jury as to each of the four issues of fact submitted by the court.

N.C.G.S. § 75-1.1 declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . ." Unfair practices are not subject to a single definition. Generally, however, "a practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Whether an act or practice is unfair or deceptive is to be determined by all the facts and circumstances surrounding the transaction. *Id.*

In an action for unfair and deceptive acts or practices the jury is to find the facts of the occurrence, *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), determine in what amount, if any, the plaintiff was injured, and decide whether the occurrence was the proximate cause of those injuries. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980). It is then up to the trial court to decide whether the defendant's behavior was unfair or deceptive. *Hardy*, 288 N.C. at 310, 218 S.E.2d at 346-47.

In this case the trial court submitted to the jury four issues of fact, to each of which the jury returned an affirmative answer. The jury also found that plaintiffs had suffered damages in the amount of $59,577.55 as a proximate result of defendant's actions. In its judgment, the trial court stated that any one of the four factual situations, standing alone, would constitute an unfair and deceptive practice. Defendant does not contend that the court abused its discretion in so doing. The inquiry posed by defendant's argument is, therefore, whether there was sufficient evidence to support the jury's findings as to any one of the four bases.

We find that there was ample evidence to justify the jury's affirmative answer to the following question:

> Did Mako Marine do any one or more of the following in selling a 1985 Mako 285-B style hull to Atlantic for $35,273 on June 24, 1985 which Atlantic, in turn, sold to the Barbees on May 15, 1988 for $37,464:
>
> . . . .
>
> . . . Represent that the boat would be covered by Mako's warranty, then after the boat was purchased by the Plaintiffs Barbee, unreasonably refuse to remedy the major defect, which permitted water to come over the transom and remain in the boat to the point that the boat was rendered useless for its intended purpose?

The plaintiffs' evidence tended to show that they complained about water accumulating in the stern of the boat from the time they bought the boat until July 1989, when Bistrong visited Atlantic's marina. David Floyd testified that after Bistrong's visit, defendant refused to take any further action, insisting that the boat was being used commercially and was thus excepted from the written warranty. In response to plaintiffs' pleas, defendant suggested only that plaintiffs trade the boat. Defendant, however, made no offer of concession,

such as offering to credit the price plaintiffs had paid for their boat toward a new boat. Kevin Rogers, defendant's former warranty manager, testified that the written warranty, which by its terms did not cover boats used commercially, applied only to boats manufactured after 1987, two years after defendant sold its boat to Atlantic. This was sufficient evidence for the jury to conclude that once the defendant realized that the problem with plaintiffs' boat could not be remedied, it seized upon the commercial use exclusion in a bad faith attempt to avoid responsibility for the defective boat. Thus, the court properly submitted the issue of unfair and deceptive acts or practices.

III.

[2] Defendant next argues that the court's award of attorney's fees in favor of plaintiff and Atlantic was erroneous since the fees were not reasonable and they were not supported by sufficient findings of fact.

A prevailing party in an action under N.C.G.S. § 75-1.1 may recover a reasonable attorney's fee upon a finding by the trial court that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit. . . ." N.C.G.S. § 75-16.1. The award or denial of attorney's fees under section 75-16.1 is within the sole discretion of the trial judge. *Borders v. Newton*, 68 N.C. App. 768, 770, 315 S.E.2d 731, 732 (1984). The court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that he refused to resolve the matter fully, and that the attorney's fee was reasonable. For us to determine whether such award is reasonable, the record on appeal must contain findings of fact that support the award. *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991). "Appropriate findings include findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney." *Id.*

In this case, the court made the following statements in its judgment:

> [E]ach act separately enumerated under 10(a)-(d) is willful and constitutes adequate grounds for the award of attorneys' fees to the [plaintiffs] and Atlantic from [defendant] pursuant to N.C.G.S. § 75-16.1. The Court also concludes in its discretion after due

> deliberation that there has been an unwarranted refusal by [defendant] to fully resolve the matter which constitutes a basis of this suit.
>
> . . . .
>
> After reviewing the Affidavits of [plaintiffs' attorneys] and of [Atlantic's attorneys], and deliberating on the case presented, I conclude that the attorneys' fees and expenses in the amount of $49,980.00 [for plaintiffs] and in the amount of $43,238.00 for Atlantic and Floyd were reasonable in light of the complexity of the facts and legal issues presented to the jury and the length of these proceedings.

During the hearing, the trial court also adopted the affidavits of the attorneys as his findings on the issue of the reasonableness of the fees.

The record is rife with evidence of defendant's intractability, and such evidence is sufficient to support the court's findings on the issues of willfulness and refusal to resolve the matter. Likewise, the affidavits adequately support the court's finding on the reasonableness of the fees. They reveal the time spent by the attorneys and their support staffs, the complexity of the issues, the length and complexity of the trial, the customary hourly fee for each of the attorneys, and the level of experience of each of the attorneys. There was ample evidence in the record to support the judge's findings and those findings in turn support the award.

IV.

[3] Defendant's fourth argument, that plaintiffs' Chapter 75 claim was barred by the statute of limitations, is meritless. The applicable statute of limitation provides, in pertinent part, that "[a]ny civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." N.C. Gen. Stat. § 75-16.2 (1988). In general, a cause of action accrues when "the right to institute and maintain a suit arises." *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962). Of course, plaintiffs could not have instituted an action against defendant for unfair and deceptive acts or practices, and their cause of action therefor could not have accrued, before they purchased the boat. Since plaintiffs purchased the boat on 15 May 1988 and instituted this action on 27 February 1990, N.C.G.S. § 75-16.2 does not bar their action.

V.

[4] Defendant finally argues that the court's entry of judgments against defendant for treble damages on the N.C.G.S. § 75-1.1 claim and against Atlantic for breach of implied warranty combined with the order that defendant fully indemnify Atlantic allowed plaintiff double recovery. We agree.

Although the judgment on the breach of warranty claim was actually entered against Atlantic, the court's order that defendant indemnify Atlantic for any liability makes it clear that the defendant was being held liable for violation of N.C.G.S. § 75-1.1 and the breach of warranty.

The injury plaintiffs suffered because of the breach of warranty was compensated by the award for the Chapter 75 claim against defendant. Indeed, the jury found that the plaintiffs had suffered precisely the same amount of damages, $59,577.55, for each of those claims. The court, having found that the defendant's acts constituted an unfair and deceptive practice, properly trebled that amount and entered judgment thereon. However, by also entering judgment against Atlantic on the breach of warranty claim, which was based on the selfsame course of conduct, the court improperly allowed plaintiffs double recovery. *See Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified on other grounds and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981).

On the basis of this, we order that the trial court modify its judgment to reflect that any amount Atlantic pays on the judgment against it be credited toward plaintiffs' judgment against defendant. We affirm the balance of the trial court's actions, including its order that defendant indemnify Atlantic "as to any and all liability . . . ."

Modified in part, affirmed in part.

Judges JOHNSON and COZORT concur.

MAXINE F. McCORKLE, GENERAL GUARDIAN FOR NICK McCORKLE, JR., PLAINTIFF v. AEROGLIDE CORPORATION, RAYMOND BARBOUR, AND LUTHER DAVIS, DEFENDANTS

No. 9310SC755

(Filed 2 August 1994)

Workers' Compensation § 69 (NCI4th)— workplace accident— no wanton negligence of co-employee—no misconduct of employer

In an action to recover for injuries sustained in a workplace accident, there was no merit to plaintiff's contention that the employee's supervisor, a co-employee, was wantonly negligent because he knew operation of a single-foot operated brake-press by two persons when only one person could stop operation of the machine was likely to result in serious injury, since the brake-press was in fact designed for use by one or two persons and so operation by two persons was not likely to result in injury; there had never been any prior accidents nor had employer been cited for any OSHA violations involving these machines; and the accident resulted from the employee's own negligence in that he was using the machinery with his hands improperly placed and after having been instructed by the supervisor not to use the machine at all. Furthermore, the employee's *Woodson* claim against employer must fail as well, since a higher degree of negligence is required of the employer than of a co-employee, and plaintiff could not even meet the requirements to show wanton negligence of the co-employee.

Am Jur 2d, Workers' Compensation §§ 100, 101, 254.

Willful, wanton or reckless conduct of co-employee as ground of liability despite bar of workers' compensation law. 57 ALR4th 888.

Appeal by plaintiff from order entered 31 March 1993 by Judge J. B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 April 1994.

Carol M. Schiller for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by David H. Batten and C.D. Taylor Pace, for defendant-appellee Aeroglide.

Maupin Taylor Ellis & Adams, P.A., by John T. Williamson and James C. Dever, III, for defendant-appellees Barbour and Davis.

JOHN, Judge.

In this case involving a workplace injury, plaintiff contends the trial court erred by granting defendants' motions for summary judgment. We disagree.

On 19 May 1989, Nick McCorkle, Jr. (Nick) was injured when his hands were caught in a brake-press machine at the Cary, N.C. sheet metal plant of his employer, defendant Aeroglide Corporation (Aeroglide). Brake-press machines are utilized by Aeroglide to form metal into various shapes and angles. Defendant Barbour was Nick's supervisor and defendant Davis was an Aeroglide employee whose job was to repair and maintain production equipment, including the brake-press machines. As a result of the accident, Nick applied for and received workers' compensation benefits.

Plaintiff, Nick's wife and general guardian, brought the instant action on 14 May 1992 seeking to recover damages in her representative capacity for Nick's injuries. She alleged that defendants Aeroglide and Barbour were wantonly negligent by requiring more than one employee to work on the brake-press machine when they knew or should have known such operation would result in serious injury. Plaintiff further set forth claims against defendants Aeroglide and Davis based upon (1) negligent manufacture and (2) breach of implied warranty.

On 31 March 1993, after considering the pleadings, affidavits, discovery, and arguments of the parties, the trial court granted each defendant's motion for summary judgment.

I.

Plaintiff assigns error to the entry of summary judgment in favor of defendants. Summary judgment is proper only when there is no genuine issue of material fact and the undisputed facts establish that a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Defendants, as the moving parties, must establish the lack of any triable issue. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C.

57, 62-63, 414 S.E.2d 339, 341-42 (1992). They may meet this burden by showing (1) an essential element of plaintiff's claim is nonexistent; (2) discovery indicates plaintiff cannot produce evidence to support an essential element; or (3) plaintiff cannot surmount an affirmative defense. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. Once defendants have successfully made such a showing, plaintiff must come forward with a forecast of evidence tending to show the existence of a *prima facie* case. *Id.* As plaintiff is the non-moving party, the reviewing court must consider all the evidence in the light most favorable to her. *Id.*

In the case *sub judice*, defendants argue the evidence fails to support any of plaintiff's claims for relief. They rely primarily upon the contention that the Workers' Compensation Act, N.C.G.S. § 97-1 to -101 (1991) (the Act), provides an exclusive remedy for plaintiff's injuries. *See* G.S. §§ 97-9 and -10.1 (if plaintiff is attempting to recover from his employer or a co-worker for injuries suffered in a workplace "accident," the Act provides an exclusive remedy); *see also Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966) (employer) and *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977) (co-employee). Plaintiff responds that the exclusivity provisions of the Act are inapplicable because Nick's accident is governed by the common-law exceptions enunciated in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) and *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

II. *Wanton Conduct of Aeroglide and Barbour*

The first two counts of plaintiff's complaint allege that Aeroglide and Barbour were wantonly negligent *because they knew operation of the single-foot operated brake-press by two persons, when only one person could stop operation of the machine, was likely to result in serious injury.* Because the conduct of Barbour and Aeroglide must be reviewed under different standards, we examine each separately.

A. *Barbour*

[1] At the time of plaintiff's accident, Barbour was employed as a layout supervisor at Aeroglide and served as plaintiff's immediate supervisor. As such, Barbour qualifies as a "co-employee" for purposes of workers' compensation. *See Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 154, 416 S.E.2d 193, 198, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992).

In *Pleasant v. Johnson*, our Supreme Court addressed the issue of co-employee liability for willful, wanton and reckless negligence. The Court noted the well-established principle that the Act will not bar a common-law action based upon "intentional injury." *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247. Equating willful, wanton and reckless negligence with intentional injury for purposes of the Workers' Compensation Act, the Court held: "the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Id.* at 716, 325 S.E.2d at 249. "Wanton" and "reckless" conduct is conduct "manifesting a reckless disregard for the rights and safety of others." *Id.* at 714, 325 S.E.2d at 248. "Willful negligence" is "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* Barbour having moved for summary judgment, we must consider whether his evidence (considered in the light most favorable to plaintiff) meets the test of *Roumillat*, thereby indicating the absence of any triable issue and shifting the burden to plaintiff.

According to Barbour, the brake-press upon which Nick was injured was purchased in approximately 1965 from the Dreis & Krump manufacturing company, and utilized a single foot pedal which permitted the press operator to stop the machine and avoid injury. The machine was designed for use by one or two persons and to accommodate sheet metal up to twelve feet in length. In those instances when the size and weight of a piece of sheet metal are too cumbersome for one person to handle, a helper is to assist the brake-press operator. Operators have been instructed to hold the sheet metal "palms upward" and to keep their hands clear of the press.

In 1976, OSHA officials and Aeroglide began discussing additional safety features for the brake-press, and in 1979 OSHA approved a protective screen designed to prevent workers from falling into the machine. No evidence indicates Aeroglide was ever cited for violation of any safety standards with regard to these machines. Indeed, affidavits from both the president of Aeroglide and a Dreis & Krump vice-president asserted the brake-press in question was in compliance with all applicable OSHA standards. The president of Aeroglide further stated that to his knowledge no Aeroglide employee had ever been injured while operating a brake-press.

Barbour's evidence further revealed Nick was a skilled brake-press operator with approximately 17 years experience. However,

Nick's health had been deteriorating for some time and, as a result, he had been transferred from his position as press operator to that of helper. On the day prior to the accident, Nick had been observed to be unsteady and Barbour removed him from the job of helper until further notice. On 19 May 1989, Nick disregarded Barbour's instructions and began working as a helper. When the brake-press operator noticed Nick's hands in the machinery, he quickly stopped the press operation, thereby avoiding amputation of Nick's fingers. At this time, Nick's hands were in an incorrect "palm downward" position, in violation of Aeroglide's instructions.

Based upon this forecast of evidence, Barbour met his burden of showing the non-existence of an essential element of plaintiff's claim, namely, that Barbour's conduct was "willful, wanton and reckless." In fact, Barbour's evidence, even when viewed in the requisite light, shows that operation of the brake-press by two persons was not likely to result in injury because it actually was designed for operation by one or two persons, and there had neither been any prior accidents nor had Aeroglide been previously cited for any OSHA violations involving these machines. Further, Barbour's evidence indicates the accident resulted from Nick's own misconduct, *i.e.*, Nick was utilizing the brake-press not only with his hands improperly placed, but after having been instructed by Barbour not to use the machine at all. Even in the light most favorable to plaintiff, therefore, it simply does not appear that Barbour's conduct was in manifest reckless disregard of the rights and safety of Nick nor does it appear Barbour intentionally failed to carry out some duty owed to Nick. *See Pleasant*, 312 N.C. at 714, 325 S.E.2d at 248; *see also Dunleavy v. Yates Construction Co.*, 106 N.C. App. at 156, 416 S.E.2d at 199.

As a result of Barbour's successful showing, the burden shifted to plaintiff to present evidence in refutation. *Dunleavy*, 106 N.C. App. at 156, 416 S.E.2d at 199. Plaintiff's presentation focused primarily on the lack of a protective screen which would have shielded workers from injury. Although there exists an issue of fact as to whether this screen actually was attached to the brake-press at the time of Nick's accident, plaintiff's complaint contains no allegation that Barbour (or Aeroglide) was wantonly negligent in failing to require the screen. The complaint alleges wanton negligence only by allowing the machine to be operated by two workers when it had but one brake. Plaintiff's failure to plead negligence based upon the lack of a protective screen permits us to decline to address whether this alleged negligent act would support a cause of action under *Pleasant*. *See*

Manning v. Manning, 20 N.C. App. 149, 154-55, 201 S.E.2d 46, 50-51 (1973).

Nonetheless, even had failure to maintain the protective screen been properly pled, Barbour's conduct did not meet the requisite level of culpability. In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), our Supreme Court reviewed a N.C.R. Civ. P. 12(b)(6) dismissal of a complaint alleging plaintiff had suffered injury after being instructed by two co-employees to work on a dangerous machine. Mr. Pendergrass claimed his co-employees were wantonly negligent in directing him to work at the machine when they knew (1) certain dangerous parts of the machine were unguarded and that (2) the failure to have necessary guards in place violated OSHA regulations. *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394. The Supreme Court nevertheless held these allegations insufficient to set out a cause of action under *Pleasant*. *Id.*

Barbour's conduct in the case *sub judice* manifests less culpability than that of the *Pendergrass* defendants. One fundamental difference is that Nick was specifically instructed by Barbour *not* to use the brake-press, while the *Pendergrass* defendants allegedly ordered the plaintiff to operate the machine in question. The allegations in *Pendergrass* being insufficient to plead a cause of action under the *Pleasant* standard, the "kinder, gentler" evidence of the case *sub judice*, even when viewed in the light most favorable to plaintiff, does not raise an issue of fact regarding wanton negligence on the part of Barbour. Plaintiff, therefore, failed to meet her burden under *Roumillat* of showing a *prima facie* case, and the trial court properly allowed summary judgment as to plaintiff's claim of wanton negligence against Barbour.

B. *Aeroglide*

In *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), our Supreme Court held an employee may pursue a civil action against his employer "when [the] employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct . . . ." *Id.* at 340, 407 S.E.2d at 228. The conduct must be so egregious as to be tantamount to an intentional tort. *Id.* The *Woodson* test is a higher degree of negligence than the "willful, wanton and reckless" standard applicable to co-employees under *Pleasant*. *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395.

Plaintiff's claim against Aeroglide utilizes the same contentions of negligence relied upon as against Barbour. We have already determined the evidence does not support plaintiff's cause of action against Barbour under the more lenient *Pleasant* standard. Consequently, plaintiff's *Woodson* claim against Aeroglide necessarily fails. *See Pendergrass*, 333 N.C. at 239-40, 424 S.E.2d at 395.

We further note substantial similarity between the case *sub judice* and our recent decision in *Vaughn v. J.P. Taylor*, 114 N.C. App. 651, 442 S.E.2d 538 (1994). In *Vaughn*, the plaintiff suffered injury on a machine after he ignored established safety procedures, and we held plaintiff's evidence failed to meet the *Woodson* standard. *Vaughn*, 114 N.C. App. at 654-55, 442 S.E.2d at 540. Here, Nick also ignored established safety procedures by handling the sheet metal with his hands in an incorrect position, and, more significantly, ignored his supervisor's safety concerns by working on the brake-press in contravention of a specific direction not to do so. As in *Vaughn*, it appears here that Nick's injuries were primarily the result of his own conduct. *See also Hooper v. Pizzagelli Construction Co.*, 112 N.C. App. 400, 409, 436 S.E.2d 145, 151 (1993) (in dismissing a *Woodson* claim, we noted there was no evidence the employer had directed the plaintiff to use a dangerous scaffold), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994). There was no error in allowing summary judgment as to the *Woodson* claim against Aeroglide.

III. *Negligent Manufacture*

Count Three of plaintiff's complaint alleges Aeroglide and Davis negligently "manufactured" the brake-press machine in that they neglected to: (1) add a second brake pedal; (2) give proper instructions; or (3) add a guard-rail. Plaintiff argues that defendants' addition of a protective screen to the brake-press transformed defendants into "manufacturers" of the machine. An identical argument was repudiated by our Supreme Court in *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 238-39, 424 S.E.2d 391, 394-95 (1993). We are bound by *Pendergrass* and consequently reject plaintiff's assignment of error as to this claim.

IV. *Breach of Implied Warranty*

Plaintiff's final contention is that Aeroglide and Davis, as manufacturers of the brake-press, breached an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. We conclude this argument is unfounded.

Under both N.C.G.S. § 25-2-314 (1986) (warranty of merchantability) and N.C.G.S. § 25-2-315 (1986) (warranty of fitness for a particular purpose), only a "seller" can be sued for breach of the alleged warranties. A seller is defined as "a person who sells or contracts to sell goods." N.C.G.S. § 25-2-103 (1986). Just as the evidence fails to support a conclusion that either Aeroglide or Davis were "manufacturers," *see* discussion *supra* part III, neither does it support a conclusion these defendants were "sellers." Absolutely no evidence tends to show either defendant sold, or was in the business of selling, brake-press machines.

Based upon the foregoing reasons, entry of summary judgment by the trial court in favor of all defendants is affirmed.

Judges WELLS and JOHNSON concur.

Judge WELLS concurred prior to 30 June 1994.

STATE OF NORTH CAROLINA v. JOHN LEE BOZEMAN

No. 925SC1257

(Filed 2 August 1994)

1. Criminal Law § 139 (NCI4th)— failure to inform defendant of mandatory minimum sentence—violation of constitutional rights—harmless error

Though failure to inform defendant of the applicable mandatory minimum sentence for drug trafficking violated N.C.G.S. § 15A-1022(a)(6) and defendant's constitutional right to have a guilty plea entered voluntarily, intelligently, and understandingly because a mandatory minimum sentence constitutes a "direct consequence" of a guilty plea, such error was harmless beyond a reasonable doubt, since defendant was informed that he could receive a maximum sentence of 95 years, and failure to inform him of a mandatory minimum seven-year sentence could not have reasonably affected defendant's decision to plead guilty.

Am Jur 2d, Criminal Law §§ 473-480.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

2. Criminal Law § 139 (NCI4th)— indigent defendant—possible fine—higher fine assessed—voluntariness of guilty plea unaffected

There was no merit to defendant's contention that his guilty plea should be set aside because the trial court incorrectly informed him he was facing a $50,000 fine and thereafter assessed total fines of $300,000, since the record on appeal indicated that defendant was indigent at the time of his plea but nonetheless tendered it with full knowledge that he faced both a substantial fine and an extended prison term, and it could not be said that the discrepancy had any effect on defendant's decision to plead guilty.

Am Jur 2d, Criminal Law §§ 473-480.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

3. Criminal Law § 1170 (NCI4th)— narcotics offenses—involvement of seventeen-year-old—consideration as nonstatutory aggravating factor—error

In a prosecution of defendant for various narcotics offenses, the trial court erred in considering as a nonstatutory aggravating factor that defendant involved a young person seventeen years of age, since the youth referred to in this case was older than the statutorily prescribed maximum age of sixteen, and it was therefore error to consider the essence of N.C.G.S. § 15A-1340.4(a)(1)(l) when sentencing defendant.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgments entered 4 February 1992 by Judge Gary E. Trawick in New Hanover County Superior Court. Heard in the Court of Appeals 27 September 1993.

Attorney General Michael F. Easley, by Associate Attorney General Elizabeth Leonard McKay, for the State.

Nora Henry Hargrove for defendant-appellant.

JOHN, Judge.

Defendant was indicted on three counts of Trafficking in Cocaine; two counts of Possession of Cocaine with Intent to Sell and Deliver;

two counts of Sale and Delivery of Cocaine; and one count of Conspiracy to Sell and Deliver Cocaine. At trial, he pled guilty to all charges and was examined by the court concerning his plea. Following the State's presentation of evidence concerning the offenses and sentencing, the court adjudicated defendant guilty and imposed prison terms totaling 71 years plus a $300,000 fine.

Defendant maintains the trial court erred by: (1) accepting his guilty plea and (2) finding as a factor in aggravation of sentence that defendant engaged a seventeen-year-old youth, his son, in the offenses. We find defendant's second argument persuasive and remand for resentencing.

I.

Defendant advances two bases for contending the trial court erred in accepting his guilty plea. *First*, the court failed to advise him of the mandatory minimum sentence he might receive and *second*, the court indicated to defendant he faced a potential fine of $50,000 rather than the $300,000 fine actually imposed. Therefore, asserts defendant, his guilty plea was "involuntary" and the trial court erred in entering judgment upon that plea.

A.

[1] As regards sentence, our review indicates the trial court informed defendant only that he "could be imprisoned for a possible maximum sentence of 95 years . . . ." While the court's statement accurately totaled the maximum terms for the offenses to which defendant pled guilty, it omitted mention of the mandatory minimum term of seven years applicable to the offense of drug trafficking. *See* N.C.G.S. § 90-95(h)(3) (Cum. Supp. 1992) (current version at G.S. § 90-95(h)(3) (1993)). This failure constituted a violation of N.C.G.S. § 15A-1022(a)(6) (1988) ("[A] superior court judge may not accept a plea of guilty . . . without first . . . informing [the defendant] . . . of the mandatory minimum sentence, if any, on the charge"). We therefore must consider whether this error was prejudicial. *See State v. Williams*, 65 N.C. App. 472, 478, 310 S.E.2d 83, 87 (1983).

Resolution of the issue of prejudice involves an initial determination of whether the error relates to rights arising under the United States Constitution. *State v. Arnold*, 98 N.C. App. 518, 530, 392 S.E.2d 140, 148 (1990), *aff'd*, 329 N.C. 128, 404 S.E.2d 822 (1991). Nonetheless, even should the error be constitutional, reversal of a conviction is not necessarily mandated. *State v. Heard and Jones*, 285 N.C. 167,

172, 203 S.E.2d 826, 829 (1974). N.C.G.S. § 15A-1443(b) (1988) provides that if the right affected arises under the Constitution of the United States, a defendant is presumed prejudiced "unless the appellate court finds that [the violation] was harmless beyond a reasonable doubt." The State carries the burden of proving such error was harmless. G.S. § 15A-1443(b). However, if the affected right *does not* arise under the Constitution of the United States, the defendant is prejudiced only "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." G.S. § 15A-1443(a). Concerning such "ordinary" error, the burden of proof resides with the defendant. *Id.* "Aside from the placement of the burden of proof, each standard is substantially equivalent to the other." *Arnold*, 98 N.C. App. at 531, 392 S.E.2d at 149. With these principles in mind, we turn to the question of whether the trial court's error was of constitutional significance.

G.S § 15A-1022(a)(6) is based upon constitutional principles enunciated in *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969) and its progeny. *See* Official Commentary to G.S. § 15A-1022. Under *Boykin*, due process, as established by the Fourteenth Amendment to the United States Constitution, requires that a defendant's guilty plea be made voluntarily, intelligently and understandingly. *Boykin*, 395 U.S. at 244, 23 L.Ed.2d at 280. Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be "entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court . . . ." *Brady v. United States*, 397 U.S. 742, 755, 25 L.Ed.2d 747, 760 (1970) (emphasis added) (quoting *Shelton v. United States*, 242 F.2d 101, 115 (1957)); *see also State v. Mercer*, 84 N.C. App. 623, 627, 353 S.E.2d 682, 684 (1987). "Direct consequences" have been defined as those which have a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005, 38 L.Ed.2d 241 (1973).

While the foregoing definition "should not be applied in a technical, ritualistic manner," *State v. Richardson*, 61 N.C. App. 284, 289, 300 S.E.2d 826, 829 (1983), we are compelled to conclude that a mandatory minimum sentence constitutes a "direct consequence" of a guilty plea. Such sentences comprise one of the few truly "automatic" characteristics of our correctional system; when a mandatory minimum sentence is legislatively prescribed, the trial court *must* impose

an active prison term of at least the minimum duration established. A majority of jurisdictions considering this question appear to view compulsory minimum sentences as direct consequences of a guilty plea. *See* 22 C.J.S. *Criminal Law* § 403, at 476 (1989); *see also* 21 Am. Jur.2d *Criminal Law* § 476, at 771 (1981). This is particularly so in jurisdictions, such as our own, which in response to *Boykin* have adopted criminal procedure statutes mandating certain information be conveyed by the trial court to an accused who is pleading guilty. *See, e.g., United States v. Journet,* 544 F.2d 633, 635-36 (2d Cir. 1976) (construing F.R. Crim. P. 11(c)).

Because the mandatory minimum sentence for drug trafficking was a "direct consequence" of defendant's guilty plea, we must apply the review required by G.S. § 15A-1443(b). As previously noted, the State has the burden of proving the constitutional error was harmless and must do so "beyond a reasonable doubt." G.S. § 15A-1443(b). The State, however, perhaps relying on the provision that "the appellate court" must find the violation harmless under the statutory standard, *id.*, has presented no argument that the failure to advise defendant properly constituted only harmless error. While the State's neglect is cause for concern, we nonetheless conclude the trial court's error was harmless in view of our decision in *State v. Richardson,* 61 N.C. App. 284, 300 S.E.2d 826 (1983).

In *Richardson,* two defendants who pled no contest to armed robbery were not informed of the applicable mandatory minimum sentence of seven years. *Id.* at 286-87, 300 S.E.2d at 827-28. This court nevertheless held the pleas were voluntarily and intelligently made based upon the record which indicated the defendants were informed they would likely receive a 30-40 year sentence and could be sentenced to life imprisonment. *Id.* at 289, 300 S.E.2d at 829.

As in *Richardson,* defendant Bozeman herein faced an analogous mandatory minimum sentence of seven years. Both the Trafficking in Cocaine statute (G.S. § 90-95(h)(6)) and that proscribing Armed Robbery (N.C.G.S. § 14-87(d)) provide that "[s]entences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." *Quoted from* G.S. § 14-87(d). The two provisions differ only in that the former utilizes the phrase "subsection" instead of "section." We have previously ruled G.S. § 14-87(d) does not require consecutive sentencing for two armed robbery offenses disposed of in the same proceeding. *State v. Thomas,* 85 N.C. App. 319, 324, 354

S.E.2d 891, 894 (1987); *State v. Crain*, 73 N.C. App. 269, 271, 326 S.E.2d 120, 122 (1985). Consequently, although defendant was charged with three counts of Trafficking in Cocaine, only a single minimum sentence of seven years was mandated by the identical language of G.S. § 90-95(h)(6).

The remaining facts of the case *sub judice* are also indistinguishable from *Richardson*. In both circumstances, the defendants were accurately informed of substantial potential prison terms. In *Richardson*, defendants were notified they could expect to receive 30-40 years and could receive a life term. Defendant herein was informed he could receive a maximum sentence of 95 years. Based upon the nearly identical circumstances of *Richardson*, we find the decision therein controlling and hold the failure to inform defendant of the applicable mandatory minimum "could not have reasonably affected [defendant's] decision to plead [guilty]," *Richardson*, 61 N.C. App. at 289, 300 S.E.2d at 829; *cf. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (a decision of an earlier panel of the Court of Appeals is binding on a subsequent panel). Accordingly, the trial court's oversight constituted harmless error.

Irrespective of our present holding, we encourage caution by the trial bench in observing the requirements of G.S. § 15A-1022. We acknowledge that in practice it is generally counsel for the State and the defendant who furnish the court sentencing information on transcript of plea forms. As officers of the court, these individuals also have a responsibility to ensure the forms are complete and accurate when submitted to the trial judge.

B.

[2] Defendant also asserts his plea should be set aside because the trial court incorrectly informed him he was facing a $50,000 fine and thereafter assessed total fines of $300,000. We note G.S. § 15A-1022(a) contains no provision requiring a defendant to be informed of any potential fines prior to acceptance of a guilty plea. Nonetheless, defendant argues the discrepancy between the amount of potential fine stated and that actually imposed affected the constitutional voluntariness of his guilty plea.

This Court addressed an analogous situation in *State v. Barnes*, 15 N.C. App. 280, 189 S.E.2d 796 (1972). In *Barnes*, the trial court failed to inform the defendant of any possible fine. As in the case *sub*

judice, defendant Barnes argued the voluntariness of his plea had been affected since as an indigent, "monetary matters were of 'supreme importance' to him . . . ." *Barnes*, 15 N.C. App. at 281, 189 S.E.2d at 796. We rejected Barnes' contentions because no fine was actually imposed, and we observed:

> [I]n view of defendant's knowledge of his own indigency and that he was unable to pay and therefore probably would not pay any fine whatever, no matter in what amount imposed, we think it highly unrealistic to assume that his plea of guilty would have been any more "freely, understandingly and voluntarily made" had he been explicitly and correctly informed by the trial judge that a fine in addition to the prison sentence might be imposed against him.

Barnes, 15 N.C. App. at 281, 189 S.E.2d at 797.

We find the reasoning in *Barnes* equally applicable to the case *sub judice*. The record on appeal indicates defendant was indigent at the time of his plea, but nonetheless tendered it with full knowledge that he faced both a substantial fine ($50,000) and an extended prison term. In view of these circumstances, we cannot conclude the discrepancy between the amount of fine recited by the court and the amount assessed had any effect on defendant's decision to plead guilty. We therefore reject defendant's second basis for asserting his guilty plea was involuntary.

Nonetheless, we observe that a new sentencing hearing is required by our opinion. *See infra*, section II. Upon resentencing, the court must again consider the matter of an appropriate fine in addition to the term imposed. In the interest of justice, we direct that defendant's total fine at resentencing not exceed $50,000. *See* N.C.G.S. § 15A-1363 (1988) (In the interest of justice, the court may "remit or revoke the fine or costs . . . ."). In this fashion, any discrepancy concern will be rendered harmless as a matter of law. We note a similar procedure was endorsed by the Fourth Circuit in *Stader v. Garrison*, 611 F.2d 61, 65 (1979).

II.

[3] Defendant's final contention is addressed to the following statement made by the trial court at the time sentence was imposed:

> Mr. Bozeman, it's bad enough to sell cocaine. . . . But to send a 17-year-old boy out there. I am afraid that makes it so that any

> sympathy I have disappears. I am sure you are familiar with what the Bible says when the accused caused the little ones to go astray. It is better he had a millstone around his neck and be cast into the sea.

Defendant asserts this declaration amounted to an erroneous non-statutory finding in aggravation of sentence. We are constrained to agree.

The gravamen of the trial court's commentary is that the court was unable to sympathize with defendant during sentencing because he had involved a 17-year-old child, coincidentally his son, in the drug transactions. Although the trial court did not explicitly find this as a non-statutory aggravating factor, the court's remarks can only be read as reflecting that this "factor" was indeed considered during sentencing. *See State v. Shaw*, 106 N.C. App. 433, 442, 417 S.E.2d 262, 268, *disc. review denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). Moreover, absence of formal documentation of the finding does not insulate it from appellate review. *Id.*

The Fair Sentencing Act, North Carolina's legislatively enacted sentencing guideline, contains the following statutory aggravating factor: "[t]he defendant involved a person under the age of 16 in the commission of the crime." G.S. § 15A-1340.4(a)(1)(l) (Cum. Supp. 1993). The General Assembly thus has limited application of this factor to situations where the individual implicated by the defendant was "under the age of 16." *See State v. Bethea*, 71 N.C. App. 125, 129-30, 321 S.E.2d 520, 523 (1984) (applying a similar analysis to G.S. § 15A-1340.4(a)(1)(g)). The youth referred to in the case *sub judice* was older than the statutorily prescribed maximum age, and it was therefore error for the trial court to consider the essence of subsection (a)(1)(l) when sentencing defendant.

Because defendant's sentence exceeded the presumptive term, the trial court's error necessitates resentencing. As stated by our Supreme Court, "in *every* case in which it is found that the judge erred in a finding . . . in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) (emphasis added). While the trial court may have been understandably concerned about defendant's involvement of a young person in what the State contended was an extensive criminal enterprise, we must be guided by established law. Accordingly, we remand for resentencing upon defendant's guilty pleas.

Remanded for resentencing with instructions.

Chief Judge ARNOLD and Judge WYNN concur.

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. 9215SC1017

(Filed 2 August 1994)

1. **Insurance § 522 (NCI4th)— insolvency of liability insurer —limitation of action—minimum period set by statute**

The three-year limitation provided in N.C.G.S. § 20-279.21(b)(3)(b) sets out a minimum period of time during which insolvency protection must be afforded and which may be extended by agreement between the insurer and insured, rather than establishing the latest time at which an insured may claim uninsured motorist coverage following insolvency of the tortfeasor's liability carrier.

Am Jur 2d, Automobile Insurance § 319.

2. **Insurance § 522 (NCI4th)— insolvency of liability insurer —uninsured motorist claim—no time specified for filing claim—statutory limit not controlling**

Under an insurance policy providing that a vehicle is uninsured if the liability insurer "is or becomes insolvent" without specifying any period of time, an uninsured motorist claim may not be barred even though the minimum period specified in N.C.G.S. § 20-279.21(b)(3)(b) has elapsed.

Am Jur 2d, Automobile Insurance § 319.

3. **Insurance § 522 (NCI4th)— insolvency of liability insurer —claim for uninsured motorist coverage—accrual of claim**

Plaintiff's claim against defendant for uninsured motorist coverage as a consequence of insolvency of the tortfeasor's insurer accrued on the date tortfeasor's insurer was declared insolvent rather than the date of the accident so that plaintiffs' action com-

menced less than two months after declaration of insolvency was well within the three-year limitation period.

Am Jur 2d, Automobile Insurance § 319.

Appeal by defendant from order signed 20 July 1992 in Alamance County Superior Court by Judge J. Milton Read, Jr. Heard in the Court of Appeals 27 September 1993.

Moore & Van Allen, by Joseph W. Eason, Christopher J. Blake, and Louis S. Watson, Jr., for plaintiff-appellee.

Frazier, Frazier & Mahler, by James D. McKinney and Torin L. Fury, for defendant-appellant.

JOHN, Judge.

In this declaratory judgment action, defendant appeals the trial court's allowance of plaintiff's motion for judgment on the pleadings. We affirm the trial court.

All factual and procedural information necessary to a resolution of defendant's appeal is essentially uncontroverted. On 25 March 1987, Lisa H. Cooke incurred personal injuries when the vehicle driven by her husband, Raymond Cooke, collided with an automobile operated by Curtis B. Vance (Vance). Defendant had previously issued the Cookes an automobile liability insurance policy (the policy) which included uninsured motorist coverage. Interstate Casualty Insurance Company (Interstate) had issued an automobile liability insurance policy to Vance.

On 8 March 1990, the Cookes sued Vance seeking damages as a result of injuries received in the collision. On 9 April 1990, an "Order of Liquidation" was entered in Wake County Superior Court declaring Interstate insolvent. Plaintiff fulfilled its statutory duty under the Insurance Guaranty Association Act (Act), N.C.G.S. § 58-48-1, *et seq.*, by defending Vance in the action filed by the Cookes.

On 31 May 1990, the Cookes amended their complaint to include a claim against defendant under the uninsured motorist provisions of the policy. In its answer, defendant admitted all factual allegations, but denied plaintiffs were entitled to coverage. On 24 January 1992, plaintiff and defendant agreed to settle the Cookes' suit against Vance and defendant by respective payments of $6,000 to the Cookes. Both

plaintiff and defendant reserved the right to seek contribution from the other for the sum each had advanced to the Cookes in settlement.

On 28 February 1992, plaintiff filed the instant declaratory judgment action attempting to recover the amount paid the Cookes. The trial court granted plaintiff's motion for judgment on the pleadings. On appeal, defendant argues the claim asserted by the Cookes against it was barred by the limitation contained in N.C.G.S. § 20-279.21(b)(3)(b) (1993) and by the applicable statute of limitations, and that the trial court therefore erred by allowing plaintiff's motion. We disagree.

Under N.C.R. Civ. P. 12(c) (1990), a party moving for judgment on the pleadings has the burden of showing no material issues of fact exist and that it is entitled to judgment as a matter of law. *Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). All facts and permissible inferences must be viewed in the light most favorable to the nonmoving party. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

I.

According to defendant, because Interstate was declared insolvent more than three years after the automobile collision in question, the provisions of G.S. § 20-279.21(b)(3)(b) operate to bar recovery by the Cookes under the policy issued them by defendant and consequently also bar plaintiff's claim for reimbursement.

G.S. § 20-279.21(b)(3)(b), included within the Financial Responsibility Act (FRA), provides in pertinent part:

> An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

G.S. § 20-279.21(b)(3)(b).

A.

[1] We first consider whether the three-year limitation provided in G.S. § 20-279.21(b)(3)(b) establishes the latest time at which an

insured may claim uninsured motorist coverage following insolvency of the tort feasor's liability carrier (thus barring plaintiff from seeking reimbursement), or rather (as plaintiff contends) sets out a minimum period of time during which insolvency protection must be afforded and which may be extended by agreement between the insurer and insured.

The mandatory coverage of the FRA was enacted to protect innocent victims injured by financially irresponsible motorists. *Insurance Co. v. Chantos*, 293 N.C. 431, 439, 238 S.E.2d 597, 603 (1977). "The provisions of the Financial Responsibility Act are 'written' into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail." *Id.* at 441, 238 S.E.2d at 604. Further, policy provisions that extend coverage, as opposed to those that create exceptions to coverage, are construed to provide coverage "wherever, by reasonable construction, it can be [done]." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 78 N.C. App. 542, 549, 337 S.E.2d 866, 870 (1985), *aff'd*, 318 N.C. 534, 350 S.E.2d 66 (1986).

The statute establishes a required minimum period of time when insolvency protection must be afforded, but, as the unambiguous language of the section reveals, an insurer may afford further protection "under terms and conditions more favorable to the insured." G.S. § 20-279.21(b)(3)(b). Any reasonable construction of this language leads to the inescapable conclusion that while the General Assembly has 1) prescribed the minimum time period within which insolvency protection must be provided, it also 2) has expressly permitted an insurer to include within a policy coverage which extends beyond the mandated minimum term.

B.

[2] We therefore next examine whether defendant agreed to provide more favorable protection to the Cookes than afforded by G.S. § 20-279.21(b)(3)(b). The terms of the insurance policy at issue control this determination, *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 366, 335 S.E.2d 214, 216 (1985), and define an "uninsured motor vehicle" as a "land motor vehicle or trailer of any type: . . . to which a liability bond or policy applies at the time of the accident but the bonding or insuring company: a. denies coverage b. is or becomes insolvent."

Terms of an insurance contract must be given their plain, ordinary, and accepted meaning unless they have acquired some technical meaning or it is apparent another meaning was intended. *Williams v. Insurance Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105, (1967). In addition, policies are to be accorded a reasonable interpretation, and, if not ambiguous, should be construed according to their terms and the ordinary and plain meaning of their language. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 6 N.C. App. 277, 280, 170 S.E.2d 72, 74 (1969), *rev'd on other grounds*, 276 N.C. 348, 172 S.E.2d 518 (1970). If ambiguous, the language of a policy is to be construed strictly against the insurer and liberally in favor of the insured. *Brown v. Insurance Co.*, 35 N.C. App. 256, 259, 241 S.E.2d 87, 88 (1978).

The State Farm policy in the case *sub judice* provides uninsured motorist coverage if the bonding or insuring company which issued a liability bond or policy applicable "at the time of the accident" denies coverage or "is or becomes insolvent." It is undisputed that on 25 March 1987, the date of the collision between the Cookes and Vance, Interstate insured Vance, and that on 9 April 1990, Interstate was declared insolvent.

Defendant contends it afforded no insolvency protection beyond the statutory minimum required by G.S. § 20-279.21(b)(3)(b). Plaintiff responds that the language "is or becomes insolvent" demonstrates defendant agreed to provide coverage in addition to that mandated by the statute. We determine plaintiff's interpretation to be correct.

The phrase "is or becomes insolvent" contemplates two occasions of insolvency. The first, represented by "*is* insolvent," refers to insolvency existing at the time of collision. The second, described by "*becomes* insolvent" refers, as the definition of "becomes" reveals, to insolvency occurring some time following the accident. "Become" is defined as: "to come to exist or occur." Webster's Third International Dictionary 195 (1976).

The policy phraseology "is or becomes insolvent" contains no ambiguity. Further it contains no time limitation. Giving the words a reasonable interpretation based upon their plain and ordinary meaning, *Wachovia Bank & Trust Co.*, 6 N.C. App. at 280, 170 S.E.2d at 74, we therefore conclude defendant by utilizing this wording agreed to furnish coverage beyond the three years mandated in G.S. § 20-279.21(b)(3)(b). Accordingly, we hold that under an insurance policy providing that a vehicle is uninsured if the liability insurer "is or becomes insolvent" without specifying any period of time, an unin-

sured motorist claim may not be barred even though the minimum period specified in G.S. § 20-279.21(b)(3)(b) has elapsed. By including such language, the insurer agreed to afford coverage under terms and conditions more favorable to the insured than required by the statute.

Our holding is consistent with a majority of jurisdictions which have considered this issue. *Utah Property and Casualty Ins. Guar. Ass'n v. United Services Auto. Ass'n*, 281 Cal. Rptr. 917 (Cal. Ct. App. 1991); *Kentucky Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co., 689 S.W.2d 32 (Ky. Ct. App. 1985)*; *Thomas v. American Family Mut. Ins. Co.*, 485 N.W.2d 298 (Iowa 1992); *Government Employees Ins. Co. v. Burak*, 373 So.2d 89 (Fla. Dist. Ct. App. 1979). See generally Alan I. Widiss, Uninsured and Underinsured Motorist Insurance, § 8.16, at 385 (2d ed. 1992), for a discussion of insolvent liability insurance companies and time limits.

In *Kentucky Ins. Guar. Ass'n*, for example, State Farm had issued an automobile liability insurance policy to Donald and Vickie Clark who were involved in a 22 January 1979 collision with D.L. Curry. Curry was insured under a policy issued by Kenilworth Insurance Company (Kenilworth). In April 1982, Kenilworth was declared insolvent. The State Farm policy defined an uninsured motor vehicle as: "A land motor vehicle . . . with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies that there is any coverage thereunder or is or becomes insolvent." The Kentucky Insurance Guaranty Association Act provided in relevant part:

> Protection against an insurer's insolvency shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tortfeasor becomes insolvent within one (1) year after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

Ky. Rev. Stat. Ann. § 304.20-020(3). The Kentucky Court of Appeals concluded that the one-year limitation period defined a minimum period after collision during which uninsured motorist coverage protecting against insolvency of a tortfeasor's insurer must be provided. The court further held, based upon the policy language, that State Farm agreed to provide uninsured motorist coverage more favorable than the statutory minimum.

Additionally, in *Utah Property and Casualty Ins. Guar. Ass'n*, Alice Lopiccolo died on 22 May 1983 when the vehicle driven by her husband struck a stalled tractor-trailer. Mr. & Mrs. Lopiccolo were insured by defendant United Services Automobile Association (USAA) under a policy providing uninsured motorist coverage. An "uninsured motor vehicle" was defined therein to include a vehicle to which insurance applied at the time of the accident, but the insuring company "is or becomes insolvent." Plaintiff Guaranty Association assumed the coverage provided by Enterprise Insurance Company (Enterprise), a Utah insurance company which became insolvent in February 1987. Enterprise had issued an automobile liability insurance policy to the business which employed the driver of the tractor-trailer. California's Insurance Code defined an "uninsured motor vehicle" as a vehicle for which liability insurance has been obtained, but the insurer has become insolvent. Cal. Ins. § 11580.2 (b)(2). Subdivision (b)(2) also stated that "[a]n insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's motor vehicle coverage is in effect where the liability insurer of the tortfeasor becomes insolvent within one year of the accident." The California Court of Appeals held that, the statute notwithstanding, a straightforward reading of the policy issued by USAA led to the conclusion that if insurance was in effect at the time of collision, then the insured vehicle would be covered in the event the insurer became insolvent at some point in the future without time limitation.

II.

[3] In its final argument, defendant maintains plaintiff cannot recover because the Cooke's claim against defendant was barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(1) (1993). The parties agree the section contains the period of limitation applicable to this action. However, the dispositive question is when the statute of limitations began to run. Defendant insists that date is 25 March 1987, when the Cookes were injured. We disagree.

A statute of limitations begins to run when the cause of action accrues. *Insurance Co. v. Rushing*, 36 N.C. App. 226, 228, 243 S.E.2d 420, 422 (1978). A cause of action accrues when the injured party is at liberty to sue. *Id.*

In *Rushing*, plaintiff, the workers' compensation insurance carrier for defendant's employer, mistakenly paid defendant on 30 October

1972 double the amount of compensable recovery she was entitled to receive. On 18 February 1975, the Industrial Commission, as a result of the error, set aside its previous order and reduced defendant's award by half. On 22 June 1976, plaintiff carrier commenced an action seeking recovery of the excess amount paid defendant Rushing. Defendant asserted the three-year statute of limitations as a bar, arguing plaintiff's cause of action accrued 30 October 1972, the date of payment. However, this Court held it was only upon modification of the Industrial Commission award on 18 February 1975 that defendant acquired a legal right to recover the overpayment and was "at liberty to sue." *Id.* at 228, 243 S.E.2d at 422. Therefore, defendant's right of action accrued upon that date. *Id.*

Similarly in the case *sub judice*, the Cookes were not "at liberty" to assert a claim against defendant State Farm for uninsured motorist coverage as a consequence of "insolvency of the tortfeasor's insurer" until 9 April 1990, the date Interstate was declared insolvent. Therefore, the Cookes' cause of action against defendant accrued 9 April 1990, and on that date the statute of limitations set out in G.S. § 1-52(1) began to run. On 31 May 1990, well within the three-year limitation period, the Cookes amended their complaint to include an uninsured motorist coverage claim against defendant. Accordingly, we hold the Cookes' action against defendant was timely filed and that plaintiff is not barred by the statute of limitations contained in G.S. § 1-52(1) from recovering the amount paid the Cookes in settlement of their claim against defendant.

Based on the foregoing, the trial court properly determined plaintiff to have shown no material issues of fact existed and that it was entitled to judgment as a matter of law. The court's allowance of plaintiff's motion for judgment on the pleadings is therefore affirmed.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

STATE OF NORTH CAROLINA v. MARTIN CISNEROS CARRILLO

No. 934SC885

(Filed 2 August 1994)

1. Kidnapping § 16 (NCI4th)— restraint—sufficiency of evidence

Evidence of restraint was sufficient to require submission of a charge of first-degree kidnapping to the jury where it tended to show that defendant grabbed the victim's foot to keep him from escaping from a bedroom, and defendant tied the victim's hands and feet with electrical cord before assaulting him by plugging the cord with bare wires into an outlet.

Am Jur 2d, Abduction and Kidnapping § 32.

2. Kidnapping § 21 (NCI4th)— restraint or confinement—intent to terrorize—sufficiency of evidence

In a first-degree kidnapping case, the State met its burden of presenting substantial evidence that defendant restrained or confined the victim with the intent of terrorizing him where the evidence tended to show that defendant awakened the victim, pulled on his clothes and asked him questions, put a knife or razor under his throat, beat him, grabbed him by the ankle as he forced him into a bedroom, used his knife to peel an electrical cord before using it to bind the victim's hands and feet, plugged the stripped cord into an outlet five separate times, asked the victim repeatedly as to whether he had knifed a friend, once left the room with the victim plugged in, and poured beer over the victim's head while the exposed electrical cord binding the victim was plugged into an outlet.

Am Jur 2d, Abduction and Kidnapping § 32.

Appeal by defendant from judgment entered 11 March 1993 by Judge Ernest Fullwood in Sampson County Superior Court. Heard in the Court of Appeals 13 April 1994.

Defendant Martin Cisneros Carrillo ("defendant") was convicted of both kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury as a result of his attack upon Alberto Martinez ("the victim") on 6 October 1992. Defendant appeals his conviction for kidnapping on several grounds: 1) the trial court erred in

denying his motion to dismiss the charge of first degree kidnapping; and 2) the trial court erroneously instructed the jury on the charge of first degree kidnapping. Additional assignments of error enumerated by defendant were not addressed in defendant's brief and are deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little, for the State.

Nora Henry Hargrove for defendant-appellant.

ORR, Judge.

Defendant and the victim, migrant laborers at the same labor camp, were housemates in a house in Sampson County, along with Juan "Shorty" Colon. On 6 October 1992, the three housemates were drinking at home. At one point, the victim fell asleep and awoke to find defendant pulling at his clothes and holding a knife or razor to his throat, asking him who had cut Shorty.

Defendant next attempted to take the victim into defendant's bedroom. The victim tried to resist by pulling on a mattress used to cover a window in the room. Defendant grabbed the victim's foot to prevent his escape. While the victim was on the floor in defendant's bedroom, defendant used his knife to peel an electrical cord's casing away to expose the bare wire. Defendant tied the victim's feet and hands with the exposed cord and then plugged the cord into an electrical outlet. According to the victim, "he [defendant] had the knife" and therefore the victim was too scared to attempt fleeing. During the course of the next few minutes, defendant plugged the cord in five times, leaving the cord plugged in for minutes at a time. Each time that the cord was plugged in the victim suffered convulsions, shook, and felt hot and burning. Defendant left the room once for a period of minutes while the victim was subjected to the electrical shock. The third time that defendant plugged in the cord he also doused the victim with beer. As defendant was repeatedly shocking the victim he continued questioning the victim, demanding to know who had cut Shorty. Eventually defendant disentangled the victim from the cord and told the victim to leave.

After leaving, the victim found someone to take him to the hospital, where emergency room physician Allan Danbeck examined the victim on the morning of 7 October 1992. Danbeck found large blis-

ters between the victim's fingers and on his right thumb, as well as blisters and redness on his forearms, lower legs, and feet. Danbeck described the electrical burns as "horrifying" and "extremely disfiguring and severe." Danbeck treated the victim, then had the victim transferred to the Chapel Hill Burn Center, where the victim underwent treatment for two months. The victim lost two fingers as a result of the electrical shock.

I. Defendant's Motion to Dismiss Kidnapping Charges.

Defendant's first assignment of error contends that the trial court erred in its refusal to grant defendant's motion to dismiss the charge of first degree kidnapping. According to defendant, there was insufficient evidence to persuade a rational trier of fact of each element of first degree kidnapping beyond a reasonable doubt.

The elements of kidnapping are defined in N.C.G.S. § 14-39:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . ., shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such person for a ransom or as hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing *serious bodily harm to or terrorizing the person so confined*, restrained or removed or any other person.
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C. Gen. Stat. § 14-39 (1993) (emphasis added). The State based its charge of kidnapping upon defendant's alleged confinement of the victim for the purpose of terrorizing him or for the purpose of doing serious bodily harm to him.

Our Supreme Court has explained how courts are to address motions to dismiss: "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C.

95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). The Court explained further that:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Id. at 99, 261 S.E.2d at 117.

A. Restraint

[1] Defendant's first contention is that there was not substantial evidence of restraint of the victim to support the charge of kidnapping. Taking all of the facts presented in the light most favorable to the State, we disagree. The victim testified that defendant pulled him by the foot when he tried to resist being pulled into the bedroom, that he was afraid to try to leave again because defendant was using a knife to trim the electrical cord, and that he was bound by that electrical cord. Defendant himself stated that he tied up the victim in order to electrocute him. This is more than enough evidence from which to draw a reasonable inference that defendant restrained and confined the victim on that night.

Defendant also contends that the restraint essential to the kidnapping charge was an inherent and inevitable feature of the assault with a deadly weapon with intent to kill inflicting serious injury, and that therefore defendant could not be convicted of kidnapping in addition to assault. We note that there are certain felonies, such as forcible rape and armed robbery, which cannot be committed without some restraint of the victim. *State v. Prevette*, 317 N.C. 148, 157, 345 S.E.2d 159, 165 (1986); *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Assault with a deadly weapon with intent to kill inflicting serious injury is not within that class of felonies. Such an assault may be committed without ever necessitating the restraint or confining of the victim—for example the firing of a gun at a victim.

In this case, the restraining of the victim with the electrical cord was not the assault with a deadly weapon. Plugging the cord into the wall outlet was the assault with a deadly weapon, as it was the act by which the victim suffered his severe burns. In addition, even if tying up the victim with the electrical cord were the actual assault, there

was ample evidence of restraining the victim, described above, to support the restraint element of kidnapping.

Furthermore, it is also "well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other." *Fulcher* at 523, 243 S.E.2d at 351-52. The *Fulcher* Court used the example of breaking and entering with intent to commit larceny, followed by the actual larceny. *Id.* at 523-24, 243 S.E.2d at 352. These are two separate and distinct crimes arising out of the same course of action.

In this case, defendant clearly dragged the victim into the bedroom (against the victim's will) and kept the victim in the bedroom (through intimidation—showing the knife while peeling the cord—and through binding the victim's hands and feet with the cord) and only then proceeded to assault the victim by *plugging the cord into the wall outlet.* Plugging the cord into the outlet was not necessary to the restraint of the victim, and it was the proximate cause of the burn injuries to the victim. The electrical burning was the assault. Therefore, we find that the restraint element necessary for the charge of kidnapping is separate and distinct from the elements necessary to the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

B. Terrorizing the victim

[2] Defendant also contends that the State did not meet its burden of presenting substantial evidence that defendant restrained or confined the victim with the intent of terrorizing him. In determining whether the State provided substantial evidence, "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize" the victim. *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986). The facts presented by the State, viewed in the light most favorable to the State, indicate that the State met this burden.

Terrorizing is defined as "more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Moore* at 745, 340 S.E.2d at 405. In the instant case, the evidence showed that defendant had already awakened the victim, pulling on his clothes and asking him questions, then put a knife or razor under his throat, beat him, and grabbed him by the ankle as he forced him into the bedroom. Defendant used his

knife to peel the electrical cord before using the electrical cord to bind the victim's hands and feet. Defendant then plugged the stripped cord into an outlet five separate times, asked the victim repeatedly about Shorty, and once left the room with the victim "plugged in." Finally, defendant poured beer over the victim's head *while the exposed electrical cord binding the victim was plugged into an outlet.* These are clearly the acts of one whose purpose was to place another person in "some high degree of fear, a state of intense fright or apprehension." *Id.* These facts are certainly substantial enough for one to reasonably infer that defendant intended to terrorize the victim. Accordingly, we believe the trial court ruled properly and find no error in the trial court proceeding on the charge of first degree kidnapping.

II. The jury instructions

Defendant next assigns as error the jury instructions on the charge of first degree kidnapping. We disagree with defendant's contentions.

In *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986), our Supreme Court explained that where a theory not supported by the evidence was included as a possible basis to form a verdict, and there was no method by which to determine whether the jury had indeed based its verdict upon the theory erroneously submitted, the trial court committed prejudicial error. Defendant contends that the jury's verdict failed to specify which statutory purpose (doing serious bodily harm or terrorizing) was the basis for its conviction for first degree kidnapping, and therefore may have been based upon a theory not supported by the evidence. However, because we find that there was evidence to support the terrorizing purpose, and because defendant has not asserted that there was insufficient evidence to prove the purpose of doing serious bodily harm, we find no error in the jury's verdict. Either theory could have properly been the basis for the jury's decision. We are fully satisfied that the verdict was based upon a theory properly submitted.

No error.

Judges COZORT and MARTIN concur.

WILLIE RAY BURWELL, PLAINTIFF v. GIANT GENIE CORPORATION, A CORPORATION; JOHN COPPALA, INDIVIDUALLY, AND AS AN AGENT OF GIANT GENIE CORPORATION; AND DAVID MARK TINDALL, INDIVIDUALLY, AND AS AN AGENT OF GIANT GENIE CORPORATION, DEFENDANTS

No. 9326DC630

(Filed 2 August 1994)

1. Assault and Battery § 2 (NCI4th); Principal and Agent § 8 (NCI4th)— battery by store manager—directed verdict for employer error

The trial court erred in directing verdict for defendant grocery store manager as to plaintiff's claim for assault and battery where the evidence tended to show that the manager accused plaintiff of stealing cartons of cigarettes, grabbed plaintiff's arm, and pulled him two aisles down toward the store office. Since defendant manager was acting within the scope of his employment by the corporate defendant, the manager's actions will be imputed to the corporate defendant under the doctrine of respondeat superior.

Am Jur 2d, Agency §§ 73-77, 270; Assault and Battery §§ 198 et seq.

2. Public Officers and Employees § 36 (NCI4th)— off-duty police officer—pat-down of store customer—no immunity for officer

The trial court erred in directing verdict for defendant off-duty police officer on plaintiff's claim for assault and battery where the officer participated in a pat-down search of plaintiff after plaintiff was accused of shoplifting, since defendant failed to plead the defense of qualified immunity, and N.C.G.S. § 14-72.1(c) does not give police officers or merchants the right to conduct pat-down searches of their customers without their consent.

Am Jur 2d, Public Officers and Employees § 373.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 ALR3d 998.

Law enforcement officer's authority, under Federal Consitution's Fourth Amendment, to stop and briefly

detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

3. False Imprisonment § 9 (NCI4th)— pat-down search of store customer—directed verdict for store, store manager, off-duty police officer improper

The trial court erred in directing verdict for defendants, a grocery store, a store manager, and an off-duty police officer, on plaintiff's false imprisonment claim where a reasonable juror could conclude that conducting a pat-down search of plaintiff against his will in plain view of other customers was an unreasonable detention even if the whole incident lasted only five to ten minutes and was for a reasonable length of time. N.C.G.S. § 14-72.1(c).

Am Jur 2d, False Imprisonment §§ 13, 91-25.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 ALR3d 998.

Appeal by plaintiff from judgment signed 2 March 1993 by Judge Marilyn R. Bissell in Mecklenburg County District Court. Heard in the Court of Appeals 22 March 1994.

On 22 May 1990, plaintiff filed suit seeking compensatory and punitive damages for false imprisonment, assault and battery and intentional infliction of emotional distress for forcibly detaining plaintiff against his will and for searching plaintiff without his consent. At the close of plaintiff's evidence, each defendant moved for, and the trial court granted, a directed verdict and dismissed all of plaintiff's claims against each defendant.

Plaintiff's evidence tended to show the following: On 9 January 1990, at approximately 6:00 p.m., plaintiff entered defendant Giant Genie's retail food store located at 5122 Park Road in Charlotte to purchase items for dinner. Plaintiff was accompanied by his wife, his infant son, and his sister-in-law. After browsing through the store and picking up the necessary items, plaintiff and his family proceeded to the check-out line to pay for the groceries. Plaintiff paid the cashier the full amount due, picked up the bagged groceries and started to leave.

Defendant Coppala, the store manager, approached plaintiff and blocked his path out of the cashier's line. Defendant Coppala accused plaintiff of stealing two cartons of Chesterfields brand cigarettes. Plaintiff denied taking any cigarettes and told defendant Coppala that he did not smoke. Defendant Coppala then grabbed plaintiff's arm and pulled plaintiff about two aisles down toward the store office. Plaintiff continued trying to explain that he had not taken any cigarettes from the store.

After defendant Coppala pulled plaintiff toward the store office, defendant Tindall, an off-duty police officer present in the check-out line, approached plaintiff and showed plaintiff his badge. Defendant Tindall told plaintiff, "[Y]ou might as well shut up and be quiet, because you're going to be searched before you leave this store." Defendant Tindall then "told Mr. Coppala—he gave Mr. Coppala a head jester [sic] like this and that's when Mr. Coppala proceeded to search me." Defendant Coppala conducted a "pat down" search of plaintiff. Plaintiff's sister-in-law, Ms. Taiwan Carter, testified that defendant Tindall also participated in the search. No cigarettes were found on plaintiff's person. Defendant Coppala also searched plaintiff's bagged groceries before allowing plaintiff to leave the store. The incident took between five and ten minutes.

Plaintiff appeals from judgment granting a directed verdict.

Sheely & Young, by Michael A. Sheely, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Gregory C. York, for defendant-appellees Giant Genie Corporation and John Coppala.

James H. Carson, Jr. for defendant-appellee Mark Tindall.

EAGLES, Judge.

Plaintiff contends that the trial court erred in granting defendants' motions for directed verdict on plaintiff's claims of false imprisonment and assault and battery. After careful review of the record and briefs, we agree and remand to the trial court for a new trial. Plaintiff has failed to discuss the dismissal of his claim of intentional infliction of emotional distress in his brief and that assignment of error is deemed abandoned. N.C.R. App. P. 28(a).

I.

A defendant's motion for directed verdict tests the legal sufficiency of the plaintiff's evidence to take the case to the jury.

Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977). In determining whether plaintiff's evidence is sufficient to take the case to the jury, "plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor." *Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 62 N.C. App. 419, 422, 303 S.E.2d 332, 334 (1983). If there is more than a scintilla of evidence supporting each element of plaintiff's prima facie case, the motion for directed verdict should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

[1] Plaintiff contends that the trial court erred in granting defendants' motions for directed verdict on plaintiff's assault and battery claim. We agree.

North Carolina follows common law principles governing assault and battery. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Assault and battery are two separate common law actions that "go together like ham and eggs." *McCraken v. Sloan*, 40 N.C. App. 214, 216, 252 S.E.2d 250, 252 (1979). An action for assault protects an individual's interest in freedom from apprehension of a harmful or offensive contact while an action for battery protects an individual's interest in freedom from intentional and unpermitted contacts with his person. *Id.*

Here, plaintiff testified that while he paid for his groceries at the check-out line and began to leave the store, defendant Coppala confronted him and asked, "Where is the Chesterfields? When you came up that aisle right there you had two cartons of Chesterfields cigarettes in your cart. What did you do with them?" Plaintiff replied, "Sir, I don't even smoke. I don't know what you're talking about." Plaintiff testified that defendant Coppala then "just grabbed my arm and then started pulling me this a way." Viewing plaintiff's testimony in the light most favorable to plaintiff, defendant Coppala's actions in grabbing plaintiff's arm and pulling him two aisles down toward the store office constituted an assault and battery upon plaintiff. Since defendant Coppala was employed by defendant Giant Genie as store manager and was acting within the scope of his employment during the incident, defendant Coppala's actions can be imputed to defendant Giant Genie under the doctrine of respondeat superior. *Long v. Eagle Store Co.*, 214 N.C. 146, 198 S.E. 573 (1938). Accordingly, the trial court

erred in directing verdict for defendant Coppala and defendant Giant Genie as to the claims for assault and battery.

[2] Plaintiff contends that defendant Tindall (hereinafter Officer Tindall) also committed an assault and battery upon plaintiff when he participated in the "pat down" search of plaintiff's person with defendant Coppala. We agree. Plaintiff's sister-in-law, Ms. Taiwan Carter, testified that she saw Officer Tindall participate in the "pat down" search of plaintiff.

> Q. Did you ever see Officer Tindall touch [plaintiff]?
>
> A. Yes, I did.
>
> Q. When did he touch him?
>
> A. When he patted him down a little bit later on . . .
>
> . . . .
>
> Q. You're saying Officer Tindall patted him [plaintiff] down?
>
> A. Yes, he did.

Viewing plaintiff's evidence as true, Officer Tindall committed an assault and battery upon plaintiff if he did not have a legal justification for participating in the search. Officer Tindall contends on appeal that as a public officer he is entitled to the defense of qualified immunity. We note, however, that Officer Tindall failed to raise this defense in his pleadings and our review of the record indicates that the trial court never ruled on Officer Tindall's motion at the close of plaintiff's evidence to amend his answer to include qualified immunity as a defense. Qualified immunity is an affirmative defense that must be pleaded by the defendant. *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, (1980) (Since the qualified immunity available to public officials sued under 42 U.S.C. § 1983 is an affirmative defense, the burden of pleading it rests with the defendant); *see* G.S. 1A-1, Rule 8(c) (defendant must plead "any matter constituting an avoidance or affirmative defense"). Ordinarily, the failure to plead an affirmative defense results in a waiver unless the parties agree to try the issue by express or implied consent. *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E.2d 656 (1984). Here, plaintiff strenuously objected to Officer Tindall's motion at the close of plaintiff's evidence to amend the pleadings to allow Officer Tindall to present evidence on the issue of qualified immunity. The trial court never ruled on Officer

Tindall's motion and no evidence was admitted on the issue of qualified immunity. "Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal." *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30 (1981). Accordingly, the issue of qualified immunity is not properly before us.

Officer Tindall also contends that he is protected from liability for the alleged assault and battery by G.S. 14-72.1(c). We disagree. G.S. 14-72.1(c) provides:

> (c) A merchant, or his agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is in a reasonable manner for a reasonable length of time, if in detaining or in causing the arrest of such person, the merchant, or his agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section.

(Emphasis added.) Officer Tindall contends that he had sufficient probable cause to arrest plaintiff under this statute and that he should not be held liable for assault and battery under the statute for conducting a "pat down" search of plaintiff before determining whether to arrest plaintiff. We disagree. G.S. 14-72.1(c) gives police officers, merchants, their employees and their agents the authority to detain or cause the arrest of persons suspected of shoplifting on the merchant's premises and protects them from civil liability for ". . . detention, malicious prosecution, false imprisonment, or false arrest. . . ." G.S. 14-72.1(c). Actions for assault and battery are conspicuously omitted from the statute. We do not read G.S. 14-72.1(c) as giving police officers or merchants the right to conduct "pat down" searches of customers without their consent. Accordingly, we conclude that G.S. 14-72.1(c) does not protect Officer Tindall from civil liability.

In sum, the trial court erred in directing verdict for all defendants on plaintiff's assault and battery claims. Accordingly, we remand to the trial court for a new trial on that issue as to all defendants. We also note that since the trial court did not rule on Officer Tindall's motion to amend his pleadings to assert the qualified immunity defense, defendant may renew his motion without prejudice and the trial court may exercise its full discretion in ruling on the motion to amend.

II.

[3] Plaintiff also contends that the trial court erred in directing verdict for all defendants on plaintiff's false imprisonment claim. After careful examination of the record before us, we agree.

Defendants contend that they are protected from civil liability under G.S. 14-72.1(c), *supra*, which provides that a merchant, his employee or agent or a police officer shall not be held civilly liable for false imprisonment "where such detention is in a reasonable manner for a reasonable length of time" and the person causing the arrest or detention had probable cause to believe that the person was shoplifting on the premises. G.S. 14-72.1(c). We conclude that plaintiff's evidence is sufficient to create a jury question as to whether plaintiff's detention was conducted in a reasonable manner.

First, plaintiff has alleged an assault and battery by Coppala in grabbing plaintiff's arm and moving him two aisles down toward the store office. Second, plaintiff has alleged another assault and battery by defendants Coppala and Tindall upon him in conducting a "pat down" search of plaintiff against his will. We have already discussed, *supra* at I, that defendants are not protected from civil liability under G.S. 14-72.1(c) from actions for assault and battery. Defendants' actions in committing the alleged assault and battery upon plaintiff during his detention create a jury question as to whether plaintiff's detention was reasonable. A reasonable juror could conclude that conducting a "pat down" search of plaintiff against his will in plain view of other customers is an unreasonable detention even if the whole incident only lasted five to ten minutes and was for a reasonable length of time. Accordingly, we conclude that the trial court erred in directing verdict for all defendants on plaintiff's false imprisonment claim and remand to the trial court for a new trial on that issue.

III.

For the reasons stated, we reverse the trial court's judgment granting defendants' motions for directed verdict on plaintiff's assault and battery claims and false imprisonment claims and remand to the trial court for a new trial.

New trial.

Judges MARTIN and McCRODDEN concur.

STATE OF NORTH CAROLINA v. RODNEY RENAA LINEBERGER

No. 9326SC932

(Filed 2 August 1994)

Assault and Battery § 77 (NCI4th)— jury instruction—failure to define assault—new trial

Defendant is entitled to a new trial in a prosecution for assault on a police officer and obstruction of an officer where the trial court failed to provide the jury with the definition of assault.

Am Jur 2d, Assault and Battery §§ 13 et seq., 48 et seq.

Appeal by defendant from judgments entered 18 May 1993 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley, for the State.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by S. Luke Largess, for defendant-appellant.

JOHNSON, Judge.

This action arises out of an incident which occurred on 25 September 1992 on the mall area near the NationsBank Plaza in Charlotte, North Carolina. Defendant Rodney Renaa Lineberger was originally tried in the District Court of Mecklenburg County on 10 November 1992 and was convicted on counts of assault on an officer, and resist, delay and obstruction of an officer. Defendant appealed to superior court.

State's evidence presented at trial tended to show the following: Officer M. C. Hurley of the Charlotte Police Department testified that on 25 September 1992 he was employed in an off-duty capacity to assist in maintaining security on the mall area near the NationsBank Plaza; that he saw defendant talking to the plaza concierge, Elizabeth Edwards; that he approached defendant and "asked him to leave the [concierge] alone" and to leave the premises; that defendant stood there and told Officer Hurley that Officer Hurley was interrupting his conversation; and that Officer Hurley again told defendant to leave the premises and that defendant walked past him, shouldered him and used profane language while telling Officer Hurley to get "out of

his way." Officer Hurley then grabbed defendant's left arm in an attempt to arrest him; defendant grabbed Officer Hurley by the shirt and jammed him up against the side of the building. As the two men struggled, other security personnel came to the scene.

State's witness Sergeant Gary H. Levilee of the Charlotte Police Department was working off-duty and testified that he saw defendant slam a security guard to the ground and that when Sergeant Levilee attempted to restrain defendant, defendant resisted. The State also presented evidence from Gary Turner, who testified that he was employed as a security guard at the NationsBank Plaza on 25 September 1992. Mr. Turner testified that he was at his post in the lobby and that he had a clear, unobstructed view of Officer Hurley as he walked out onto the plaza in the open foyer area; that he saw Officer Hurley approach defendant and Ms. Edwards and that Ms. Edwards was seated at a table having lunch; and that he turned away and when he looked back, he saw defendant push Officer Hurley into a wall. Mr. Turner testified that he used his radio to call for assistance and then attempted to help Officer Hurley by climbing on defendant's back and placing his arm around defendant's head, and that defendant threw him off and slammed him to the ground. Mr. Turner then radioed for more assistance and several officers responded who subdued defendant.

Defendant testified on his own behalf. Defendant testified that he was a spiritual rap music singer; that on a previous occasion he had spoken to Ms. Edwards about performing on the plaza, and that she told him to get her a tape with him performing and that he had given her such a tape; that she told him to come and see her periodically and she would let him know whether he would get the opportunity to perform; that she never told him to not come back to the plaza; and that she never acted in a way that would indicate she was not receptive to him coming around and that she was friendly to him. Defendant further testified that on the day of the incident, he was at the bank with his girlfriend and he saw Ms. Edwards and went out to speak with her about performing and that while they were conversing, Officer Hurley "came up kind of arrogant and rude" and said "you are harassing this lady, and don't be coming down here harassing this lady"; that defendant responded that he and Ms. Edwards were "talking business"; but that as Officer Hurley continued, defendant told Ms. Edwards that he was going to leave. As defendant stepped to leave, Officer Hurley was in his way and they bumped shoulders, and as defendant walked away, Officer Hurley ordered him to stop, which

he did. Officer Hurley then grabbed his shoulder and defendant responded by grabbing Officer Hurley's shoulder and pushing Officer Hurley back toward the wall, and other officers came soon thereafter.

After closing arguments and after the judge charged the jury and the jury went to deliberate, defendant asked for an exception in the record regarding the following portion of the jury charge:

> And I charge for you to find the defendant guilty of assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of his office, the State must prove these things beyond a reasonable doubt.
>
> First, that the defendant assaulted M. C. Hurley by intentionally and without justification or excuse, striking or bumping against him with his shoulder.
>
> Second, that M. C. Hurley was a law enforcement officer and the defendant knew or had reasonable grounds to know that Hurley was a law enforcement officer.
>
> And, third, that when the defendant struck or bumped against Hurley, Hurley was attempting to discharge a duty of his office, to it [sic], ejecting the defendant from the premises in question.
>
> So, then, members of the jury, I charge you that if you find from the evidence beyond a reasonable doubt, the burden being upon the State to so satisfy you, that on or about September 25, 1992, the defendant, Rodney Lineberger, intentionally and without justification or excuse struck or bumped against M. C. Hurley, and that M. C. Hurley was a Charlotte police officer, the defendant knowing or having reasonable grounds to know that Hurley was a police officer and that Hurley was attempting to discharge the duty of his office, to it [sic], ejecting the defendant from the premises in question, then it would be your duty to return a verdict of guilty as charged. However, if you do not so find or have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

The court made no change in the instruction. After the jury had deliberated some time, the jury issued a written inquiry to the court during deliberation asking first, for a definition of "assault," and second, to hear Officer Hurley's testimony again. The court responded to the first request thus:

> Now, members of the jury, you will recall that I instructed you upon the charge of assault upon a law enforcement officer while the officer was discharging or attempting to discharge the duty of his office, that the State is required to prove these things beyond a reasonable doubt.
>
> First, that the defendant, that is to say, Rodney Lineberger, assaulted M. C. Hurley by intentionally and without justification or excuse striking against him or hitting a blow against him with his shoulder.
>
> Second, that Hurley was a law enforcement officer, and the defendant knew it or had reasonable grounds to know it.
>
> Next, that the defendant shouldered against the officer or rubbed against him with his shoulder while the officer was attempting to discharge the duty of his office, to it [sic], attempting to eject the defendant from the premises in question.

Defendant asked again for an exception in the record for the instruction and the court noted the exception. The jury rendered a guilty verdict on both counts and defendant was sentenced to a term of two years for assault on a government officer and a term of six months for resisting and obstructing a public officer. Each sentence was suspended for five years and defendant placed on probation. Defendant has appealed these convictions and sentences to this Court.

Defendant first argues that a new trial should be ordered for his conviction of assault on a police officer because the jury received an erroneous instruction. Specifically, defendant argues that the trial court erred when instructing the jury that it should find defendant guilty of assault if it found that defendant rubbed against the officer with his shoulder while the officer attempted to discharge a duty of his office. We agree.

"In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon." *State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965).

In this case the court used the pattern jury instruction for the crime of assault on a law enforcement officer as set out in the North Carolina Pattern Instructions. The pattern instructions state:

> The defendant has been accused of assault upon [a law enforcement officer] . . . while [the officer] . . . was [discharging] [attempting to discharge] a duty of his office.
>
> (An assault is an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.)
>
> Now I charge that for you to find the defendant guilty of assault upon [a law enforcement officer] . . . while [such officer] . . . was [discharging] [attempting to discharge] a duty of his office, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant assaulted the victim by intentionally (and without justification or excuse) (describe assault).
>
> Second, that the victim was [a law enforcement officer][.] . . . A(n) (state victim's title) is [a law enforcement officer][.] . . .
>
> Third, that the victim was [discharging] [attempting to discharge] a duty of (state victim's title). (Describe duty . . .) is a duty of that office.
>
> And fourth, that the defendant knew or had reasonable grounds to know that the victim was [a law enforcement officer][.]

N.C.P.I., Crim. 208.80. While not mandatory, these instructions serve as a guide for judges on how a jury should be instructed concerning a particular crime. In the case *sub judice*, the key question the jury had to determine was whether defendant had assaulted Officer Hurley when defendant "shouldered" Officer Hurley. Clearly, the jury could not make that determination without a definition of assault. The jury's struggle with this issue was evident when the jury asked the court for a definition of assault. The court repeated its earlier instruction that did not set out the elements of an assault. *See State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967), where our Supreme Court defined an assault as an overt act or show of violence which causes the person assailed reasonably to apprehend immediate bodi-

ly harm or injury so that he engages in a course of conduct which he would not otherwise have followed. *See also State v. McDaniel*, 111 N.C. App. 888, 433 S.E.2d 795 (1993), where our Court reiterated the definition of criminal assault:

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

Id. at 890, 433 S.E.2d at 797.

Therefore, because a definition of assault was necessary for the jury to reach a verdict on the charges herein, we find the omission of the definition of assault was prejudicial error.

In addressing defendant's conviction of resist, delay and obstruction of a public officer, we note that the trial court instructed the jury that if the attempt to arrest defendant was unlawful, defendant would be justified in resisting an unlawful arrest. In that the trial court erred in instructing the jury on the assault charge, the jury could not properly determine if there was an assault, and whether defendant's subsequent resistance was lawful. Accordingly, we find that defendant should also be granted a new trial for his conviction of resist, delay and obstruction of a public officer. We therefore award defendant a new trial as to all charges.

New trial.

Judges ORR and WYNN concur.

ALLISON PATRICE WINTERS, PLAINTIFF v. MARIE C. LEE, DEFENDANT

No. 9326SC404

(Filed 2 August 1994)

Negligence § 18 (NCI4th)— defendant lending vehicle to grandson—plaintiff subsequently assaulted by grandson—no foreseeability alleged—action properly dismissed

The trial court properly dismissed plaintiff's negligence complaint against defendant whose grandson cut plaintiff with a knife

37 times where plaintiff alleged that the grandson was living with defendant at the time of the assault; defendant knew her grandson was "intoxicated," "visibly emotionally disturbed," and "had a history of committing acts of violence" against plaintiff; and defendant provided her grandson the use of her vehicle when she reasonably should have known that he was likely to travel to plaintiff's residence and commit some act of violence upon her; but there was no declaration of any facts supporting any nexus of foreseeability between defendant's act of lending her automobile to her grandson and plaintiff's subsequent injury.

Am Jur 2d, Negligence §§ 502, 503.

Appeal by plaintiff from order entered 14 January 1993 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 February 1994.

Joseph F. Lyles for plaintiff-appellant.

Bailey & Thomas, P.A., by John R. Fonda and Scott O'Neal, for defendant-appellee.

JOHN, Judge.

Plaintiff contends the trial court erred by granting defendant's motion to dismiss under N.C.R. Civ. P. 12(b)(6). We disagree.

Plaintiff's complaint contained the following allegations: on 22 September 1989, Randy Cable (Randy) cut plaintiff with a knife 37 times. Defendant is the grandmother of Randy and at the time of the incident, Randy was living with defendant. Defendant knew Randy was "intoxicated," "visibly emotionally disturbed," and "had a history of committing acts of violence" against plaintiff. Paragraph 11 accuses defendant of the following acts of negligence:

a. The Defendant carelessly and negligently provided Randy . . . the use of her vehicle at a time when she knew or reasonably should have known that he posed a present danger to the person of the Plaintiff.

b. The Defendant carelessly and negligently provided Randy . . . the use of her vehicle at a time when she knew or reasonably should have known that he was likely to travel to the Plaintiff's residence, and commit an assault and battery, or some other act of violence upon the Plaintiff.

Defendant moved to dismiss plaintiff's complaint on grounds it failed to state a claim upon which relief could be granted. N.C.R. Civ. P. 12(b)(6). On 14 January 1993, the trial court granted defendant's motion.

In order to avoid dismissal under Rule 12(b)(6), a party must "state enough to satisfy the substantive elements of at least some legally recognized claim." *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983) (citation omitted). We believe plaintiff's complaint fails to meet this test.

Plaintiff argues her complaint sets forth a cause of action based upon principles of ordinary common law negligence. To establish a *prima facie* case of actionable negligence, a plaintiff must allege facts showing: (1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; (3) defendant's breach was an actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as the result of defendant's breach. *Southerland v. Kapp*, 59 N.C. App. 94, 95, 295 S.E.2d 602, 603 (1982); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30 (5th ed. 1984).

An inherent component of any ordinary negligence claim is *reasonable foreseeability of injury*, which has been discussed by our courts both in terms of the duty owed, *see, e.g., James v. Board of Education*, 60 N.C. App. 642, 648, 300 S.E.2d 21, 24 (1983) and of proximate cause, *see, e.g., Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). In order to plead this element properly, a plaintiff must set out allegations showing that "a man of ordinary prudence would have known that [plaintiff's injury] or some similar injurious result was *reasonably foreseeable* . . . ." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 178 (1992). However, foreseeability "requires only reasonable prevision. A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565.

Plaintiff maintains the foreseeability element of her claim is satisfied by her allegation that defendant provided Randy with the use of her vehicle "at a time when she knew or reasonably should have known that he was likely to travel to the [p]laintiff's residence, and commit an . . . act of violence upon the [p]laintiff." She relies almost exclusively upon the recent case of *Hart v. Ivey* to support this contention.

In *Hart v. Ivey*, plaintiffs suffered injury when their automobile was struck by a drunken driver. They brought suit against defendants who had served alcoholic beverages to the driver, alleging negligence in providing an alcoholic beverage "to a person they knew or should have known was under the influence of alcohol" and who "would shortly thereafter drive an automobile." *Hart*, 332 N.C. at 305, 420 S.E.2d at 178. As in the case *sub judice*, the trial court dismissed the complaint pursuant to Rule 12(b)(6). In holding plaintiffs had stated a claim, our Supreme Court observed that defendants were under a duty to persons who travel on the highways "not to serve alcohol to an intoxicated individual who was known to be driving." *Hart*, 332 N.C. at 305, 420 S.E.2d at 178. The Court further noted that upon these allegations, a jury could find "that a man of ordinary prudence would have known that such or some similar injurious result was reasonably foreseeable . . . ." *Id.*

The *Hart* defendants in effect placed a dangerous instrumentality, a drunken driver, behind the wheel of a motor vehicle. That instrumentality, while operating the vehicle, thereafter crashed into plaintiffs' automobile causing them injury. We agree with the *Hart* court that a person of ordinary prudence would have known that an automobile collision, or some similar injurious result, was foreseeable at the time alcohol was served to the drunken driver.

The case *sub judice* bears similarity to *Hart v. Ivey* in that plaintiff herein claimed defendant had placed a dangerous instrumentality —a driver known by defendant to be intoxicated, emotionally upset, and to have a history of violence towards plaintiff—behind the wheel of a motor vehicle. However, the similarity ends at that point. In *Hart v. Ivey*, the intoxicated driver was alleged to have subsequently injured plaintiffs who were also operating a motor vehicle; as previously indicated, such injuries are foreseeable consequences of placing a drunk driver behind the wheel of an automobile. Here, plaintiff's complaint stated the intoxicated driver (Randy) drove to her home and thereafter attacked her. Thus, unlike *Hart*, the case *sub judice* involves an assault by a driver removed from the defendant's alleged act of placing that driver (drunken or otherwise) on the roadway and also removed from the driver's use of the automobile itself. Under these circumstances, we find two other cases from our Supreme Court more pertinent to the present controversy.

In *Moore v. Crumpton*, 306 N.C. 618, 295 S.E.2d 436 (1982), the Court considered parental liability for a rape committed by defend-

ants' unemancipated son. The trial court had granted the parents' motion for summary judgment. Evidence presented to the court indicated the son was intoxicated when he assaulted plaintiff and had used a knife to facilitate the rape. Further, the son had a long history of undisciplined behavior and defendant father knew that his son: had been involved in drug and alcohol abuse, had engaged in sexual intercourse, and had committed an assault with a deadly weapon at least one year prior to the rape in question. In holding foreseeability lacking, the Supreme Court noted there was no recent information tending to warn the parent that his son might become involved in a rape with the use of a deadly weapon. *Moore*, 306 N.C. at 627, 295 S.E.2d at 442.

In *Toone v. Adams*, 262 N.C. 403, 137 S.E.2d 132 (1964), the Court considered the actions of defendant baseball manager who repeatedly engaged in heated argument with plaintiff umpire during a baseball game attended by 3,452 paying fans. In the ninth inning, plaintiff ejected defendant from the game; before leaving the field, defendant protested for approximately ten minutes. While exiting the field after the game, plaintiff was struck in the head by an angry fan. Plaintiff alleged the defendant baseball club and its manager should reasonably have foreseen that the manager's partisan behavior would result in injury to plaintiff. In dismissing the plaintiff's complaint, the Court noted that "[a]n act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another." *Toone*, 262 N.C. at 409, 137 S.E.2d at 136. In reaching its decision, the Court quoted and relied upon the following rule from *Hiatt v. Ritter*, 223 N.C. 262, 25 S.E.2d 756 (1943):

> "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold [defendants] bound in like manner to guard against what is unusual and unlikely to happen or what, as it is sometimes said, is only remotely and slightly probable."

Hiatt, 223 N.C. at 265, 25 S.E.2d at 758 (quoting *Stone v. Boston & A.R. Co.*, 51 N.E. 1 (Mass. 1898)).

After considering the relevant law, in particular *Toone* and *Moore*, we are persuaded that a person of ordinary prudence, with the knowledge ascribed to defendant in the complaint, would not have anticipated that plaintiff's injury or one similar was likely to occur. In reaching this conclusion, we necessarily focus on defendant's alleged

negligent act, *i.e.*, furnishing her automobile to Randy. Plaintiff asserted only that defendant loaned the vehicle to Randy with awareness he was "intoxicated," "visibly emotionally disturbed," and had a "history of committing acts of violence" against plaintiff. While a motor vehicle collision may be a reasonably foreseeable consequence of such an act, *see Hart*, 332 N.C. at 305, 420 S.E.2d at 178, we do not believe it foreseeable by a person of ordinary prudence that Randy would thereafter drive to a private residence and stab or otherwise assault the occupant. Although it is alleged Randy had a history of committing violent acts against plaintiff, nothing in the complaint suggests this history was in any way associated with the use of a motor vehicle, or indeed with intoxication or being "emotionally disturbed." Further, there is no claim Randy said or did anything which reasonably would have put defendant on notice that Randy was contemplating using the automobile to commit an assault or similar act of violence. Reviewing plaintiff's complaint, one finds no declaration of facts supporting any nexus of foreseeability between defendant's act of lending her automobile to Randy and plaintiff's subsequent injury.

Under these circumstances, plaintiff's complaint fails to allege facts sufficient "to satisfy [one of] the substantive elements," of a claim of common law negligence, *i.e.*, foreseeability. *Hewes v. Johnston*, 61 N.C. App. at 604, 301 S.E.2d at 121. Accordingly, the trial court properly allowed defendant's motion to dismiss.

Affirmed.

Judges WELLS and McCRODDEN concur.

Judge WELLS concurred prior to 30 June 1994.

PATSY M. MISHOE AND LAWRENCE W. MISHOE, PLAINTIFFS v. MICKEY FRANKLIN SIKES, DEFENDANT

No. 9318SC903

(Filed 2 August 1994)

Costs § 30 (NCI4th)— attorney's fee for defending claim and prosecuting counterclaim—award of full amount error

Because defendant was not entitled to recover attorney's fees for defending against plaintiff's claim but was entitled to recover

attorney's fees for prosecuting his counterclaim, and because the amount of attorney's fees sought by defendant represented the cost for defending against plaintiff's claim as well as prosecuting defendant's counterclaim, the trial court necessarily abused its discretion in awarding defendant the full amount of attorney's fees sought. N.C.G.S. § 6-21.1.

Am Jur 2d, Costs §§ 72-86.

Judge COZORT dissenting.

Appeal by plaintiffs from order entered 9 June 1993 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 22 April 1994.

On 23 October 1991, plaintiffs filed a negligence action against defendant for personal injuries and property damage allegedly arising out of an automobile accident that occurred between Patsy M. Mishoe and defendant while Patsy M. Mishoe was driving Lawrence W. Mishoe's automobile on 17 July 1991. Defendant filed an answer denying plaintiffs' allegations of negligence and a counterclaim for property damage in the amount $800.00.

This action came on for trial during the 21 September 1992 jury session of Guilford County Superior Court. Subsequently, the jury was unable to reach a unanimous verdict, and on 30 September 1992, Judge Julius A. Rousseau, Jr. entered an order declaring a mistrial.

This action came on for trial a second time during the 1 March 1993 civil jury term of the Guilford County Superior Court. Prior to this second trial, the parties stipulated that defendant sustained property damage in the amount of $2,582 as a result of the collision. On 5 March 1993, the jury returned a verdict finding that Plaintiff Patsy M. Mishoe was not injured by the negligence of defendant, that the automobile of Plaintiff Lawrence W. Mishoe was not damaged by the negligence of defendant, but that defendant was, however, damaged by the negligence of Plaintiff Patsy M. Mishoe. On 12 March 1993, Judge W. Douglas Albright entered a judgment based on this verdict ordering that defendant recover $2,582 for property damage in his counterclaim and that plaintiffs recover nothing from defendant.

On 26 April 1993, defendant filed a motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 in the amount of $8,673. On 9 June 1993, Judge W. Douglas Albright entered an order granting defend-

ant's motion and ordering plaintiffs to pay defendant $8,673 in attorney's fees.

From this order, plaintiffs appeal.

Wyatt Early Harris Wheeler & Hauser, by Kim R. Bauman, for plaintiff-appellants.

Frazier, Frazier & Mahler, by Torin L. Fury, for defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in awarding defendant $8,673 in attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1.

N.C. Gen. Stat. § 6-21.1 provides:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

"The obvious purpose of [N.C. Gen. Stat. § 6-21.1] is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim." *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973). A party entitled to recover attorney's fees under N.C. Gen. Stat. § 6-21.1 is so entitled based upon his status as "the litigant obtaining a judgment." *See Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991) (holding that defendant is entitled to recover attorney's fees under N.C. Gen. Stat. § 6-21.1 for recovery on a counterclaim).

In the present case, plaintiffs concede that defendant is entitled to recover attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 as a

"litigant obtaining a judgment for damages" based on his recovery for his counterclaim of less than ten thousand dollars; plaintiffs object, however, to the amount of attorney's fees that the trial court awarded. As their basis for this objection, plaintiffs contend that the trial court's award represented not only attorney's fees to which defendant was entitled for prosecuting his counterclaim but also attorney's fees to which defendant was not entitled for defending plaintiffs' claims against him. In support of this contention, plaintiffs cite to defendant's motion for attorney's fees and accompanying exhibit.

In his motion for attorney's fees, defendant stated that prior to the filing of these proceedings, defendant employed Gregory A. Wendling to represent him in exercising his legal rights. Further, defendant stated:

> During Mr. Wendling's representation of Mickey Franklin Sikes in this matter, he consulted with Mickey Franklin Sikes, investigated the accident, made demand for payment, evaluated Mickey Franklin Sikes' position under general legal principles, and filed the necessary action. The fees for Mr. Wendling to both defend the original action and prosecute Mr. Sikes['] [c]ounterclaim are more particularly itemized on the attached Exhibit "A" which is referred to and incorporated herein by reference, which fees totaled Eight Thousand Six Hundred Seventy Three Dollars and 0/100 Cents ($8,673.00)[.]

(Emphasis added.)

Defendant argues, however, that based on the holding in *Mickens*, 103 N.C. App. 52, 404 S.E.2d 359, the trial court did not abuse its discretion in awarding defendant the full amount of attorney's fees. Because we find that *Mickens* does not hold that a trial court may award the full amount of attorney's fees representing the cost of prosecuting the counterclaim as well as the cost for defending against the plaintiff's claim, we disagree.

Mickens involved a negligence action against defendant for damages arising out of an automobile collision. Defendant denied any negligence and counterclaimed for damages. The jury found against plaintiff, awarded defendant $6,000 for "personal injury" and found that defendant was entitled to an award for property damage, which amount was stipulated to by the parties to be $1,500. Subsequently, defendant also sought attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1. Defendant's attorneys put on evidence "tending to show that

they were entitled to a fee of $8000.00 for their work in [the] case", and the trial court awarded defendant $5000.00 in attorney's fees. *Id.* at 59, 404 S.E.2d at 363.

On appeal to this court, plaintiff assigned as error the trial court's award of attorney's fees. This Court stated:

> We . . . reject plaintiff's contention that the legislature did not intend for defendants to be able to collect attorney's fees when they have prevailed on counterclaims for less than the stated amount. We also decline to adopt plaintiff's argument that the trial court was required to make findings of fact allocating the time spent on this case between work required to defend against plaintiff's claim and that required to forward her counterclaim. We see little way for the trial court to have made such a differentiation in this case. Much of the investigation and presentation of evidence necessarily overlapped. Defendant's attorneys presented evidence tending to show that they were entitled to a fee of $8000.00 for their work in this case. The trial court, after "having carefully reviewed the petitioner's hours," awarded $5000.00. There was no abuse of discretion in this award.

Id. at 58-59, 404 S.E.2d at 363.

Thus, in *Mickens*, this Court held that the trial court was not required to make specific findings of fact allocating the time spent on defending against plaintiff's claim and the time spent prosecuting defendant's counterclaim in its award of attorney's fees under N.C. Gen. Stat. § 6-21.1. The trial court in *Mickens* did not, however, award the full amount of attorney's fees sought by defendant's attorneys which represented the cost of both prosecuting defendant's counterclaim and defending against plaintiff's claim. Instead, the court in *Mickens* reduced the amount sought by defendant's attorneys in its discretion from $8000.00 to $5000.00.

Thus, although the trial court was not required to make findings of fact allocating the time spent on defending against plaintiff's claim and the time spent prosecuting defendant's counterclaim in its award of attorney's fees, the holding in *Mickens* does not give the trial court the blanket authority to award attorney's fees in an amount that unquestionably includes the cost for defending against plaintiff's claim. Courts are still bound by the specific language of N.C. Gen. Stat. § 6-21.1 that the party is entitled to an award of attorney's fees based on the party's status as a "litigant obtaining a judgment for damages." Thus, although a trial court is not necessarily required to

make specific findings as to the allocation of time for attorney's fees in its award of attorney's fees under N.C. Gen. Stat. § 6-21.1, the court must still carefully review the attorney's hours and determine the amount of fees to be awarded that represents, in the court's opinion, the legal fees for obtaining a judgment whether from a complaint or a counterclaim.

In the present case, defendant sought attorney's fees in the amount of $8,673 representing the cost "to both defend the original action and prosecute [defendant's] [c]ounterclaim." Unlike the trial court in *Mickens* that reduced the amount of attorney's fees in its discretion, however, the trial court in the present case awarded defendant attorney's fees in the full amount of $8,673. Because defendant is not entitled to recover attorney's fees for defending against plaintiff's claim and because the amount of attorney's fees sought by defendant represented the cost for defending against plaintiff's claim as well as prosecuting defendant's counterclaim, the trial court necessarily abused its discretion in awarding defendant the full amount sought. Accordingly, we reverse the order of the trial court and remand this case for the trial court to determine the amount of attorney's fees to which defendant is entitled, representing the cost for prosecuting defendant's counterclaim.

Reversed and Remanded.

Judge MARTIN concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I find the trial court's award of attorney fees was consistent with our opinion in *Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991), and was within the trial court's discretion. I therefore vote to affirm.

IN RE APPEAL OF BASS INCOME FUND

[115 N.C. App. 703 (1994)]

IN THE MATTER OF: THE APPEAL OF **BASS INCOME FUND** AND **BASS REAL ESTATE FUND III** FROM THE APPRAISAL OF SABAL PARK I AND SABAL PARK II BY THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 9310PTC89

(Filed 2 August 1994)

Notice § 4 (NCI4th)— notice of appeal—postmark affixed by postal meter—notice not filed on postmark date

A notice of appeal to the Property Tax Commission was not considered filed on the postmark date where the postmark was affixed by a postal meter in the office of the taxpayer's representative rather than by the U. S. Postal Service. Therefore, the notice was not filed until it was received by the Commission, and the Commission had no jurisdiction to hear the appeal where it was received after the expiration of the appeal period. N.C.G.S. § 105-290(g).

Am Jur 2d, Notice §§ 5-12, 32-40.

Appeal by taxpayers from order entered 27 October 1992 by Chairman John A. Cocklereece of the North Carolina Property Tax Commission. Heard in the Court of Appeals 1 December 1993.

Moore & Van Allen, by Joseph D. Joyner, Jr. and A. Bailey Nager, for appellant Bass Income Fund and Bass Real Estate Fund III.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade and Paul R. Baynard, for appellee Mecklenburg County.

JOHN, Judge.

Bass Income Fund and Bass Real Estate Fund III (taxpayers) challenge a 27 October 1992 order of the Property Tax Commission (the Commission) dismissing their appeal to the Commission. Upon review, we find taxpayers' arguments unpersuasive.

The essential facts are undisputed. On 23 March 1992, the Mecklenburg County Board of Equalization and Review for 1991 (the Board) entered a property tax assessment order affecting real property owned by taxpayers. On that same date, the Clerk of the Board mailed notice of this action to taxpayers' representative located in

Atlanta, Georgia. The representative thereafter submitted notice of appeal to the Commission by certified mail dated 21 April 1992 and deposited it in a United States Postal Service (Postal Service) mailbox. The envelope containing the notice was stamped with a postal meter postmark in the office of taxpayers' representative, but the Postal Service never affixed its own postmark.

On 23 April 1992, the notice of appeal was received by the Commission via the Postal Service, 31 days after the Board had mailed its notice of decision to taxpayers. The Commission concluded taxpayers' appeal was untimely filed and that it was therefore without jurisdiction to hear the matter. *See* N.C.G.S. § 105-290 (Cum. Supp. 1990) (current version at G.S. § 105-290 (1992)).

The sole issue before us is: *whether a notice of appeal to the Commission is considered filed on the postmark date when the postmark is affixed by a postal meter rather than by the Postal Service.*

We commence with an examination of G.S. § 105-290. The statute first requires that an appeal be *filed* with the Commission within 30 days of mailing by the Board of its notice of decision to the taxpayer. G.S. § 105-290(e). Further, the statute establishes that the date on which a notice of appeal is deemed filed is dependent upon the manner in which it is submitted to the Commission. G.S. § 105-290(g) provides:

> (g) What Constitutes Filing.—[1] A notice of appeal submitted to the Property Tax Commission by a means other than United States mail is considered to be filed on the date it is received in the office of the Commission. [2] A notice of appeal submitted to the Property Tax Commission by United States mail is considered to be filed on the date shown on the *postmark stamped by the United States Postal Service.* [3] If an appeal submitted by United States mail is not postmarked or the postmark does not show the date of mailing, the appeal is considered to be filed on the date it is received in the office of the Commission. A property owner who files an appeal with the Commission has the burden of proving that the appeal is timely.

G.S. § 105-290(g) (emphasis added).

The meaning intended by the General Assembly to be accorded the expression "postmark" in the third sentence of subsection (g)

above is dispositive of the issue herein. We therefore consider whether "postmark" was meant to refer to *any* postmark, or rather to that term as set out in the second sentence, *i.e.*, *"postmark stamped by the United States Postal Service."*

The primary rule of statutory construction is to "ensure that the purpose of the legislature is accomplished." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 191, 420 S.E.2d 124, 128 (1992). In seeking to observe this rule, a court should consider the "nature and purpose of the statute" as well as the consequences which would follow proposed interpretations. *In re Kirkman*, 302 N.C. 164, 167, 273 S.E.2d 712, 715 (1981). In addition, the statute should be read as a whole. "The words and phrases of a statute must be interpreted contextually," and read in a manner which effectuates the legislative purpose. *Id.*

A reading of G.S. § 105-290(g) in its entirety reveals an effort to account for all potential contingencies regarding filing of notices of appeal to the Commission, and an intent that this classification be exhaustive. Under the statutory scheme, a determination of the date upon which a notice of appeal is deemed filed depends upon classification of the notice into one of the legislatively created categories.

The *first* concerns notices of appeal submitted to the Commission other than through the Postal Service. These are considered filed on the date received by the Commission. The *second* deals with notices submitted to the Commission via the Postal Service *and* which carry a postmark stamped by the Postal Service indicating the date of mailing. These are accorded legislative favor and are treated as filed on the postmark date. The *third* legislative category appears to have been designed to encompass those notices submitted through the Postal Service which, for whatever reason, do not display a "postmark" or which bear a postmark not containing a date. These are regarded as filed upon receipt by the Commission.

The statute does not specifically describe the type of "postmark" cited in the final category. However, considered in context with the remainder of the subsection, "postmark" in the third sentence can only be read to refer to the term as used in the second sentence, that is, "postmark stamped by the United States Postal Service." We therefore hold the statute to establish that a notice of appeal submitted to the Commission via the Postal Service, but which does not bear a postmark *stamped by the Service*, is considered filed only upon receipt by the Commission. We further hold that a postmark affixed

by a private individual employing a postal meter, admittedly obtained from the Postal Service, does not under the statute constitute a "postmark stamped *by* the United States Postal Service."

Taxpayers argue that such an interpretation of the statute is hypertechnical, endorses the bureaucratic rigidity they assert is present in the case *sub judice*, and penalizes those entities or individuals which utilize postal meters, intended as office efficiency and automation systems. While these points may be well taken, legislation by the General Assembly is presumed to have a purpose, *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 676, 443 S.E.2d 114, 119 (1994), and it is our duty to apply legislation as written, whatever our opinion may be as to its efficacy or as to the hardship it may impose in individual cases. *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973).

In this context, we observe the statute in question was amended in 1989 to create the "stamped by the United States Postal Service" category as a single exception to the general proviso that notices were deemed filed upon receipt by the Commission. Were we to adopt taxpayers' argument, therefore, it would have the effect of treating those notices of appeal bearing a postal meter postmark, as opposed to a postmark stamped by the Postal Service, in a manner other than provided in the statute. Whatever our sympathies, we "may not, under the guise of judicial interpretation, interpolate provisions which are wanting in the statute and thereupon adjudicate the rights of the parties thereunder." *Simmonds v. Wilder*, 6 N.C. App. 179, 181, 169 S.E.2d 480, 481 (1969). The General Assembly unequivocally granted a favored filing privilege to such notices of appeal as may be postmarked by the Postal Service. It is not for us now to extend such consideration to notices outside this precisely limited category. Had the General Assembly intended this effect, it would have been a simple matter to include the explicit phrase "or by a postal meter issued by the United States Postal Service," or some similar language.

Our holding finds support in decisions from other jurisdictions which have considered this issue, *see, e.g., Upper Allegheny Joint Sanitary Auth. v. Commonwealth*, 567 A.2d 342 (Pa. Commw. Ct. 1989), as well as in reasons of public policy. Postmarks stamped by the Postal Service, for example, are affixed by official individuals independent of the correspondence involved and unaffected by the consequences of accurate dating; postage meters, on the other hand, are easily susceptible to manipulation, either intentional or uninten-

tional, by private, non-postal personnel who may indeed have an interest in the date affixed. *See Roberts v. Houston Fire & Casualty Co.*, 170 So.2d 188, 189 (La. Ct. App. 1964); *see also Albaugh v. State Bank of LaVernia*, 586 S.W.2d 137, 138 (Tex. Ct. App. 1979). Therefore, while the official postmark of the Postal Service may reliably be considered determinative of the date of mailing, the date appearing in a metered postmark is actually no more than the date set in the machine by the operator.

Accordingly, since the notice of appeal at issue contained a postal meter postmark rather than a postmark "stamped by the United States Postal Service," it falls within the third category established by G.S. § 105-290(g) and was not "filed" until received by the Commission. Because taxpayers' notice of appeal was not received by the Commission until after expiration of the 30 day limitation period in G.S. § 105-290(e), therefore, the Commission's determination it was without jurisdiction to entertain taxpayers' appeal is affirmed.

Affirmed.

Judges ORR and LEWIS concur.

STATE OF NORTH CAROLINA v. VICTOR BYRON MOOSE

No. 9318SC455

(Filed 2 August 1994)

Evidence and Witnesses § 1788 (NCI4th)— polygraph evidence excluded—prosecutor's subsequent mention of polygraph—reversible error

The trial court abused its discretion in denying defendant's motion for a mistrial where the assistant district attorney was twice clearly warned by the judge and instructed not to bring up the matter of defendant's having been offered a polygraph examination; the assistant district attorney indicated that he understood; immediately after the initial discussion of the polygraph, the court ruled that it would "sustain defendant's motion at this time"; the prosecutor subsequently asked a prosecution witness if defendant had been offered a polygraph examination; and

because the judge had sustained defendant's motion, the prosecutor's mention of the polygraph constituted reversible error.

Am Jur 2d, Appeal and Error §§ 797-803.

Judge ORR dissenting.

Appeal by defendant from judgment entered 14 January 1993 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 5 January 1994.

Attorney General Michael F. Easley, by Assistant Attorney General David Gordon, for the State.

Assistant Public Defenders Frederick G. Lind and Richard S. Boulden for defendant-appellant.

LEWIS, Judge.

Defendant was indicted, tried and convicted on two counts of felonious incest, two counts of first degree statutory rape, and two counts of taking indecent liberties with a child. He was sentenced to serve two consecutive life terms. From these judgments, defendant appeals.

The indictments arise from acts charged against defendant on two occasions involving defendant's thirteen-year-old stepdaughter. The stepdaughter testified at trial that defendant on both occasions had sexual relations with her. This testimony was corroborated by others to whom the child gave the information. There was also evidence that defendant had involved her in sexual activities for several years.

Before the beginning of trial, defendant moved to exclude any mention of "any polygraph or talk of a polygraph, because at one time there was talk of Mr. Moose taking a polygraph, but it was not administered." The following exchange took place during the hearing on the defendant's motion:

THE COURT: Mr. Carroll [the district attorney], do you want to introduce any evidence about any polygraphs?

MR. CARROLL: Well, under case law, your Honor, I think whether or not he was offered a polygraph would be admissible.

MR. LIND [the defense attorney]: We would object to that, whether he was offered a polygraph. We would say that's not relevant in the case, and we would strenuously object to that, because that's not even—a polygraph would not be admissible in evidence.

THE COURT: Mr. Carroll, if you get near any polygraph mentions, let me know, and we'll do an *in camera* hearing, and I'll rule on it at that time. It could conceivably be admissible, but the chance of prejudice is so great.

MR. CARROLL: I understand.

THE COURT: Warn me before you get to that point.

Thereafter the trial began and on re-direct examination of a prosecution witness, Mr. Carroll asked three questions regarding the prosecuting witness' statements to police and whether or not they were false. The witness answered that she saw no reason to believe the child had falsely reported sexual abuse. The district attorney then asked the following questions:

Q. During the course of the interview, was he offered a polygraph examination?

MR. LIND: Objection. Move to strike.

THE COURT: Sustained.

MR. LIND: Motion for mistrial.

THE COURT: Denied. Motion to strike is allowed. Ladies and gentlemen, disregard anything about any mention of that last question. Go ahead.

No answer was recorded as being given from the witness. The judge refused to grant a mistrial, and defendant urges reversal on the basis that this was an abuse of the judge's discretion. We agree.

It is clear that the law of this state does not mandate reversal upon the mere mention of a polygraph. *State v. Willis*, 109 N.C. App. 184, 426 S.E.2d 471, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 29 (1993). However, here the Assistant District Attorney was twice clearly warned by the judge and instructed not to bring it up without having first consulted the judge and he indicated that he understood. We find the district attorney's subsequent actions to be inexcusable. Certainly all would agree that such a deliberately offensive act would provide grounds for sanctions by the trial judge. Furthermore, imme-

diately after their initial discussion of the polygraph, the court ruled that it would sustain defendant's motion "at this time." Because the judge had sustained defendant's motion, we find that the district attorney's mention of the polygraph constituted reversible error. We conclude that the trial judge abused his discretion in denying the motion for a mistrial. Other matters asserted as issues in this case may not recur on retrial.

Reversed. New trial.

Judge JOHN concurs.

Judge ORR dissents.

Judge ORR dissenting.

Because I disagree with the majority's holding that the trial judge abused his discretion by denying defendant's motion for mistrial, I respectfully dissent.

The State urges us to find that the trial court did not abuse its discretion, correctly stating that "[w]hether a motion for mistrial should be granted is a matter addressed to the sound discretion of the trial judge. A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Harris*, 323 N.C. 112, 125, 371 S.E.2d 689, 697 (1988).

The defendant, on the other hand, bases his argument in large part on the fact that the actions of the prosecutor were in direct violation of the court's order. While such a deliberate act is inexcusable and certainly would provide grounds for appropriate sanctions by the trial judge to the offending attorney, this Court should base its decision on whether the impropriety of the question made it impossible for the defendant to attain a fair and impartial verdict. The mere mention of an offer of polygraph testing does not necessarily require granting a mistrial. "A motion for a mistrial must be granted if an incident occurs of such a nature that a fair and impartial trial would be impossible under the law." *State v. Harding*, 110 N.C. App. 155, 164, 429 S.E.2d 416, 422 (1993). "Absent a showing of abuse of discretion, the decision of the trial court will not be disturbed on appeal." *Id.* Under the facts of this case, I find that the defendant received a fair

and impartial trial in spite of the district attorney's mention of the offer of a polygraph.

Therefore, I would hold that there was no abuse of discretion in denying the motion for a mistrial.

STATE OF NORTH CAROLINA v. RICHARD GEORGE JOHNSTON

No. 9326SC967

(Filed 2 August 1994)

Searches and Seizures § 44 (NCI4th)— defendant avoiding driver's license check—officer's questioning of defendant—constitutionally permissible seizure

Because an officer may approach a person in a public place and ask questions without violating that person's constitutional rights, an officer's encounter with defendant was a constitutionally permissible seizure and the trial court did not err in denying defendant's motion to suppress evidence from that confrontation where the evidence tended to show that defendant turned into a parking lot 200 yards before a license check point and did not get out of his car; the officer approached defendant, asked why he had pulled into the lot, and asked to see defendant's driver's license; defendant could produce no license; the officer conducted a field sobriety test based on the odor of alcohol about defendant; defendant failed the test; and it was only at that point that the officer placed defendant under arrest.

Am Jur 2d, Searches and Seizures §§ 64, 69, 70.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

Search and seizure: "furtive" movement or gesture as justifying police search. 45 ALR3d 581.

Appeal by defendant from judgment signed 20 May 1993 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 1994.

Defendant was convicted of impaired driving, G.S. 20-138.1, and was sentenced to four months imprisonment. From judgment entered, defendant appeals.

On 31 May 1992, North Carolina State Trooper T. L. Ashby conducted a license check at the intersection of Canterwood and Tom Hunter Road. At approximately 4:50 p.m., Trooper Ashby observed defendant's car turn off of Canterwood into the parking lot of an apartment complex. The entrance to the parking lot was approximately 200 yards from the intersection where Trooper Ashby was checking licenses. He observed that defendant remained seated in the parked car for approximately four to five minutes. When asked on direct examination what alerted his attention to defendant's car, Trooper Ashby testified that "[t]he fact that the vehicle pulled off the roadway into the apartment complex, which [sic] you could clearly see the vehicle, and the fact that no one exited that vehicle led me to believe—well, it was uncommon that someone would pull up, just [sic], and turn off just prior to the license check and no one exit the vehicle." Trooper Ashby drove over to defendant's car. As Trooper Ashby got out of his patrol car, defendant stepped out of his (defendant's) car. Trooper Ashby noticed that defendant was "unsteady on his feet." Trooper Ashby walked over to defendant and asked him why he turned off of the road prior to the license check. Defendant responded that he lived at the apartment complex. (This information was later verified as true by Trooper Ashby.)

Trooper Ashby testified that "[a]s we stood there and spoke, I noted a strong odor of alcoholic beverage about his breath . . . . It was basically just light, pleasant conversation at that point. I asked to see his drivers license and informed him as to why I had approached him." Defendant was unable to produce a drivers license. Trooper Ashby testified, "[a]fter I detected the odor of alcohol and no I.D. I simply asked him to step back to my vehicle, so I could verify drivers license information and check further as far as intoxication." Trooper Ashby gave defendant a field sobriety test. First, defendant was unable to recite the alphabet correctly. Trooper Ashby testified that he then gave defendant "a sway test, at which point you ask the person to place both feet together, put their arms freely to the side and put their head back and close their eyes, at which point Mr. Johnston [defendant] swayed pretty much. It was very noticeable." Defendant was then placed under arrest for impaired driving, G.S. 20-138.1, and was advised of his rights. Defendant was taken to the "In-take Cen-

ter." Defendant declined to answer any questions. A breathalyzer test was given to defendant and the result of the test was .13.

A jury trial was held on 19 May 1993. The trial court denied defendant's motion to suppress evidence, G.S. 15A-974, and motion to dismiss at the close of all evidence. The jury found defendant guilty of impaired driving, G.S. 20-138.1.

Attorney General Michael F. Easley, by Associate Attorney General Robert T. Hargett, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Alicia Delaney Brooks and Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

EAGLES, Judge.

Defendant brings forward one assignment of error. Assignments of error 2 and 3 are not brought forward on appeal and are deemed abandoned. N.C.R. App. P. Rule 28(b)(5).

Defendant contends that the trial court erred by denying his motion to suppress evidence pursuant to G.S. 15A-974. After careful review, we find no error.

In order to determine "whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, — U.S. —, 115 L.Ed.2d 389, 401-02 (1991). *See State v. Poindexter*, 104 N.C. App. 260, 265, 409 S.E.2d 614, 616 (1991), *disc. review denied*, 330 N.C. 616, 412 S.E.2d 93 (1992). The scope of appellate review of a ruling upon 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) (citations omitted). An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. *Id.*; *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L.Ed.2d 715 (1971). We note that the

record on appeal contains no findings of fact or conclusions of law by the trial court regarding the denial of defendant's motion to suppress. We further note that nothing in the record indicates that defendant objected at trial to the trial court's failure to make findings or conclusions and that defendant has not assigned error to the absence of such findings or conclusions. No material conflict in the evidence exists here. "Where there is no material conflict in the evidence, findings and conclusions are not necessary even though the better practice is to find facts." *State v. Edwards and State v. Jones*, 85 N.C. App. 145, 148, 354 S.E.2d 344, 347, *disc. review denied*, 320 N.C. 172, 358 S.E.2d 58 (1987) (citation omitted).

It is well established that

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.

Florida v. Royer, 460 U.S. 491, 497-98, 75 L.Ed.2d 229, 236 (1983) (citations omitted). *See also State v. Farmer*, 333 N.C. 172, 186, 424 S.E.2d 120, 128-29 (1993).

Here, the evidence shows that after defendant got out of his car and appeared unsteady, Trooper Ashby asked defendant why he turned off of the road prior to the license check and for his drivers license. "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick*, —- U.S. —-, 115 L.Ed.2d at 398. At this point, there was no evidence of coercion or detention. " 'Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment.' " *State v. Thomas*, 81 N.C. App. 200, 205, 343 S.E.2d 588, 591, *disc. review denied*, 318 N.C. 287, 347 S.E.2d 469 (1986) (citation omitted).

Defendant voluntarily answered Trooper Ashby's question by responding that he could not produce his license. "[A drivers] license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle." G.S. 20-7(n). *See* G.S. 20-7(a). Failure to

carry one's license at all times while engaged in the operation of a motor vehicle is a misdemeanor. G.S. 20-35. *See also* G.S. 20-29. Accordingly, Trooper Ashby had sufficient probable cause at that time to place defendant under arrest. *State v. Hudson*, 103 N.C. App. 708, 716, 407 S.E.2d 583, 587 (1991), *disc. review denied*, 330 N.C. 615, 412 S.E.2d 91 (1992); *see also U.S. v. Dixon*, 729 F. Supp. 1113, 1116 (W.D.N.C. 1990).

While Trooper Ashby could have placed defendant under arrest at this time, he merely chose to ask defendant to step back to the patrol car so that he could check defendant's license information and so that he could further investigate defendant's intoxication based upon defendant's unsteady movements and the smell of alcohol noticed during the course of the conversation. Only after defendant failed the field sobriety tests was he placed under arrest and advised of his rights. We conclude that the seizure was constitutionally permissible and that the trial court's decision to deny defendant's motion to suppress was supported by the evidence. *See State v. Badgett*, 82 N.C. App. 270, 346 S.E.2d 281 (1986).

For the reasons stated, we find no error.

No error.

Judges COZORT and LEWIS concur.

JOAN FELTS, ADMINISTRATOR OF THE ESTATE OF MICHAEL DAVID MOORE, PLAINTIFF v. CHARLES RICHARD HOSKINS AND HOSKINS FARMS, INC., DEFENDANTS

No. 9321SC607

(Filed 2 August 1994)

Principal and Agent § 45 (NCI4th)— automobile accident— driver not acting within scope of his employment

In an action to recover for injuries arising out of an automobile accident, the trial court properly entered summary judgment for defendant farm where the evidence established that the individual defendant was not acting within the scope of his employment with defendant farm at the time the accident occurred.

Am Jur 2d, Agency §§ 73-77, 270, 362, 363.

Appeal by plaintiff from order entered 16 December 1992 by Judge James A. Beaty, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 21 March 1994.

Bennett & Blancato, by William A. Blancato, for plaintiff appellant.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., and Denis E. Jacobson, for defendant appellee.

COZORT, Judge.

Plaintiff appeals the entry of summary judgment in defendant Hoskins Farms, Inc.'s favor on the ground that defendant Charles Richard Hoskins was not acting as the farm's agent at the time of the alleged negligent act which is the basis for this action. We affirm.

This action was filed on behalf of Michael David Moore to recover damages for his wrongful death when he was killed in an automobile collision. An identical action was filed seeking damages for the wrongful death of Randel Scott Felts, who was Moore's stepbrother and who was driving the vehicle in which Moore was riding when he was killed. The accident occurred on 4 February 1992 on Route 65 near Walkertown, North Carolina, when a trailer attached to a pickup truck driven by Charles Hoskins came loose, crossed the centerline, and collided with Felts' Ford Escort.

Plaintiff sued both Hoskins, the driver of the truck, and Hoskins Farms, Inc., where defendant Hoskins held the office of vice president. Plaintiff alleged that defendant Hoskins was the agent or employee of Hoskins Farms, Inc., at the time of the accident. Defendant Hoskins Farms, Inc., moved for summary judgment.

Evidence before the trial court for summary judgment purposes indicated the trailer hitch was inadequate to hold the trailer to the towing vehicle. Defendant Hoskins was transporting a Black Angus steer to the slaughterhouse at the time of the accident. Defendant Hoskins stated in his deposition that the beef was to be used for his personal consumption and was not for the benefit of Hoskins Farms, Inc. (Hoskins Farms). Hoskins Farms is a corporation owning four tracts of land totaling approximately 600 acres. Defendant Hoskins is the vice president and a shareholder of defendant Hoskins Farms. He manages the farm property along with his sisters, who are also shareholders. The land owned by Hoskins Farms is leased to a tenant who conducts the farming operations. The tenants who rented the land at

the time of the accident grew wheat and tobacco; they did not raise livestock. Defendant Hoskins owns his own farm where he raises cattle. He admitted that his cattle, including the steer he was transporting at the time of the accident, grazed partially on land owned by the corporation.

Defendant Hoskins testified that the 1968 Ford truck he had been driving at the time of the accident had been purchased a month earlier to replace another truck which was owned and registered in the name of Hoskins Farms. The truck being replaced was covered by a corporate insurance policy; however, the truck involved in the accident was registered to defendant Hoskins individually and covered by his personal insurance. Defendant Hoskins acknowledged that, when the responding officer arrived at the scene, he mistakenly had given the name of the corporation's insurance company, rather than his own, as the insurer of the vehicle. Defendant Hoskins also testified that the trailer attached to the truck was not registered. He had purchased the trailer himself years prior to the date of the accident. The trailer was stored on farm property owned by the corporation when not in use.

Based on the evidence presented, the trial court granted Hoskins Farms' motion for summary judgment on the ground that defendant Hoskins was not acting as an agent or servant of the farm at the time of the accident. Following entry of that order, plaintiff and defendant Hoskins reached a settlement of the claims between them, and a notice of dismissal with prejudice was filed on 8 April 1993 reflecting such agreement. Plaintiff thereupon filed notice of appeal from the final judgment on 14 April 1993.

The sole question presented on appeal is whether the trial court erred by granting Hoskins Farms' motion for summary judgment based on a finding that defendant Hoskins was not acting on behalf of the corporation at the time of the accident. Our standard of reviewing the entry of summary judgment is whether the pleadings, depositions, answers to interrogatories, along with other discovery material and any affidavits, show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Meadows v. Cigar Supply Co.*, 91 N.C. App. 404, 371 S.E.2d 765 (1988).

A principal is liable for torts of his agent when the agent commits a negligent act within the scope of the agent's employment and in furtherance of the principal's business. *Hogan v. Forsyth Country Club*

Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140, *disc. review denied*, 346 S.E.2d 141 (1986). Plaintiff argues that the insurance information given to the police officer at the accident scene, defendant Hoskins' purpose for using the truck, and credibility questions concerning defendant Hoskins' testimony "raise a strong inference that he was acting on behalf of the farm and that the farm benefitted from his activities." We disagree.

Contrary to plaintiff's assertion, the evidence, taken in the light most favorable to plaintiff, establishes that defendant Hoskins was not acting within the scope of his employment at the time the accident occurred. The pickup truck and trailer involved in the accident were owned by defendant Hoskins, not Hoskins Farms. At the time of the collision, defendant Hoskins was transporting a steer to a slaughterhouse in Walnut Cove, North Carolina. He testified the meat from the steer was to be used for his family's consumption and not for use by Hoskins Farms. The corporation itself does not engage in raising livestock; instead it rents the land to tenants who also do not raise livestock. Plaintiff has not presented any evidence to demonstrate how Hoskins Farm benefited from the trip to the slaughterhouse. Plaintiff simply fails to show defendant Hoskins was on corporate, rather than personal, business at the time of the collision. Accordingly, no vicarious liability will lie with respect to defendant Hoskins Farms. The trial court properly granted defendant Hoskins Farms' motion for summary judgment. The trial court's order is thus

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

DELLA D. BAXLEY, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9416SC110

(Filed 2 August 1994)

Insurance § 690 (NCI4th)— UIM coverage—limit of liability met by defendant—plaintiff not entitled to prejudgment interest

Where defendant UIM carrier's limit of liability was $75,000, representing the difference between the limit of liability listed in

the declarations, $100,000, and the amount paid by the tortfeasor's liability carrier, $25,000, and defendant paid plaintiff $65,000, and later $10,000, defendant compensated plaintiff for her damages up to the limit of its liability, and defendant could not be required to pay any more as prejudgment interest, which the North Carolina Supreme Court held was included within the term "damages" in defendant's policy.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Appeal by defendant from judgment entered 29 November 1993 by Judge D. Jack Hooks, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 6 June 1994.

Baker and Jones, P.A., by H. Mitchell Baker, III, for plaintiff-appellee.

Ragsdale, Liggett & Foley, by Peter M. Foley, for defendant-appellant.

EAGLES, Judge.

This case returns to this Court after remand to the trial court by our Supreme Court. *See Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993).

Briefly summarized, the facts are as follows:

Plaintiff, having underinsured motorist coverage (UIM) in the amount of $100,000 per person and medical payments coverage in the amount of $10,000 through defendant, Nationwide Mutual Insurance Company (Nationwide), obtained a judgment awarding her compensatory damages in the amount of $100,000 in a negligence action against the driver of a vehicle which hit a vehicle in which plaintiff was a passenger. Nationwide deposited the sum of $25,000, representing the limits of the tortfeasor's automobile liability insurance carrier, with the clerk of superior court, and paid plaintiff the additional sum of $65,000 under the UIM coverage of Nationwide's policy. Nationwide also paid plaintiff the sum of $10,000 under the medical payments coverage of its policy. Nationwide subsequently received

$25,000 from the tortfeasor's liability insurance carrier. Plaintiff filed a declaratory judgment action seeking to determine: (1) whether Nationwide was entitled to a credit of $10,000 against the UIM coverage for the $10,000 it paid under the medical payments coverage; and (2) whether Nationwide was liable for court costs, including prejudgment interest, in the original action. Our Supreme Court ultimately held (1) that Nationwide was not entitled to a credit for the payments it made under the medical payments coverage, *Id.* at 14, 430 S.E.2d at 903 and (2) that Nationwide was liable for payment of prejudgment interest "up to, but not in excess of, its UIM policy limits." *Id.* at 11, 430 S.E.2d at 901.

Following the Supreme Court's decision, Nationwide paid an additional $10,000, representing the amount for which it had claimed a credit, to plaintiff on 3 September 1993. Nationwide refused to pay any prejudgment interest on the ground the $10,000 payment exhausted its UIM limits. Plaintiff then filed a motion on 30 September 1993 seeking an order directing Nationwide to pay prejudgment interest in the amount of $11,633.97. The trial court granted plaintiff's motion and entered judgment requiring Nationwide to pay the foregoing sum as prejudgment interest. From this judgment Nationwide now appeals.

Nationwide contends that it is not liable for prejudgment interest because it has exhausted the limits of its liability under the UIM coverage of its policy. Plaintiff, on the other hand, contends that Nationwide has not exhausted the limit of its liability because Nationwide received $25,000 from the tortfeasor's liability carrier, and consequently has actually paid only $75,000 of its $100,000 limit under the policy. Resolution of this appeal is therefore dependent upon a determination of the limits of Nationwide's liability.

In examining the policy at hand, we find an UIM endorsement which limits Nationwide's liability as follows:

> The most we will pay under this coverage is the lesser of the amount by which the:
>
> a. limit of liability for this coverage; or
>
> b. damages sustained by the covered person for bodily injury;
>
> exceeds the amount paid under all bodily injury liability bonds and insurance policies applicable to the **covered person's** bodily injury.

In addition, when a statute applies to the terms of an insurance policy, the provisions of the statute become terms of the policy to the same extent as if they were written in the policy, and if the terms of the policy conflict with the statute, the provisions of the statute control. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The applicable statute in this case is N.C. Gen. Stat. § 20-279.21(b)(4), which provides:

> [T]he limit of underinsured motorist coverage applicable to any claim is determined to be **the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.** (Emphasis added).

It is therefore clear from the foregoing that Nationwide's limit of liability is the amount by which the limit of UIM coverage listed in the declarations exceeds the amount paid to Nationwide's insured by the tortfeasor's liability carrier. See *Davidson v. U.S. Fidelity & Guar. Co.*, 78 N.C. App. 140, 336 S.E.2d 709 (1985). Thus, in this case Nationwide's limit of liability is $75,000, representing the difference between the limit of liability listed in the declarations, $100,000 and the amount paid by Allstate, the tortfeasor's liability carrier, $25,000. By paying $65,000 and later paying $10,000 on 3 September 1993, Nationwide paid the full limit of its liability. Having compensated plaintiff for her damages up to the limit of its liability, Nationwide cannot be required to pay any more as prejudgment interest, which our Supreme Court held is included within the term "damages" in Nationwide's policy. *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 11, 430 S.E.2d 894, 901. Indeed, the Supreme Court recognized that Nationwide would meet its liability by making the $10,000 payment by stating with reference to the credit issue: "If it is entitled to a credit on the UIM payments for this $10,000 payment, Nationwide will be deemed to have paid $100,000 under its UIM coverage. If it is not entitled to a credit, then $10,000 of UIM coverage remains." *Id.* at 12, 430 S.E.2d at 902.

For the foregoing reasons, we reverse the judgment of the court below and remand for the entry of a judgment consistent with this opinion.

Reversed and remanded.

Judges ORR and LEWIS concur.

EVA FITCH, PETITIONER v. EDWARD FITCH, RESPONDENT

No. 9326DC1153

(Filed 2 August 1994)

Divorce and Separation § 417 (NCI4th)— child support arrearage—reducing to judgment—emancipation of child irrelevant

There was no merit to respondent's contention that the trial court lacked subject matter jurisdiction over petitioner's motion in the cause alleging that respondent was in arrears on his child support obligation and requesting that a child support lien be attached to his real estate, even though the minor child had become emancipated, since a trial court may determine the amounts owed by an obligor under a child support order, enter its final judgment for the total properly due, and execution may issue thereon.

Am Jur 2d, Divorce and Separation §§ 1056 et seq.

Power of divorce court, after child attained majority, to enforce by contempt proceedings payment of arrears of child support. 32 ALR3d 888.

Appeal by respondent from judgment entered 5 August 1993 by Judge Fritz Y. Mercer, Jr. in Mecklenburg County District Court. Heard in the Court of Appeals 25 July 1994.

On 18 April 1991 the trial court entered an order requiring respondent to pay child support pursuant to an action filed under the Uniform Reciprocal Enforcement of Support Act. The trial court directed respondent to pay $433.00 per month commencing 1 August 1991 for the ongoing support of one minor child, Edward Fitch.

Petitioner filed a Motion in the Cause on 11 March 1993 alleging that respondent was $8,410.00 in arrears on his child support obligation. She further alleged that the minor child was emancipated in

March of 1993. Petitioner requested, pursuant to N.C. Gen. Stat. § 50-13.4(f)(8) (Cum. Supp. 1993), that the trial court order respondent to appear and show cause why a child support lien should not be attached to respondent's real estate.

The trial court granted petitioner's motion and heard the matter on 22 July 1993. After finding that $250.00 in bond money had been applied to the arrearages, the trial court found respondent to be $8,160.00 in arrears. The trial court concluded that respondent's failure to comply was willful and without just cause or excuse, then declared the arrearages a specific lien against respondent's interest in real estate. From the trial court's judgment, respondent appeals.

Schultze and Tomchin, P.A., by Michael F. Schultze, for petitioner-appellee.

Edward Fitch, respondent-appellant, pro se.

LEWIS, Judge.

In this appeal respondent contends that: (1) the trial court lacked subject matter jurisdiction because his children are no longer minors; and (2) the trial court's amendment of the earlier support order was not timely. These arguments are without merit.

Respondent first argues that the trial court lacked subject matter jurisdiction to conduct a hearing on petitioner's motion in the cause because neither of his children is a minor. The support order entered 18 April 1991 only provided support for the benefit of one minor child, Edward Fitch. While the trial court found that Edward was emancipated in March of 1993, thereby ending respondent's legal obligation as a parent to support this child, we note that "[a] court nevertheless continues to have authority to compel a parent to provide that support due before emancipation, so long as the action is not barred by the statute of limitations." *Griffith v. Griffith*, 38 N.C. App. 25, 27, 247 S.E.2d 30, 32, *disc. review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).

A judgment or order awarding child support directs the payment of money, generally in future installments. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977). Absent a provision in the child support decree itself which renders it a specific lien upon the obligor's property, any arrearages in those periodic payments must be reduced to judgment by a judicial determination before enforceable by execution. *Id.* at 203, 237 S.E.2d at 563. "[P]ast due periodic pay-

ments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments." N.C. Gen. Stat. § 50-13.4(f)(8) (Cum. Supp. 1993). When the obligor under a child support judgment or order is in arrears, the trial court may, "upon motion in the cause, judicially determine the amount then properly due and enter its final judgment for the total then properly due, and execution may issue thereon." *Lindsey*, 34 N.C. App. at 203, 237 S.E.2d at 563. Any past due child support payments which became due more than ten years prior to the filing of a motion in the cause are barred by the ten year limitation of N.C. Gen. Stat. § 1-47 (1983). *Id.*

In the case *sub judice* the trial court conducted a hearing on petitioner's motion in the cause and found that the 18 April 1991 child support order directed respondent to make monthly payments of $433.00 for the minor child Edward. After finding that Edward was emancipated in March of 1993 the trial court determined that respondent's total arrearages were $8,160.00. Since all of respondent's past due child support payments became due within two years of petitioner's motion in the cause, none of those payments was barred by the ten-year statute of limitation. Having judicially determined the amount properly due, the trial court did not err in entering its judgment for arrearages in the amount of $8,160.00 and declaring it a specific lien on respondent's real estate described in the judgment.

Respondent's second argument, that petitioner's motion in the cause to amend the 1991 support order was untimely, is meritless. Respondent misapprehends the nature of the trial court's judgment and argues that petitioner's action was not brought within a reasonable time under N.C.R. Civ. P. 60(b). The trial court did not amend the 1991 child support order; it reduced the past due child support payments to judgment. Rule 60(b) is inapplicable.

Respondent's final argument is not supported by an assignment of error. Rule 10 of the North Carolina Rules of Appellate Procedure provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal. . . ." N.C.R. App. P. 10(a). Although respondent's argument failed to comply with this rule, we nonetheless considered the argument and find it to be meritless. The judgment of the trial court is affirmed.

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. CORY GRANT MAYFIELD, DEFENDANT

No. 9410SC120

(Filed 2 August 1994)

Constitutional Law § 318 (NCI4th)— Anders brief—defendant not given documents to review—attorney unable to locate defendant—appeal permitted

Review of this case pursuant to an *Anders* brief submitted by defendant's attorney was permitted even though defendant had not been given the necessary documents to conduct his own review of the case, since delivery of the necessary documents to defendant was not required where defendant's attorney, after a diligent effort, was unable to locate defendant and deliver the documents to him.

Am Jur 2d, Criminal Law §§ 752, 985-987.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR4th 582.

Appeal by defendant from judgment entered 17 December 1992 by Judge F. Gordon Battle in Wake County Superior Court. Heard in the Court of Appeals 18 July 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Mary Jill Ledford, for the State.

John T. Hall for defendant-appellant.

GREENE, Judge.

Defendant's appeal involves three cases. On 28 July 1992 defendant entered a plea of no contest to the offense of breaking and entering in Wilson County Case No. 91 CRS 9541. Defendant was sentenced to ten years imprisonment, suspended, and five years supervised probation. Probation was transferred to Wake County and was assigned Wake County Case No. 92 CRS 92670. In Wake County Case No. 91 CRS 74187, defendant entered a plea of guilty to the offense of possession of stolen property. On 19 August 1992, pursuant to a plea arrangement, defendant was sentenced to five years imprisonment, suspended, with three years supervised probation.

On 17 December 1992 defendant entered a plea of guilty to breaking and entering and larceny in Wake County Case No. 92 CRS 76921 and was sentenced to five years imprisonment pursuant to a plea arrangement. At the time of the third sentencing on 18 December 1992, the probationary sentences in the two earlier cases were revoked. Defendant was ordered to begin serving his sentences on 28 December 1992. On 23 December 1992 defendant gave notice of appeal from the conviction in Case No. 92 CRS 76921, and the revocation of probation in Case Nos. 92 CRS 92670 and 91 CRS 74187.

Counsel for defendant filed a brief with this Court stating that he was "unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal . . . [and requesting this Court] to review the record and to conduct a full examination for prejudicial error and to grant the appropriate relief, if any, to which the defendant may be entitled." In the brief the attorney acknowledged that he had not sent to the defendant "a copy of the transcript of the hearing, a copy of the Brief or notice to the defendant that he is entitled to submit a brief." Counsel for defendant states that he has made reasonable efforts to locate the defendant and has been unable to do so. Specifically, he states in his brief that there is currently an outstanding warrant for defendant's arrest issued upon his failure to report for the beginning of his sentence on 28 December 1992; mail sent to defendant's last known address has been returned; inquiry with the U.S. Postal Service reveals that defendant no longer resides at his last known address, and that he has provided no forwarding address; and repeated inquiries made with the North Carolina Department of Corrections reveal that defendant is not in custody in this State.

The issue presented is whether review of this case is permitted even though the defendant has not been given the necessary documents to conduct his own review of the case.

An attorney for a criminal defendant who believes that his client's appeal is without merit is permitted to file what has become known as an *Anders* brief. *See Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967). As a general rule, the defendant must be given "the necessary documents to conduct his own review of the case," *State v. Bennett*, 102 N.C. App. 797, 800, 404 S.E.2d 4, 5 (1991); *see State v. Kinch*, 314 N.C. 99, 102, 331 S.E.2d 665, 667 (1985) (counsel provided defendant with a copy of counsel's brief, the record, the transcript, and the State's brief), and

"time . . . to raise any points [with the appellate court] that he chooses." *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. However, delivery of the necessary documents to the defendant is not required if the defendant's attorney has, after a diligent effort, been unable to locate the defendant and deliver the documents. *See Peacock v. State*, 404 So. 2d 1059 (Fla. 1981) (where notification to defendant was returned marked "return to sender," the record was nonetheless ripe for consideration); *People v. Goodman*, 318 N.E.2d 635 (Ill. App. 1974) (where the notice to the defendant of his opportunity to provide a brief on his own behalf was returned marked "address unknown," the appeal was nonetheless ripe for appellate review).

In this case, defendant's attorney has used all due diligence in attempting to notify defendant of his right to pursue his appeal *pro se*, and the fault of counsel's failure to so notify defendant must lie with defendant. Accordingly, defendant's counsel has fully complied with the holding in *Anders*, and the appeal is ripe for appellate review upon the record and briefs before us.

Pursuant to *Anders* and *Kinch*, we have conducted a full examination of all the proceedings in this case, and determine that this appeal is wholly frivolous.

No error.

Chief Judge ARNOLD and Judge MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 AUGUST 1994

ALLEN v. DISTRICT MEMORIAL HOSP. No. 9430SC270	Cherokee (92CVS231)	Reversed & Remanded
BARNES v. HUMANA OF N.C. No. 9318SC827	Guilford (90CVS09537)	Affirmed
COLE v. BD. OF GOVERNORS OF UNC No. 9314SC1115	Durham (91CVS01866)	Affirmed
CONLEY v. NEILL No. 9427DC122	Lincoln (93CVD416)	Affirmed in part; vacated & remanded in part
DAVIS v. JOYCE No. 9322SC627	Davie (92CVS469)	Affirmed
DAVIS v. PUBLIC SCHOOLS OF ROBESON COUNTY No. 9316SC803	Robeson (93CVS894)	Affirmed
FELTS v. HOSKINS No. 9321SC608	Forsyth (92CVS2798)	Affirmed
GAUNT v. KNIGHT PUBLISHING CO. No. 9326SC1051 No. 9426SC104	Mecklenburg (91CVS1504) (91CVS9645)	Dismissed
H & W TRUCKING v. WARREN TRUCKING No. 9425DC137	Catawba (92CVD163)	Affirmed
HENDERSON v. LEBAUER No. 9418SC96	Guilford (88CVS7169)	Affirmed
HENSLEY v. NATIONWIDE MUTUAL INS. CO. No. 9327SC1285	Gaston (91CVS3269)	Reversed & Remanded
HUGHES v. HUGHES No. 932DC940	Buncombe (92CVD1798)	Affirmed in part and vacated in part
IN RE APPEAL OF CAROLINA PLACE ASSOC. No. 9310PTC92	Prop. Tax Comm. (92PTC175)	Affirmed
IN RE APPEAL OF CHILDRESS & KLEIN No. 9310PTC91	Prop. Tax Comm. (92PTC177)	Affirmed

IN RE APPEAL OF DRAINE ELM PROPERTIES No. 9310PTC94	Prop. Tax Comm. (92PTC176)	Affirmed
IN RE APPEAL OF KUESTER HOSPITALITY, INC. No. 9310PTC93	Prop. Tax Comm. (92PTC174)	Affirmed
IN RE APPEAL OF LPZ LIMITED PARTNERSHIP No. 9310PTC90	Prop. Tax Comm. (92PTC178)	Affirmed
IN RE BARLOW No. 9323DC1111	Wilkes (93J95)	Affirmed
IRIZARRY v. HOLLOMAN No. 9414DC63	Durham (92CVD3440)	Affirmed
LAKE TOXAWAY PROPERTY OWNERS ASSN. v. LEDDICK No. 9329DC943	Transylvania (92CVD22)	Reversed & remanded for dismissal of the injunction
LOWERY v. FORD MOTOR CREDIT CO. No. 9330SC680	Swain (91CVS19)	Affirmed in part, reversed in part & remanded
MICHAEL v. FUTRELL No. 9322SC212	Davidson (90CVS1914)	Affirmed
MOORE v. MOORE No. 9312DC1286	Cumberland (92CVD4343)	Affirmed
MORGAN v. CHASE No. 938SC939	Wayne (91CVS1470)	No Error
ORTEGA v. HART No. 9312SC1147	Cumberland (92CRS2122)	Affirmed
PARKER v. WINN-DIXIE RALEIGH No. 9311SC1047	Harnett (90CVS1264)	Reversed
SMITH v. RIGGSBEE No. 9315SC1066	Chatham (92CVS607)	Affirmed
SPIVEY & SELF, INC. v. HIGHWAY FARMS INC. No. 9419SC233	Rowan (90CVS1228)	Affirmed
STATE v. BRADSHER No. 9415SC45	Alamance (92CRS30648)	No Error
STATE v. BRAXTON No. 9312SC1236	Cumberland (93CRS9556)	No Error

STATE v. BRAYBOY No. 9416SC114	Robeson (92CRS23998) (92CRS23999)	Affirmed
STATE v. COLE No. 9414SC124	Durham (91CRS5380)	Appeal Dismissed
STATE v. DAVIS No. 9414SC109	Durham (92CRS14586)	No Error
STATE v. FENN No. 9419SC179	Randolph (91CRS9405)	No Error
STATE v. FREEMAN No. 9430SC54	Graham (92CRS730)	Appeal Dismissed
STATE v. FREEMAN No. 9329SC1173	Rutherford (93CRS1485) (93CRS1486)	No Error
STATE v. HALE No. 934SC1180	Onslow (92CRS17072) (92CRS17073) (92CRS17075) (92CRS17076)	No Error as to 92CRS17072, 92CRS17075, 92CRS17076 Remand for resentencing as to 92CRS17073
STATE v. HENDERSON No. 943SC51	Craven (92CRS14202) (92CRS14203) (92CRS14204)	No Error
STATE v. HOLMES No. 9322SC1230	Iredell (92CRS13400)	No Error
STATE v. JONES No. 947SC170	Edgecombe (92CRS5955)	No Error
STATE v. JORDAN No. 9419SC53	Rowan (93CRS4620) (93CRS4622)	No Error
STATE v. LEACH No. 9426SC26	Mecklenburg (91CRS89866) (91CRS89867) (91CRS89868)	No Error
STATE v. LEMIEUX No. 9419SC28	Cabarrus (93CRS427)	No Error
STATE v. LOWERY No. 9430SC118	Swain (93CRS1346)	Dismissed

STATE v. MANGUM No. 9410SC279	Wake (92CRS94413) (92CRS94414)	No Error
STATE v. MANUEL No. 9412SC68	Cumberland (91CRS25775)	No Error
STATE v. MAYO No. 943SC92	Pitt (92CRS19290) (92CRS19291) (93CRS4764) (93CRS4765) (93CRS4767)	No Error
STATE v. McLAWHORN No. 9318SC1240	Guilford (90CRS26677)	No Error
STATE v. MOORE No. 9419SC59	Cabarrus (91CRS4707)	No Error
STATE v. MOORE No. 9418SC88	Guilford (93CRS43514)	No Error
STATE v. PAGE No. 9410SC6	Wake (93CRS4405)	No Error
STATE v. PATTERSON No. 9421SC103	Forsyth (93CRS7654)	No Error
STATE v. PRESSLEY No. 9416SC24	Scotland (91CRS8185) (91CRS8186) (91CRS8187) (91CRS8208)	No Error
STATE v. PRIESTER No. 9328SC1229	Buncombe (92CVS66436)	No Error
STATE v. QUINN No. 9420SC220	Union (91CRS007890)	No Error
STATE v. RAGLER No. 9412SC112	Cumberland (90CRS46803) (90CRS46804) (90CRS47711)	No Error
STATE v. ROBINSON No. 9426SC153	Mecklenburg (92CRS18151) (92CRS18152) (92CRS18153) (92CRS18154)	Affirmed
STATE v. SIMPLER No. 948SC32	Lenoir (93CRS1070)	No Error

STATE v. SINCLAIR No. 9310SC1295	Wake (93CRS36912) (93CRS36913) (93CRS36914)	No Error
STATE v. SMALLWOOD No. 946SC36	Bertie (93CRS1182)	No Error
STATE v. STEPHENSON No. 9426SC119	Mecklenburg (91CRS16250)	No Error
STATE v. TAYLOR No. 946SC13	Halifax (92CRS3920)	No Error
STATE v. TAYLOR No. 9324SC634	Madison (91CRS1870)	No Error
STATE v. VASSEY No. 9327SC1305	Cleveland (92CRS5999) (92CRS6000)	No Error
STATE v. WOOD No. 9419SC275	Montgomery (93CRS101)	No Error
STREET v. CLEVELAND MEMORIAL HOSP. No. 9327SC1112	Cleveland (90CVS1558)	Reversed in part & Remanded
TALLY v. WATAUGA HOSPITAL No. 9324SC638	Watauga (91CVS376)	No Error
TAYLOR v. INTEGON GENERAL INS. CORP. No. 9328SC946	Buncombe (92CVS2302)	Affirmed
U.S. PACKAGING v. BRADLEY No. 9318SC703	Guilford (87CVS7167)	Affirmed
WHITE v. N.C. DEPT. HUMAN RESOURCES No. 938SC479	Lenoir (92CVS834)	Affirmed
WLOCH v. NELSON No. 941SC130	Currituck (92CVS227)	Affirmed
WOOD v. SHERRON No. 9314SC1275	Durham (92CVS4507)	Appeal Dismissed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 65 (NCI4th). Procedure on review; scope and effect of review generally

A superior court judgment was vacated and remanded where the superior court treated G.S. 126-37(b) as creating a cause of action in which the court could make its own findings of fact and substitute its own judgment for the Commission's and, in doing so, exceeded its jurisdiction over state employee grievances. **Hill v. Morton,** 390.

§ 72 (NCI4th). Appeal from judgment on review generally

Because some of respondent's assignments of error in an appeal from a superior court order reversing a decision of the State Personnel Commission presented errors of law, the Court of Appeals conducted a de novo review of those issues. **Eury v. N.C. Employment Security Comm.,** 590.

APPEAL AND ERROR

§ 89 (NCI4th). Interlocutory orders; what constitutes order affecting substantial right, generally

An interlocutory order denying a motion for class certification affects a substantial right and is immediately appealable. **Dublin v. UCR, Inc.,** 209.

§ 112 (NCI4th). Appealability of orders denying motion to dismiss; jurisdiction over person or property of defendant, or subject matter, generally

The trial court's refusal to dismiss a suit against the State on the ground of sovereign immunity is immediately appealable. **Colombo v. Dorrity,** 81.

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

An interlocutory order denying a motion for summary judgment did not affect a substantial right and thus was not immediately appealable. **Dublin v. UCR, Inc.,** 209.

§ 119 (NCI4th). Appealability of particular orders; summary judgment granted

Defendants' appeal from the allowance of summary judgments for plaintiffs on defendants' counterclaims was dismissed as interlocutory where the trial court made no certification as required by G.S. 1A-1, Rule 54(b), and defendant presented neither argument nor citation to show that it had the right to appeal the dismissal. **Jeffreys v. Raleigh Oaks Joint Venture,** 377.

Plaintiff's appeal from the trial court's order granting defendant partial summary judgment on the issue of punitive damages is interlocutory and is dismissed. **Moose v. Nissan of Statesville,** 423.

§ 170 (NCI4th). Mootness of questions involving child custody

Plaintiff's appeal from the trial court's orders with regard to child custody, child support, and alimony is dismissed where plaintiff and the child in question are in hiding. **Medina v. Medina,** 493.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

Plaintiff's appeal was deemed abandoned where he failed to provide any assignments of error for review and present those in his brief. **Wiggins v. Triesler Co.,** 368.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 464 (NCI4th). Sudden emergency; accident resulting from failure to take evasive action

Defendant was not negligent in failing to avoid the truck in which plaintiff was riding when it went out of control during heavy rain and veered into the path of defendant's vehicle. **Patterson v. Pierce,** 142.

§ 564 (NCI4th). Contributory negligence; acquiescence of guest or passenger in driver's willful and wanton conduct

The trial court properly submitted an issue of willful or wanton conduct by plaintiff passenger based on his knowledge that the driver had been drinking and that his license had been revoked for driving while impaired. **Anderson v. Austin,** 134.

Evidence of plaintiff's habits with regard to alcohol, marijuana, and automobiles was relevant to defendants' claim of willful or wanton conduct on the part of plaintiff. **Ibid.**

§ 818.1 (NCI4th). Penalty for habitual impaired driving

The offense of habitual impaired driving constitutes a separate subsequent felony which is properly within the original exclusive jurisdiction of the superior court. **State v. Priddy,** 547.

A defendant cannot collaterally attack the validity of his prior convictions in a prosecution for habitual impaired driving. **State v. Muscia,** 498.

BROKERS AND FACTORS

§ 61 (NCI4th). Liability for damages; actions by purchasers; sufficiency of evidence

Defendant, the selling agent for real property purchased by plaintiffs, did not owe plaintiffs the duty to check federal flood hazard maps to determine whether the property was located in a flood hazard zone and, upon finding that the property was located in such a zone, to inform plaintiffs that the property was located in a flood plain and probably would be subject to flooding. **Clouse v. Gordon,** 500.

BURGLARY AND UNLAWFUL BREAKINGS

§ 121 (NCI4th). Sufficiency of evidence; possession of burglary or housebreaking tools

The trial court did not err by denying defendant's motion to dismiss the charge of felonious possession of implements of housebreaking where, although the tools possessed by defendant were capable of legitimate use, a legitimate inference can be drawn that defendant possessed the screwdriver and ice pick for the purpose of breaking into the building. **State v. Robinson,** 358.

§ 151 (NCI4th). Instructions; felonious intent

The trial court did not err by instructing the jury that it could find defendant guilty of first-degree burglary if it found that he broke into the victim's home with the intent to commit a second-degree sexual offense when the indictment alleged that defendant intended to commit a first-degree sexual offense. **State v. Roten,** 118.

§ 167 (NCI4th). Instructions on nonfelonious or misdemeanor breaking or entering as lessor included offense of felonious breaking or entering

The trial court did not err in a felonious breaking or entering prosecution by not submitting nonfelonious breaking or entering. **State v. Robinson,** 358.

CONSTITUTIONAL LAW

§ 169 (NCI4th). Attachment of jeopardy generally

The midtrial dismissal of the habitual driving while impaired charge on jurisdictional grounds did not amount to an acquittal of that offense so as to bar a second trial. **State v. Priddy,** 547.

§ 318 (NCI4th). Effective assistance of counsel on appeal generally

Review of this case pursuant to an Anders brief submitted by defendant's attorney was permitted even though defendant had not been given the necessary documents to conduct his own review of the case where the attorney was unable to locate defendant and deliver the documents to him. **State v. Mayfield**, 725.

CONTRACTS

§ 126 (NCI4th). Sufficiency of particular pleadings

The trial court erred in dismissing plaintiff's breach of contract claim where plaintiff alleged that defendant corporation, through its agent, orally offered a specific job to plaintiff for a stated duration and stated compensation and that plaintiff was not permitted to complete the contract's stated duration of employment. **Brandis v. Lightmotive Fatman, Inc.,** 59.

§ 148 (NCI4th). Sufficiency of evidence as to breach of contract; other miscellaneous contracts

The trial court erred by granting plaintiff's motion for a directed verdict on a breach of contract claim where plaintiff ordered a tanker truck from defendant for shipment of a cleaning compound and plaintiff's customer rejected the shipment because the compound was contaminated. Viewing the evidence in the light most favorable to plaintiff, an issue of fact exists as to whether defendant breached the contract. **Ace Chemical Corp. v. DSI Transports, Inc.,** 237.

CORPORATIONS

§ 208 (NCI4th). Claims against dissolved corporations; claims as consequence of entire asset purchase

It would be inequitable to permit a transfer of all of the assets of a corporation defending a class action to a newly formed corporation so as to make the original corporation judgment proof and to allow the successor corporation to escape the class action claims. **Dublin v. UCR, Inc.,** 209.

COSTS

§ 7 (NCI4th). Who may recover costs, generally

Plaintiff was not the prevailing party and therefore was not entitled to attorney's fees in bringing a motion to protect its judgment and in bringing the present appeal. **Custom Molders, Inc. v. American Yard Products, Inc.,** 156.

§ 9.1 (NCI4th). Costs following voluntary dismissal

The trial court did not err by taxing costs in a previous action; the filing of a notice of dismissal does not terminate the court's authority to enter orders apportioning and taxing costs. **Sealey v. Grine**, 343.

COSTS — Continued

§ 25 (NCI4th). Attorney's fees; necessary findings; review of award

Where petitioner agency did not have the authority to appeal its own decision to the superior court, G.S. 96-17(b1) was inapplicable to require respondent to pay his own legal fees, and the trial court could order attorney's fees under G.S. 6-19.1, but the court was required to make findings as to whether the agency acted without substantial justification or whether there were special circumstances which would make the award of fees unjust. **Employment Security Comm. v. Peace,** 486.

§ 28 (NCI4th). Attorney's fees; caveat proceedings; actions to construe wills or trusts

The trial court did not err by denying plaintiff's claim for attorney's fees under G.S. 6-21(2) in an action against an estate involving the division of an income tax refund. **Brantley v. Watson,** 393.

§ 30 (NCI4th). Attorney's fees in personal injury actions or property damage suits

Defendant was entitled to recover attorney's fees under G.S. 6-21.1 only for the attorney's prosecution of defendant's counterclaim and not for defending plaintiff's claim. **Mishoe v. Sikes,** 697.

§ 31 (NCI4th). Attorney's fees in personal injury actions or property damage suits; where judgment for damages exceeds statutory maximum

The trial court did not err in denying plaintiff's motion for attorney's fees under G.S. 6-21.1 where plaintiff's recovery of damages was in excess of $10,000. **Davis v. Sellers,** 1.

§ 47 (NCI4th). Discovery and deposition fees and expenses

The trial court did not err in an action arising from an allegedly negligent lithotripsy by taxing as costs deposition expenses where there was no assignment of error to the finding that the costs were reasonable and necessary. However, the court erred in taxing as costs expenses for copies of x-rays and records related to depositions. **Sealey v. Grine,** 343.

COURTS

§ 87 (NCI4th). Jurisdiction to review rulings of another superior court judge; miscellaneous

A second judge was not authorized by Rule 23 to review and modify another judge's prior order for class certification, but since the class certification order was interlocutory, a subsequent judge could modify the order for circumstances which changed the legal foundation for the prior order. **Dublin v. UCR, Inc.,** 209.

CRIMINAL LAW

§ 104 (NCI4th). Information subject to disclosure by State; documents and tangible objects

Changes in the police officers' report of defendant's statements omitting racial phraseology and substituting acceptable terminology did not violate G.S. 15A-903 by depriving defendant's counsel of the opportunity to voir dire prospective jurors regarding their reactions to the racial slurs prior to hearing those epithets during the officers' testimony. **State v. Swann,** 92.

CRIMINAL LAW — Continued

§ 1098 (NCI4th). Aggravating factors; prohibition on use of evidence of element of offense

Evidence that defendant took a deadly weapon with him into the homicide victim's neighborhood was so closely connected to evidence possibly used by the jury to find that the killing was done with malice that it was error for the trial court to consider the use of the pistol again in sentencing. **State v. Swann,** 92.

§ 1169 (NCI4th). Aggravating factors; pretrial release as to other charges

The trial court did not err when sentencing defendant for attempted first-degree statutory rape and attempted first-degree sexual offense by finding in aggravation that defendant committed the offenses while on pretrial release for a felony charge where he was ultimately acquitted of the prior charge. **State v. Robertson,** 249.

§ 1170 (NCI4th). Statutory aggravating factors; defendant involved person under 16 in commission of crime

The trial court erred in considering as a nonstatutory aggravating factor for narcotics offenses that defendant involved a young person seventeen years of age since the youth was older than the statutorily prescribed maximum age of sixteen. **State v. Bozeman,** 658.

§ 1234 (NCI4th). Mitigating factors; age or immaturity of defendant

The trial court did not err when sentencing the seventeen-year-old defendant for attempted first-degree statutory rape and attempted first-degree sexual offense by not finding defendant's immaturity as a mitigating factor; age alone is not sufficient to support this factor and defendant presented no evidence on the effect of his immaturity upon his culpability for the offense. **State v. Robertson,** 249.

§ 1680 (NCI4th). Modification and correction of judgment or sentence by court in term

The trial court did not err in resentencing defendant in accordance with his original plea agreement after his original sentence was set aside since G.S. 15A-1335 did not prohibit a trial court from correcting the way in which it consolidated offenses during a sentencing hearing prior to remand. **State v. Harris,** 42.

State v. Hemby, 333 N.C. 331, does not apply to situations in which a defendant is sentenced to less than the presumptive term. **Ibid.**

DEDICATION

§ 11 (NCI4th). Sufficiency of acts of dedication

An 80-foot proposed thoroughfare on defendant's site plan which was submitted to plaintiff in order to get a special use permit was insufficient to constitute a dedication. **Town of Cary v. Franklin-Sloan V.F.W. Post 7383,** 113.

DEEDS

§ 33 (NCI4th). Construction and operation of deeds generally

A general warranty deed describing only land was sufficient, as between the grantor and the grantees, to transfer title to a mobile home affixed to the land. **Hughes v. Young,** 325.

ELECTION OF REMEDIES

§ 3 (NCI4th). Time that election is made

The trial court erred by requiring plaintiff to choose its remedy before submitting the case to the jury in an action involving a contaminated tanker truck in which plaintiff brought both contract and negligence claims. **Ace Chemical Corp. v. DSI Transports, Inc.**, 237.

EMINENT DOMAIN

§ 231 (NCI4th). Governmental immunity as defense

The defense of governmental immunity was not available to defendant city where plaintiff, who operated a solid waste collection service, alleged that the city negligently prevented plaintiff's receipt of just compensation for a taking of its property lost when the city annexed the area in which plaintiff did business. **Denegar v. City of Charlotte,** 166.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 40 (NCI4th). Planning processes; local programs; development permits

Plaintiff's failure to exhaust the administrative remedies provided by CAMA for review of a permit decision allowing defendant to construct a pier across submerged lands belonging to plaintiff precluded plaintiff's action seeking a declaratory judgment that the permit was improperly issued. **Leeuwenburg v. Waterway Investment Limited partnership,** 541.

ESTOPPEL

§ 13 (NCI4th). Conduct of party to be estopped generally

Equitable estoppel did not preclude defendant's assertion of the invalidity of the parties' marriage in his motion to terminate alimony since it was plaintiff who was negligent in failing to obtain a copy of a divorce judgment prior to entering into a second marriage. **Lane v. Lane,** 446.

EVIDENCE AND WITNESSES

§ 124 (NCI4th). Evidence of sexual behavior between complainant and defendant

In a rape prosecution in which the trial court admitted evidence of prior sexual acts between the victim and defendant which was pertinent to the defense that the victim consented, the trial court did not err in excluding evidence of sexual acts between them which was irrelevant and cumulative. **State v. Jenkins,** 520.

§ 293 (NCI4th). Other crimes, wrongs, or acts; dropping of charges for previous offenses; acquittal

The trial court did not err in a prosecution for attempted first-degree statutory rape and attempted first-degree sexual offense in allowing the victim to testify that defendant threatened her by saying that if she told anyone what he was going to do, he was going to hurt her like he hurt Koda, whom defendant was then charged with murdering, where defendant was subsequently acquitted at trial of the murder. The probative value of defendant's statement was to show that the victim was scared of defendant as well as why she did not scream or make any noise and does not depend on the proposition that defendant in fact hurt Koda. **State v. Robertson,** 249.

EVIDENCE AND WITNESSES — Continued

§ 368 (NCI4th). Other crimes, wrongs, or acts; admissibility to show common plan, scheme, or design; theft offenses generally

There was no prejudicial error in the admission in a prosecution for feloniously breaking or entering a health club and possession of housebreaking tools where the trial court allowed the State to introduce the testimony of a salesperson at a store that defendant had entered the stockroom and office area and had stolen a cash box, but had been acquitted because the arresting officer was not present when the case was tried. **State v. Robinson,** 358.

§ 386 (NCI4th). Other crimes, wrongs, or acts; admissibility to show relationship between defendant and victim

Evidence that one month prior to an alleged rape, defendant failed to return the victim's car, stole some money, broke into her home, and was arrested was admissible to show the chain of events and the termination of the relationship. **State v. Jenkins,** 520.

§ 403 (NCI4th). Opportunity to observe defendant prior to commission of offense

Although evidence of a prior altercation with an eyewitness is relevant as a general rule, that evidence lost its relevance when the identity of the person with whom defendant argued is merely speculation. **State v. Floyd,** 412.

§ 886 (NCI4th). Hearsay evidence; other uses of evidence other than to prove truth of matter asserted; to impeach or corroborate

The trial court did not err in a prosecution for attempted first-degree statutory rape and attempted first-degree sexual offense by allowing the State's medical expert to testify about statements the victim made to her during a physical examination where the statements corroborated the earlier testimony of the victim. **State v. Robertson,** 249.

§ 1469 (NCI4th). Physical evidence; weapons or similar devices generally

The trial court properly admitted into evidence in an attempted armed robbery case a broken bottleneck which was allegedly used by defendant in the crime and which was found in the area of the crime. **State v. Harris,** 560.

§ 1708 (NCI4th). Photographs of crime scene generally

Defendant was not prejudiced by the improper exclusion of photographic evidence where the scene depicted in the photographs was described for the jury. **State v. Floyd,** 412.

§ 1788 (NCI4th). Lie detector test; effect of statement that defendant had been asked to take test

The trial court abused its discretion in denying defendant's motion for a mistrial where the prosecutor was twice warned and instructed not to bring up the matter of defendant's having been offered a polygraph examination, and the prosecutor subsequently asked a prosecution witness if defendant had been offered a polygraph examination. **State v. Moose,** 707.

§ 1994 (NCI4th). Parol or extrinsic evidence affecting writings; contracts, leases, and agreements generally

The trial court properly entered summary judgment for plaintiff in an action to recover sums which plaintiff had deposited with defendant company in anticipation of

INSURANCE

INSURANCE — Continued

Where the husband's business auto policy included a "family member" exclusion, UM coverage provided by the policy to the insured's wife was limited to the statutory minimum of $25,000 per person. **Ibid.**

§ 522 (NCI4th). Uninsured motorist coverage; effect of liability insurance carrier becoming insolvent subsequent to collision

The three-year limitation provided in G.S. 20-279.21(b)(3)(b) sets out a minimum period of time during which insolvency protection must be afforded and which may be extended by agreement between the insurer and insured, rather than establishing the latest time at which an insured may claim uninsured motorist coverage following insolvency of the tortfeasor's liability carrier. **N.C. Ins. Guaranty Assn. v. State Farm Mut. Auto. Ins. Co.**, 666.

Under an insurance policy providing that a vehicle is uninsured if the liability insurer "is or becomes insolvent" without specifying any period of time, an uninsured motorist claim may not be barred even though the minimum period specified in G.S. 20-279.21(b)(3)(b) has elapsed. **Ibid.**

Plaintiff's claim against defendant for uninsured motorist coverage as a consequence of insolvency of the tortfeasor's insurer accrued on the date the insurer was declared insolvent rather than the date of the accident. **Ibid.**

§ 528 (NCI4th). Extent of underinsured coverage

An underinsured highway vehicle can include a motor vehicle owned by the named insured, and policy provisions attempting to exclude such coverage are invalid and unenforceable. **State Farm Mut. Auto. Ins. Co. v. Young,** 68.

The claimants were not entitled to intrapolicy stacking in an action arising from an automobile accident where there was no dispute that this was a nonfleet policy and the two vehicles involved were a Mack truck and a low boy trailer; under the version of G.S. § 58-40-10(1) in effect at the time of the accident, it is more than obvious that the low boy trailer is not a private passenger motor vehicle. **Nationwide Mutual Ins. Co. v. Mabe**, 193.

§ 532 (NCI4th). Underinsured coverage; effect of policy provisions being in conflict with statutes

The trial court in an automobile accident case correctly held that an "owned vehicle" exclusion in the UIM section of a Farm Bureau automobile insurance policy was not enforceable where, but for the owned vehicle exclusion, the claimants would be first class insured persons. **Nationwide Mutual Ins. Co. v. Mabe**, 193.

§ 536 (NCI4th). Garage and dealers' liability insurance generally

There was no coverage under Sanford Toyota's garage policy for an automobile accident involving an employee's vehicle bearing Sanford Toyota's dealer tags where there was no indication that the automobile was being used in Sanford Toyota's business, it cannot reasonably be asserted that "ownership" and "use" have any application since Sanford Toyota neither owned nor used the automobile, plaintiff has made no contention that Sanford Toyota was maintaining the vehicle, permitting dealer tags to be affixed to an employee's vehicle was in no way necessary to Sanford Toyota's business, and there was no incidental business purpose furthered by the permissive use of the tags. **McLeod v. Nationwide Mutual Ins. Co.**, 293.

Plaintiff wife was entitled to UM coverage under plaintiff husband's garage policy where an endorsement to the policy provided UM coverage of $25,000 per person/$50,000 per accident. **Bray v. N.C. Farm Bureau Mut. Ins. Co.,** 438.

INSURANCE — Continued

§ 617 (NCI4th). Effect of injury resulting from use for which vehicle not covered

Injuries suffered by defendant when hit by an object intentionally thrown from a moving vehicle did not arise out of the use of the vehicle within the meaning of an automobile liability policy. **Providence Washington Ins. Co. v. Locklear,** 490.

§ 622 (NCI4th). Automobile insurance; termination of coverage by insured failing to meet condition of renewal offer

Where plaintiff disregarded a premium notice from his automobile insurer and failed to pay the premium by the cancellation date of 17 March, his policy was not in effect and his 28 March accident was not covered, even though defendant insurer mailed plaintiff a reinstatement offer on 27 March and plaintiff gave the insurance premium payment to his agent within two days after 28 March. **Zenns v. Hartford Accident and Indemnity Co.,** 482.

§ 686 (NCI4th). Automobile insurance; limits per accident or per person

Plaintiffs, an injured child and his parents, were entitled to an aggregate award of $100,000 under a policy issued by defendant rather than $100,000 per plaintiff where the policy limited liability to $100,000 for each person injured in an accident, since the parents' claim was derivative, and they sustained no bodily injury within the meaning of the policy. **Howard v. Travelers Insurance Cos.,** 458.

§ 690 (NCI4th). Propriety of award of prejudgment interest

The trial court erred in an action arising from an automobile accident by ordering that Nationwide pay prejudgment interest; there is no statutory duty which requires a liability insurance carrier to pay prejudgment interest in addition to its limit of liability under the policy. A liability carrier's obligation to pay prejudgment interest in addition to its stated limits is governed solely by the language in the policy. **Nationwide Mutual Ins. Co. v. Mabe,** 193.

Where defendant UIM carrier compensated plaintiff for her damages up to the limit of its liability, defendant could not be required to pay any more as prejudgment interest. **Baxley v. Nationwide Mutual Ins. Co.,** 718.

§ 725 (NCI4th). Homeowner's policies; coverage of personal injuries

Defendant homeowner's deeds and subsequent admission that he willfully sexually abused a music student in his home established the student's injuries were "expected" by the homeowner within the meaning of a provision of a homeowner's policy excluding liability coverage for bodily injury "which is expected or intended by the insured." **Nationwide Mutual Ins. Co. v. Abernethy,** 534.

§ 963 (NCI4th). Contribution between insurers; equitable subrogation

The trial court did not err by granting summary judgment for defendant Century on its counterclaim under the doctrine of equitable subrogation where Century was a commercial umbrella insurer; the insured's primary insurer became insolvent; there was a claim as a result of an automobile accident; and there was a dispute between the Insurance Guaranty Association and Century as to which would provide primary coverage. **N.C. Insurance Guaranty Assn. v. Century Indemnity Co.,** 175.

INTOXICATING LIQUOR

§ 31 (NCI4th). Unlawful conduct on licensed retail premises; failure to provide supervision

A memorandum distributed by the Division of Alcohol Law Enforcement to its supervisors that "video poker" and similar video machines were in violation of state gambling laws, and that possession or operation of those video machines on ABC licensed premises was unlawful, did not constitute a "rule" which required compliance with the Administrative Procedure Act's rule promulgation requirements. **Ford v. State of North Carolina,** 556.

JUDGMENTS

§ 115 (NCI4th). Tender or offer of judgment generally

Defendant's offer of judgment was remanded for entry of an order for $45,001.00 plus remaining costs as determined by the trial court where the offer was for "$45,001.00 together with costs accrued as of the date hereof"; any ambiguity in the offer must be construed against the drafter. **Craighead v. Carrols Corp.,** 381.

§ 547 (NCI4th). Procedure to attack judgment; meritorious defense generally

A claim for equitable distribution constitutes a meritorious defense to an action for absolute divorce for the purpose of obtaining relief from the judgment of absolute divorce under Rule 60(b)(1), and where the trial court found that defendant's failure to file a claim for equitable distribution was the result of excusable neglect, the court properly set aside the divorce judgment and permitted defendant to file her answer and counterclaim for equitable distribution. **Baker v. Baker,** 337.

§ 651 (NCI4th). Amount to which interest should be added

Plaintiff was not entitled to post-judgment interest on the treble damages portion of its judgment. **Custom Molders, Inc. v. American Yard Products, Inc.,** 156.

JURY

§ 260 (NCI4th). Effect of racially neutral reasons for exercising peremptory challenges

The trial court did not err in finding that the prosecutor rebutted defendant's prima facie case of racial discrimination in the prosecution's use of peremptory challenges of all five black prospective jurors and that the prosecutor's reasons for excusing the black jurors were not pretextual. **State v. Floyd,** 412.

KIDNAPPING

§ 16 (NCI4th). Sufficiency of evidence; confinement, restraint, or removal generally

The evidence of restraint was sufficient to require submission of a charge of first-degree kidnapping to the jury where defendant tied the victim's hands and feet with electrical cord before assaulting him by plugging the cord with bare wires into an outlet. **State v. Carrillo,** 674.

§ 21 (NCI4th). Sufficiency of evidence; confinement for purpose of doing serious bodily harm to or terrorizing person

The State met its burden of proving that defendant restrained or confined the victim with the intent of terrorizing him where defendant put a knife under the victim's

PUBLIC OFFICERS AND EMPLOYEES — Continued

tory suspension by letter informing them that the reason for their suspension was the "need to investigate allegations concerning your personal conduct which could affect your work status." **Eury v. N.C. Employment Security Comm.**, 590.

§ 67 (NCI4th). Disciplinary actions; what constitutes "just cause"

Where a state employee has engaged in off-duty criminal conduct, the agency need not show actual harm to its interests to demonstrate just cause for the employee's dismissal but must demonstrate that the dismissal is supported by the existence of a rational nexus between the type of criminal conduct committed and the potential adverse impact on the employee's ability to perform for the agency. **Eury v. N.C. Employment Security Comm.**, 590.

QUASI CONTRACTS AND RESTITUTION

§ 18 (NCI4th). Unjust enrichment generally

While an action based on unjust enrichment may be appropriate in the situation of a bigamous marriage, plaintiff was estopped from asserting such a claim where she knew for ten years that her marriage was bigamous and hid that fact from defendant. **Lane v. Lane**, 446.

RAPE AND ALLIED SEXUAL OFFENSES

§ 83 (NCI4th). Sufficiency of evidence; first-degree rape generally

The evidence was sufficient for submission to the jury in a prosecution for first-degree rape and second-degree kidnapping of defendant's former girlfriend. **State v. Jenkins**, 520.

ROBBERY

§ 84 (NCI4th). Attempted armed robbery generally

The evidence was sufficient for submission to the jury in a prosecution for attempted armed robbery by threatening to cut the victim with a broken bottleneck. **State v. Harris**, 560.

SCHOOLS

§ 86 (NCI4th). Persons who may be charged tuition; amount of tuition

Defendant board of education could not require the payment of an exit tuition fee of $200 as a condition to approving the transfer of a Greene County resident student to a school system in a different county. **Streeter v. Greene County Bd. of Education**, 452.

§ 158 (NCI4th). Suspension of probationary or career teacher

Petitioner's reinstatement was automatic when more than ninety days passed between the notice of suspension with pay and the notification of the recommendation to dismiss, but the superintendent's failure to reinstate petitioner was of no practical effect because school was not in session, petitioner was compensated, and a new suspension began shortly thereafter. **Davis v. Public Schools of Robeson County**, 98.

§ 172 (NCI4th). Liability insurance; waiver of tort immunity

The trial court properly dismissed under G.S. 1A-1, Rule 12(b)(6) a complaint which included a school principal and school board as defendants but failed to allege

STATE — Continued

executive session had little effect on the substance of the challenged action. **Dockside Discotheque v. Bd. of Adjustment of Southern Pines**, 303.

§ 22 (NCI4th). Sovereign or governmental immunity; applicability to state agencies

The State and its agencies can be issued citations for violations of the Occupational Safety and Health Act which are enforceable by proceedings before the Safety and Health Review Board. **Brooks v. N.C. Dept. of Transportation,** 163.

TAXATION

§ 65 (NCI4th). Ad valorem taxes; persons and property assessable

Goods rented by the taxpayer to third parties did not retain their tax exempt status under G.S. 105-273(8a) because the taxpayer retained the right to sell the property to another party. **In re Appeal of R. W. Moore Equipment Co.,** 129.

§ 66 (NCI4th). Ad valorem taxes; exemptions, exclusions and deductions

The taxpayer's treatment of equipment as income producing property rather than inventory rendered the equipment ineligible for a tax exclusion. **In re Appeal of R. W. Moore Equipment Co.,** 129.

§ 82 (NCI4th). Valuation of real property generally

The Property Tax Commission exceeded its statutory authority in determining the value of property when it considered the ability of the property to produce income in its contaminated state and the cost to cure the contamination. **In re Appeal of Camel City Laundry Co.,** 469.

§ 100 (NCI4th). Judicial review of orders of Property Tax Commission

The Property Tax Commission's failure to identify a county's witness as an expert when listing the county's evidence did not show that the Commission failed to consider the testimony of this witness to be expert testimony. **In re Appeal of Camel City Laundry Co.,** 469.

TRIAL

§ 105 (NCI4th). Partial summary judgment

The trial court was bound by a prior judge's order granting partial summary judgment for defendant on the issue of notice in a foreclosure proceeding. **McArdle Corp. v. Patterson,** 528.

§ 113 (NCI4th). Summary judgment; effect of trial court's making findings of fact

The trial court did not err in making findings of fact and conclusions of law in his order denying summary judgment where the court merely listed the undisputed facts, and the recitation of those facts was not error. **McArdle Corp. v. Patterson,** 528.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 8 (NCI4th). Transactions subject to state unfair competition statute generally

The Unfair and Deceptive Trade Practices Act does not apply to employer-employee relations. **Brandis v. Lightmotive Fatman, Inc.,** 59.

VENUE

§ 7 (NCI4th). Agreement of parties; forum selection clause in contracts

The trial court did not abuse its discretion in refusing to enforce the terms of a forum selection clause in the parties' contract where defendants made two representations that plaintiffs could sue defendants in the courts of North Carolina, and defendants are estopped from asserting the forum selection clause as a defense to the filing of the action in North Carolina. **Appliance Sales & Service v. Command Electronics Corp.,** 14.

WATERS AND WATERCOURSES

§ 57 (NCI4th). Riparian and littoral ownership and rights

The trial court did not err in a trespass action by granting defendant's motion to dismiss for lack of subject matter jurisdiction, but did err by allowing a motion to dismiss for failure to state a claim upon which relief may be granted, where the Division of Coastal Management issued a CAMA permit for construction of a pier, plaintiff did not request a contested case hearing, and plaintiff began this action 22 months later, alleging that defendant's pier encroaches the riparian boundary between plaintiffs' and defendants' property. The location of the boundary was settled as a part of the DCM permitting process. **Flowers v. Blackbeard Sailing Club,** 349.

WILLS

§ 165 (NCI4th). Ademption

A devise of real property in testator's will did not adeem because of an agreement by the testator to sell the property; therefore, following testator's death, legal title passed to the devisees subject to the executory agreement, and when the purchaser withdrew from the agreement, the devisees acquired complete title to the real property. **Morrison v. Grandy,** 170.

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

The trial court erred in granting summary judgment for defendant power company on plaintiff's Woodson claim where a jury could conclude that defendant's act of sending a lineman up an electrical tower with faulty or incompatible safety equipment was substantially certain to result in the death of a lineman, based on the number of falls over the years experienced by defendant's linemen, and that defendant knew with substantial certainty that its continued use of only body-belts and pole straps as safety equipment would inevitably result in death or serious bodily injury. **Mickles v. Duke Power Co.,** 624.

§ 69 (NCI4th). Fellow employee's willful, wanton, or reckless conduct as tantamount to intentional tort

Plaintiff employee's evidence was insufficient to show that his supervisor was wantonly negligent in permitting the operation of a single-foot operated break-press by two persons when only one person could stop operation of the machine. **McCorkle v. Aeroglide Corp.,** 651.

ZONING

§ 6 (NCI4th). Jurisdiction of county zoning authorities

Defendants were not estopped from arguing the issue of the location of their property by their failure to appeal the board of adjustment's determination that their property was located in Guilford County since that issue determines the fundamental question of subject matter jurisdiction. **Guilford Co. Planning & Dev. Dept. v. Simmons,** 87.

Plaintiff county failed to meet its burden of proving that defendants' chicken houses were located in Guilford County and were thus subject to Guilford County zoning laws. **Ibid.**

§ 47 (NCI4th). Nonconforming uses generally

Petitioner was not entitled to use its property in a town's central business district for topless entertainment as a nonconforming use allowed by the town's development ordinance where the property had not been used for topless entertainment in eleven months at the time the ordinance was amended to prohibit "special use entertainment" such as topless entertainment in the central business district. **Dockside Discotheque v. Bd. of Adjustment of Southern Pines,** 303.

§ 54 (NCI4th). Nonconforming uses; vested rights in particular use of property

The trial court erred in holding that respondent had received a vested right to a quarry permit under G.S. 160A-385(b) where the case did not involve a building permit. **Simpson v. City of Charlotte,** 51.

Whether respondent had a vested right to a permit to construct a quarry depended upon whether respondent, acting in good faith, had made a substantial beginning toward its intended use of the land. **Ibid.**

§ 66 (NCI4th). Discretion of zoning board to grant special use permits

The decision of a board of county commissioners to deny petitioner's applications for special use permits to operate a stone quarry was not shown to be arbitrary on the ground that the board members were biased and predisposed to vote against the applications. **Vulcan Materials Co. v. Guilford County Bd. of Comrs.,** 319.

§ 67 (NCI4th). Standards for issuance of special use permit

Two general zoning ordinances regarding noise and vibrations did not apply to respondent's application for a quarry permit. **Simpson v. City of Charlotte,** 51.

§ 71 (NCI4th). Sufficiency of findings to support denial of special use permit

The evidence supported a decision by a board of county commissioners to deny petitioner's applications for special use permits to operate a stone quarry in an agricultural district on the ground that the proposed use will not be in harmony with the area in which it is to be located and in general conformity with the plan of development of this jurisdiction and its environs. **Vulcan Materials Co. v. Guilford County Bd. of Comrs.,** 319.

§ 109 (NCI4th). Administrative relief from zoning regulations generally

Neither G.S. 160A-388(b) nor G.S. 160A-388(c) gave a zoning board of adjustment the authority to decide an appeal from a decision by the town board of commissioners approving a site plan. **Garrity v. Morrisville Zoning Bd. of Adjustment,** 273.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina